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THE SUPREME COURT AND PHILOSOPHY OF LAW

JAMES A. GARDNER †

“Theory is the most important part of the dogma of the law, as the architect is the most important man who takes part in the building of a house.” *

I.
INTRODUCTION.

THEORIES OF LAW have played a fundamental role in the origin and development of the American legal system, and this is particularly true in the case of our constitutional law. When the early Greeks began to speculate on the nature of things, they raised the question as to whether right is right by reason of custom and enactment or because of its inherent nature. The best minds of Greece were turned to the solution of this problem, theories of law were formulated, and jurisprudence or philosophy of law had its birth.

Throughout the history of our western civilization philosophy has made rich contributions to jurisprudence. From the time of the Greeks of the fifth century B.C., the idea of a natural law governing social relations, analogous to the laws of nature governing the physical universe, was accepted without question by the dominant stream of philosophical thought. The natural law school recognized absolute standards of value, eternal principles of morality, and a world governed by the application of these principles through the processes of reason. It has naturally followed that the history of juristic theory in the western world has been in large part, particularly until the advent of the nineteenth century, the story of natural law. Our law in the United States received its rich heritage from the politico-legal tradition of the common law and the classical natural law of continental Europe. Both of these sources owe their debt to antiquity.

How our law reached its present state of growth and development can be understood only in the light of this tradition. This is particularly true of the United States Supreme Court and its present

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* Holmes, The Path of the Law, in COLLECTED LEGAL PAPERS 139 (1920).
role in national policymaking. It is the purpose of this paper to 'sketch briefly the basis of the present juristic divergencies among the justices on the Supreme Court, particularly as indicated in the language of the justices in some recent decisions.

II.

THE OLD NATURAL LAW.

The Greeks gave us the concept of law as universal principles and law based on right reason and an embodiment of right reason. They evolved the dualistic concept of law as fundamental principles separate and distinct from particular rules of law applicable only to local conditions and needs. To this the Romans added the notion that an idealized version of the laws under which they were trained was the true law or natural law. The Romans were also the first to apply natural law principles in a practical manner, so as to evolve a vast system of laws capable of governing a great empire. The Middle Ages restated natural law principles, refined and clarified them, and substituted the dichotomy of God and reason for reason alone. The Enlightenment, in a sense a revolt from medieval thought, actually came to identify God with reason, so that law was once again right reason, a position which had first been asserted by the Greeks. The chief difference between medieval natural law and that of the ancients, in the light of subsequent developments, was that the ancients regarded natural law as a terminus ad quem, a goal toward which positive law inevitably tended; the medievals regarded natural law as a terminus a quo, a standard from which human nature was always straying. The purpose of natural law was not to account for a prevalent justice and improve upon it but to correct a prevalent injustice by circumscribing authority. Through its continuation into the natural law of the Enlightenment, this conception was to influence legal behavior down to the present time. The break of the seventeenth and eighteenth centuries with the Middle Ages was sufficiently clear. Reason was now insistent on looking forward, disregarding history and existing institutions, depending on its own resources to make a new and better world. Natural law, demonstrable by reason, existed to secure man's natural rights, through positive law, which must conform to natural law. The state itself was the product of a social compact which man had entered into to secure his natural rights. Its purpose, authority, and limitations were prescribed by natural law. Since natural law principles were deducible by individual reason, the result could logically lead to anarchy, but the eighteenth century assumed a kind of stand-
ard conscience, analogous to the average reasonable man in our law of torts. Moreover, the eighteenth century did not have the heterodoxy of thought with which later times have had to deal. The appeal to individual reason meant in practice that the jurist would test the positive law by the only frame of reference which he understood, and an idealized version of the legal system under which he had been trained would be the fundamental law. The eighteenth century believed that it could solve all of man's problems through unaided reason, which would reveal the fundamental natural laws, just as Newtonian science had discovered the laws governing the physical universe. As a result, it is from this period that we have the great legislative codes as well as our paper constitutions and bills of rights, political and legal charts to guide men for all time.¹

Our chief interest in these theories of natural law, natural rights, and the social compact lies in their relation to the individualism of Anglo-American legal thought. The theories themselves are thoroughly individualistic. Natural rights are the rights of individuals who have entered into a contract. Apart from this contract, based on individual consent, there would be no rights for the law to secure, and in fact no law. This sort of individualism began with the Reformation, was reinforced by the emancipation of the middle class and the growth of puritanism with its emphasis on the individual conscience as the guide to conduct, the victory of the courts over the crown in seventeenth-century England which seemed to say that law was something that stood between the individual and organized society, and finally, nineteenth-century political theory with its different modes of demonstrating the end of law as the maximum of free individual self-assertion. Thus, there developed in England and America an ultra-individualism which has persisted in legal thought even into the twentieth century.²

On the juristic level, much of the history of the Supreme Court can only be explained as being the outcome of the application of natural law theory, fortified by the conceptual idea of liberty of contract as drawn from the theories of the historical school. But the notions which had been new and forward looking in the eighteenth century were no longer suited to the different needs of a society in

¹ Good discussions of the history of natural law are numerous. The following are especially suggested: Haines, The Revival of Natural Law Concepts (1930); Pound, An Introduction to the Philosophy of Law (1922) (2d ed. 1954); Corwin, Liberty Against Government (1948).

² In relation to the significance of natural law theories for our legal development, in addition to the sources cited in note 1, supra, see also Pound, The Formative Era of American Law (1938); and Pound, The Spirit of the Common Law (1921).
transition from rural individualistic to urban socialistic. The eighteenth-century natural law was now old and backward looking. Reason untested by experience had failed to meet expectations and was not now adjusting to the new demands made by experience. Nevertheless, eighteenth-century rationalism was resisting change because it did not admit of the variability of fundamental principles and did not understand the functional nature of law in relation to changing society. The necessary adjustment of the law to the new tasks ahead was to be the burden of sociological jurisprudence in the twentieth century. Hence, fundamental principles, held to be eternal and immutable, once they had been settled upon in the light of eighteenth-century needs, became what Dean Pound has described as “positive natural law,” \(^3\) not to be treated lightly by later jurists, who continued to adhere to the theory of natural rights. As a result, few juristic theories have been more barren than the eighteenth-century natural law in the hands of the American judges in the late nineteenth century and the early twentieth century.\(^4\)

The old natural law did great work in its day, but it lingered on to hold back progress when its vitality was gone and it existed only as an anachronism, out of harmony with the thought and needs of the times. It did not reach its full bloom in our constitutional decisions until after Kant had dealt it the death blow in juristic thought on the continent of Europe. However it hung on in our courts until well into the twentieth century, after the stage of maturity of the law had achieved its purpose of organization and synthesis of the received materials of the stage of equity and naturalization. Its remnants are yet to be seen as we proceed with a new stage of legal growth and development, sometimes called the stage of socialization of the law — as we pass from a society characterized by contractual relations, with free individual self-assertion as the end of law, to a new relational society, conceived in terms of rights and duties, or, to reverse the famous phrase of Sir Henry Maine, from contract to status.\(^5\)

III.
THE NEW NATURAL LAW.

In a distinguished essay, the late Judge Charles M. Hough said of the due process doctrine that it is on its way out and all the Su-

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impeachment Court can do is to delay its dying agony; that moreover this
is true for the concept of "liberty" as then conceived by the Court. 6
Though this was written in 1919, much of it has come about, par-
ticularly the passing of the concept of abstract liberty of the individual
as fundamental. Professor Corwin suggests that the whole concept
of liberty against government may be crowded to the wall and that
man may come to seek his self-satisfactions in new aims and objectives
which promote the general welfare rather than individual preferment. 7
Though he might regret the trend, 8 Dean Pound lends support to this
idea with the warning that the common law is no longer popular with
the masses because it is no longer looked upon as something standing
between the people and unpopular government and, therefore, the
need for a new philosophy of law is urgent. 9 The juristic pessimism
of the deterministic schools has ceased to be in fashion, and a return
to juristic idealism is now in progress, but this new natural law is
shorn of the ideal of absolute values, universal and eternal. Its ad-
herents are content to search for the ideals of the age, the jural postu-
lates of the civilization of the time and place, and to set them up
as its guides. 10 Our greatest jurist and teacher has put it in these
terms:

“There is no eternal law. But there is an eternal goal — the
development of the powers of humanity to their highest point.
We must strive to make the law of the time and place a means
toward that goal in the time and place, and we do this by formu-
lating the presuppositions of civilization as we know it.” 11

This is once more a natural law, but it is neither the deterministic nor
absolute and abstract natural law of the eighteenth century. While
the eighteenth century sought a just, natural law outside of positive
law, an ideal by the side of which positive law was of only secondary
importance, this new philosophy of law recognizes that there is only
positive law but seeks its ideal and enduring side. Thus, it endeavors
to shape the development of modern positive law by having recourse
to ethical ideals and norms, as in the period of equity and naturaliza-
tion but without the acceptance of the deterministic ideas which ulti-

6. Hough, Due Process of Law Today, in SELECT ESSAYS ON CONSTITUTIONAL
7. CORWIN, LIBERTY AGAINST GOVERNMENT 182-83 (1948).
8. POUND, NEW PATHS OLT THE LAW, passim (1950).
9. Pound, Do We Need a Philosophy of Law? in JURISPRUDENCE IN ACTION
393, 398 (published by the Committee on Legal Education of the Bar Association
of New York City, 1953).
10. Jural postulates are the fundamental legal principles of a particular era.
Dean Pound has formulated a set of such postulates, and they are set out in POUND,
OUTLINES OF LECTURES ON JURISPRUDENCE 168, 179, 183-84 (5th ed. 1943).
11. POUND, INTERPRETATIONS OF LEGAL HISTORY 84 (1930).
mately bred the juristic pessimism and the diversity of theory of the
nineteenth and twentieth centuries.\textsuperscript{12}

This new natural law rejects the various positivist theories of
law and asserts that law cannot be separated from moral and ethical
values. It maintains that these notions must be used as guides in the
process of making new law and shaping the growing content of the
law to protect new interests and to meet new situations in a complex,
changing, urban industrial society. It is a natural law with a changing
and growing content. It seeks to formulate a legal ideal as to the
end of law, taking into account the ethical customs and institutions
of the time and place, as instruments for drawing in, shaping and
fashioning materials from outside the law.\textsuperscript{13} This new conception of
natural law has been functionally expressed by the late Justice Cardozo,
as follows:

"What really matters is this, that the judge is under a duty,
within the limits of his power of innovation, to maintain a re-
lation between law and morals, between the precepts of juris-
prudence and those of good conscience." \textsuperscript{14}

It might be summed up by saying that "logic, and history, and custom,
and utility, and the accepted standards of right conduct, are the forces
which singly or in combination" \textsuperscript{15} are relied upon to shape the progress
of the law.

In this new period of legal development which is at hand, there
will be a working over of the legal materials of the past and working
into them new ideas from without the law. This will be effected by
means of "a philosophical theory of right and justice and conscious
attempt to make the law conform to ideals." \textsuperscript{16} Not only eighteenth-
century natural law but the legal positivism which has been in vogue
since Austin must be put behind us, at least for the time being.

"Law has been lived and grown through juristic activity. It
has been liberalized by ideas of natural right or justice or rea-
sonableness or utility, leading to criteria by which rules and
principles and standards might be tested, not by ideas of force
and command and the sovereign will as the ultimate source of
authority." \textsuperscript{17}

\textsuperscript{12} "We may at least have a natural law with a growing content — an idealized
ethical custom and an ideal picture of the end of law, painted it may be, with reference
to the institutions and ethical customs of the time and place, which may serve as an
instrument of shaping and developing legal materials and of drawing in and fash-
ioning materials from outside the law." \textit{Pound, Law and Morals} 113 (1924).

\textsuperscript{13} \textit{Ibid}.

\textsuperscript{14} \textit{Cardozo, The Nature of the Judicial Process} 133 (1921).

\textsuperscript{15} \textit{Id.} at 112.

\textsuperscript{16} \textit{Pound, The Spirit of the Common Law} 84 (1921).

\textsuperscript{17} \textit{Ibid}.
It is submitted, however, that while this new natural law is undoubtedly of great value in both statutory and constitutional interpretation, as well as in the application and extension of traditional case law through the methods of judicial empiricism, it cannot be used to supply the content of a nebulous due process clause in a situation where the eighteenth-century natural law failed. The standards, such as "ultimate decency in a civilized society," 18 are not a sufficient referent and will fail again as fundamental notions of vested rights and liberty of contract failed in the past. Though the Supreme Court has continued to adhere to the principle of substantive due process in recent years, there has been vigorous dissent. Judicial decision outside the area of constitutional law, however, is a different matter. Thus, it is in the area of the fourteenth amendment and the two due process clauses that the lack of an adequate standard has caused the greatest difficulty when the old natural law notions were adhered to as a justification for decisions. Yet, judicial philosophy carries over from the area of general law to that of constitutional law, and some positivistic judges have gone so far as to apply natural law in the constitutional area while refusing to apply it in the area of general law. Can these difficulties be resolved? To a considerable extent, the answer lies in the future philosophies which the justices might follow and internal consistency within the ambit of such philosophies.

IV.

Constitutional Law Summary.

In the early days of our struggle for independence and national unity, our political statesmen had accepted principles of natural law to justify the changes which they wished to accomplish. Later our judiciary, more remote from and distrustful of popular government, made use of natural law to support the rights of property and the doctrine of the inherent incapacity of legislatures. Theirs was a conservative, stabilizing theory of natural law. 19 "Judicial review" of acts of Congress had been announced, the Court observing at the time that unless remedies could be had for violation of vested rights, this would soon cease to be a government of laws and not of men. 20

The doctrine of natural rights as constitutional limitations on legislatures, declaratory of universal rights running back of all constitu-

tions and rights based on the compact theory of government, had been used by both the state and federal courts to declare laws unconstitutional, particularly those which interfered with vested rights of property. In the later years of the pre-Civil War era, such doctrines had been re-enforced by the due process and law of the land clauses of state constitutions and the due process clause of the fifth amendment to the federal constitution.

After the Civil War there came the fourteenth amendment and the question as to its effect on our dual system of government. The Court refused to give the amendment its full effect. The conservatives, in control of the judicial branch of the government, did not want to change the dual nature of our state-federal system. Therefore, when the first case came before the Supreme Court under the new amendment, the Court construed away the enlarged meaning of "privileges and immunities" of national citizenship. But the Court soon saw an opportunity to transfer the then latent powers of the new amendment from the Congress into its own hands. While maintaining the dual system, the Court itself might become the protector of vested rights from encroachments of the states and at the same time extend protection to abstract individual rights, all within the framework of the Constitution itself. They could do this by the assertion of a veto power, through the expanded use of judicial review, in matters arising under the fourteenth amendment. While denying an expanded power of Congress over the states, they could themselves, through the phrase "due process of law," measure the validity of all state legislation and some federal legislation by tests which the Court would lay down. But what was "due process of law"? A comprehensive definition would not be easy and could certainly involve difficulties. It might discredit the Court, as the Dred Scott decision had discredited it earlier. But a comprehensive definition at once would not be necessary. The Court would apply to the matter the same method that judges had used to mould and develop the common law:

"[T]here is much wisdom, we think, in the ascertaining of the intent and application of such an important phrase in the federal Constitution, by the gradual process of inclusion and exclusion, as the cases presented for decision shall require. . . ." 24

24. Miller, J., in Davidson v. New Orleans, 96 U.S. 97, 103 (1877). Compare the statement of Justice Harlan, who was among those applying natural law doctrine when he said: "the courts have rarely if ever felt themselves so restrained by technical rules that they could not find some remedy, consistent with the law, for
The Court could now incorporate its economic and social views into the Constitution — while asserting judicial abstention from the political field and policy-making, it could strike down laws under a claim of duty. After some hesitation, this is what the Court proceeded to do — what had formerly been forbidden by "the spirit of the constitution" or "the principles of free government" was now prohibited by the due process formula, which the Court fashioned according to its own socio-economic philosophy — and we were off on a "constitutional carnival" which ended only as recently as 1937.20

The substantive due process concept took on two forms: (1) the protection of the vested rights of property in the classical pre-Civil War era sense; and (2) the protection of the abstract liberty of the individual as conceived in terms of "liberty of contract." To protect the former, courts struck down regulatory laws which interfered with the full use and enjoyment of property rights in the classical sense. To protect the latter, the courts ignored the conditions of the time and place and considered the end of law as a theoretical liberty or equality, in support of which they brought to their aid eighteenth-century rationalism, natural law and natural rights, and the historically derived concepts of the classical common law of England, all conceived as operating with inexorable determinism. In taking this position, the courts refused to consider the usual inequality of the contracting parties and held that any law which interfered with the theoretical freedom of the abstract individual man to contract was not due process of law. To a limited extent, they introduced and developed the concept of "the police power," holding that regulation would be permitted in the interest of health, safety, and morals so long as it had a reasonable relation to the regulatory end in view and did not go beyond the extent of the evil to be corrected. As to what might be reasonable, however, the courts set themselves up as the final judges, and it was the United States Supreme Court which had the last say. The result was that judges trained in the classical common law notions, classical natural law, and laisser-faire economics of the classical

acts, whether done by government or individual persons, that violated natural justice or were hostile to the fundamental principles devised for the protection of the essential rights of property." Monongahela Bridge Co. v. United States, 216 U.S. 177, 195 (1910).

25. "It is sometimes said that the court assumes a power to overrule or control the actions of the people’s representatives. This is a misconception. ... When an act of Congress is appropriately challenged in the courts as not conforming to the constitutional mandate the judicial branch of the Government has only one duty — to lay the article of the Constitution which is invoked beside the statute which is challenged and to decide whether the latter squares with the former." Roberts, J., in United States v. Butler, 297 U.S. 1, 62 (1936).

English economists held back social and economic legislation for over half a century, to the detriment of the common people and the benefit of the wealthy and propertied classes.27

V.

The Court Since 1937.

Since 1937, a decided change has come in the attitude of the Justices toward constitutional questions. The Court has wisely adopted a policy of judicial self-restraint, thereby allowing the Congress and the state legislatures greater freedom in the enactment of legislation regulating persons and property. While protecting civil liberties to a considerable extent, a new generation of Justices has refused to strike down social legislation which infringed on the rights of property in the classical sense. Discarding notions of free individual self-assertion as the end of the legal order and the juristic pessimism born of deterministic theories of law, the Court has taken a more positive approach, generally allowing a wide range of experimentation in the realm of legislation and law administration. This new attitude has greatly enlarged the powers of both the state and federal governments for experimentation in the development of what has been described as “the welfare state.” 28

The safer position of the Court today is in no small measure due to the repeated warnings voiced by Justice Holmes. The following quotation is illustrative of the philosophy of judicial self-restraint, the basic concept for which his life and work have come to stand:

“"There is nothing I deprecate more than the use of the Fourteenth Amendment beyond the absolute compulsion of its words to prevent the making of social experiments that an important part of the community desires, in the insulated chambers afforded by the several states, even though the experiment may seem futile or even noxious to me and to those whose judgment I most respect." 29

While the fame of Justice Holmes rests on his self-restraint properly exercised in the constitutional field, his positivistic approach to legal questions extended beyond constitutional questions to the

27. See generally Corwin, Liberty Against Government (1948); Pound, Liberty of Contract, 18 Yale L. J. 454 (1909); Jackson, The Struggle for Judicial Supremacy (1941); Corwin, Constitutional Revolution (1941).
whole of the law. Justice Frankfurter, following in Holmes's steps, has expressed the positivistic position in these words:

"In view of the complexities of modern society and of the inevitable narrowness of individual experience, tolerance and humility in passing judgment on the validity of the experience and beliefs of others become the chief dynamic factors in the disposition of cases." 80

Holmes's gospel of maintaining strict neutrality in deciding cases was undoubtedly the result of his legal positivism, his belief that the jurist must not go outside of the strictly logical, historical and positivistic sources of the law for considerations to be weighed in deciding cases. Holmes abhorred the natural law approach and endeavored to maintain a stern impartiality in the deciding of all legal questions. Thus, in a famous speech, he once said:

"For my part, I often doubt whether it would not be a gain if every word of moral significance could be banished from the law altogether, and other words adopted which could convey legal ideas uncolored by anything outside the law. We should lose the fossil records of a good deal of history and the majesty got from ethical associations, but by ridding ourselves of an unnecessary confusion we should gain very much in the clearness of our thoughts." 81

This separation of law from morals is characteristic of the period of legal maturity during which Holmes's philosophy was formed, but it takes away the motivating factor in the growth of law that is much needed today. Holmes was too close to the analytical school to which he had once belonged, too close to a theory of the law as is rather than ought, to consider any real or ideal law to which positive law ought to conform or to preoccupy himself with moral ideals from without the law that might be absorbed into it. The legal positivism of Mr. Justice Holmes continues to have great influence.

This change of position by the Court is not due merely to the legal positivism of Justice Holmes and his repeated warnings, however. It is also due in substantial part to the progress that comes with the re-examination of ideas in the light of changed conditions and new ideals, particularly when seen from the perspective of a new generation:

"A change of attitude in legal thinking throughout the world, which marks twentieth century jurisprudence, rests on recognition

30. Frankfurter, Mr. Justice Holmes and the Constitution, 41 Harv. L. Rev. 121-32 (1927); reprinted in Markie, The Holmes Reader 173, 182 (1955).
of the social interest in the individual life as something broader and more inclusive than individual self-assertion.”

Political pressures as well as the economic depression of 1929-1932 played a part in changing the viewpoint of the Court. It may be that this latter factor was more indirect in that it changed basic attitudes of large segments of the population toward the role of government in the operation of our country. The end result has been summarized by a distinguished teacher as follows:

“The net effect has been a shift in political, economic and social philosophies from individualism towards socialism, from acceptance of an economic system operating in response to the profit motive to belief in one in which government planning and direction is to play an increased role, from a social philosophy which admitted the duty of government to intervene in the distribution of income to a limited extent to one urging government to interpose for that purpose on an ever-increasing scale, and from a political and constitutional theory of rather restricted federal activity to one in which the federal government was assigned the major role in realizing the social objectives explicit or implicit in the new approaches to our social and economic problems.”

But the change in our constitutional theory since 1937 basically represents a change of emphasis rather than the adoption of a new set of assumptions. There has been no demand for a new society, with new political, social and economic philosophies, and the professed aims of the leaders have been to preserve the system by making it work more efficiently and more in the interest of society in general. In overruling certain precedents, the Court has merely treated them as departures from the true construction of the Constitution.

The new position of the Court may be summed up as follows: No change has been effected in the scope of interpretation of the privileges and immunities clause. “State action” is all that is forbidden in the fourteenth amendment’s prohibitory provisions, and Congress may not act against individual citizens. The concept of substantive due process still remains the same. In fact, the Court has repeatedly refused to read this out of the Constitution, as Justice Black has repeatedly pointed out. All that has happened is that the Court has decided to read the classical economists out of the Constitution and to permit the enactment of socio-economic legislation.

32. POUND, INTERPRETATIONS OF LEGAL HISTORY 147 (1930).
which it had formerly said was prohibited. Considering the question of constitutionality as one of degree, all the Court has decided to do is to widen the arc of the compass of constitutionality — to be more liberal in construing what is "reasonable" and more strict in construing what is "harsh, arbitrary, or capricious" in areas outside of the Bill of Rights. Actually, this has made a vast difference in practice, because few state laws and even fewer federal laws have been declared unconstitutional since 1937, but the theory and the power remain undiminished. The precedents differ only in degree. Moreover, as shown by the cautious language with which the Court has guarded its retreat from the socio-economic field, as well as its reluctance to overrule precedent in unequivocal manner, due process could be used again as it has been in the past to deter and prevent the carrying out of state and congressional programs not in agreement with the philosophy of the Court.

That the Court may again attempt to assert positively the theoretical power it has been holding in abeyance since 1937 is what Justice Black seems to fear most. Justice Black, the leader of the so-called "left wing" of the Court, would prevent this by limiting the veto powers of the Court under the fourteenth amendment to civil liberties safeguarded by the Bill of Rights and the Court's supervisory powers over federal legislation to the area of the Bill of Rights. This he would do by de-emphasizing due process and revitalizing the concept of "privileges and immunities" of national citizenship. He would especially renounce the power of the Court to subject legislation to the test of some substantive due process concept.

But a majority of the Court have thus far steadfastly refused to discard this reserve of power, so laboriously created over a period beginning with the foundation of our republic. Justice Frankfurter, the leader of the right wing of the Court, believes that the public has adequate protection from judicial tyranny in the new philosophical approach which the Court is gradually working out. In determining whether a particular law meets those certain minimal standards which are "of the very essence of a scheme of ordered liberty," the judges must always move "within the limits of accepted notions of justice."

37. In a technical sense, he would expand the Court's powers in a narrow area to restrict them in a broader area.
40. Adamson v. California, 332 U.S. 46, 65 (1947). Seven years earlier, however, Justice Frankfurter had written as follows: "An informed study of the works..."
The natural law-due process struggle still continues but in a much attenuated form, for the burning issue is now confined mostly to the following question: Does the fourteenth amendment incorporate the Bill of Rights, thereby making it applicable to the several states?\textsuperscript{41} The majority opinion, voiced by Justice Frankfurter, is that it does not, that the states are not "imprisoned in what are merely legal forms even though they have the sanctions of the Eighteenth Century."\textsuperscript{42} Justice Frankfurter maintains that the Court must in each instance decide whether the particular state or federal action is according to "due process of law," which means that it must comply with the standards laid down by the Court as "essential to a scheme of ordered liberty."\textsuperscript{43} He recognizes the broad powers of interpretation which this confers upon the Court but believes that this is an essential part of our constitutional system:

"Our constitutional system makes it the Court's duty to interpret those feelings of society to which the due process clause gives legal protection. Because of their inherent vagueness, the tests by which we are to be guided are most unsatisfactory but such as they are we must apply them."\textsuperscript{44}

Moreover, the Court is the head of a coordinate branch of the government and should occupy the role of policy-maker in its proper sphere:

"The stuff of constitutional law differs profoundly from ordinary law. . . . The Court exercises essentially political functions. . . . Constitutional adjudication has always been statecraft."\textsuperscript{45}

While Justice Black would hardly dispute this statement as a general proposition, he stands as the opposition's leader to the Court's in-

\textsuperscript{41} Adamson v. California, 332 U.S. 46 (1947).
\textsuperscript{42} Id. at 66.
\textsuperscript{43} This includes concepts not embodied within the Bill of Rights as well as those contained therein which are held applicable to the states. Thus, it retains the old substantive due process notions. This is strikingly illustrated by the attitude of the Justices toward review of rate-fixing. While the Court today is leaving the method of evaluation in the hands of the particular commissions, as expert bodies in this field, nevertheless, it still holds that rates must not be so fixed as to be confiscatory. The minority, however, have attacked the entire theory of judicial review of rate-fixing and would return to the position of the Court in Munn v. Illinois, 94 U.S. 113 (1877). But no one on the Court in recent years has contended that any rates fixed by a commission were confiscatory. See ROTTSCHEIDER, THE CONSTITUTION AND SOCIO-ECONOMIC CHANGE 162-67 (1948), and the cases discussed therein, particularly the natural gas decisions.
\textsuperscript{44} Frankfurter, J., in Haley v. State, 332 U.S. 596, 605 (1948).
\textsuperscript{45} Frankfurter, J., as quoted in Frank, COURTS ON TRIAL 311 (1949).
terpretation of the meaning of due process. He warns that a majority of the Court are asserting a theory that the Court is endowed “with boundless power under ‘natural law’ periodically to expand and contract constitutional standards to conform to the Court’s conception of what at a particular time constitutes ‘civilized decency’ and ‘fundamental liberty and justice.’” 46 He describes the natural law notions introduced into the due process clause as “the natural-law-due-process formula.” 47 While recognizing that the Court has substantially limited its previous assertions of power to the field of prevention of “state violations of the individual civil liberties guaranteed by the Bill of Rights,” yet he warns that this formula which has been used in the past can again be used

“to license this Court, in considering regulatory legislation, to roam at large in the broad expanse of policy and morals and to trespass, all too freely on the legislative domain of the States as well as the federal government.” 48

That it sharply points up the divergent attitudes of the justices toward eighteenth-century natural law in the adjudication of constitutional questions is the chief significance of the Adamson case. The controversy was continued in Rochin v. California, 49 a case in which the justices found themselves in agreement as to the end result but not as to the means by which this had been gained. Justice Frankfurter, who tends to uphold state action, found the use of a stomach pump on the defendant so shocking as to violate “those canons of decency and fairness which express the notions of justice of English-speaking peoples.” 50 To what extent he has relied upon the privilege against self-incrimination as contained in the fifth amendment is not clear, but he continues to emphasize what might be termed “the new natural law interpretation of due process”:

“The vague contours of the Due Process clause do not leave judges at large. We may not draw on our merely personal and private notions and disregard the limits that bind judges in their judicial function. Even though the concept of due process of law is not final and fixed, these limits are derived from considerations that are fused in the whole nature of the judicial process. . . .” 51

47. Id. at 90.
48. Ibid.
49. 342 U.S. 165 (1952).
50. Id. at 169.
51. Id. at 170.
Again, he refers to the constraint imposed upon the judges through their "duty of exercising a judgment within the narrow confines of judicial power." Due process as thus conceived

"is not to be derided as a resort to a revival of 'natural law.' To believe that this judicial exercise of judgment could be avoided by freezing 'due process of law' at some fixed stage of time or thought is to suggest that the most important aspect of constitutional adjudication is a function for inanimate machines and not for judges, for whom the independence safeguarded by Article 3 of the Constitution was designed and who are presumably guided by established standards of judicial behavior." 53

The requisite of self-discipline, self-criticism and tolerance are "the qualities society has the right to expect from those entrusted with the ultimate judicial power." 54

"The faculties of the Due Process Clause may be indefinite and vague, but the mode of their ascertainment is not self-willed. In each case, 'due process of law' requires an evaluation based on a disinterested inquiry pursued in the spirit of science, on a balanced order of facts exactly and fairly stated, on the detached consideration of conflicting claims . . . on a judgment not ad hoc and episodic but duly mindful of reconciling the needs both of continuity and change in a progressive society." 55

Justice Black, referring to "the nebulous standards stated by the majority" and "the accordion-like qualities of this philosophy," again protests against "such unlimited power to invalidate laws" and inquires: "what avenues of investigation are open to discover 'canons' of conduct so universally favored that this Court should write them into the Constitution?" 57

Whatever may be the outcome of this controversy, the Court can claim a stronger basis for its position than the mere prejudices of the Justices, even if the standard of adjudication does have its origin in eighteenth-century rationalism. This is true, however, only so long as the controversial area is limited by the Bill of Rights as a referent. 58 That even here the position of the Court is not without difficulties has been fully realized in recent years. Thus, Justice Jackson, in the second flag salute case admitted that

52. Id. at 171.
53. Ibid.
54. Id. at 171-72.
55. Id. at 172.
56. Id. at 175 and 177.
57. Id. at 176.
58. "Due Process" as a judicial concept has been called a symbol without a referent. Brockelbank, The Role of Due Process in American Constitutional Law, 39 Cornell L. Q. 561, 571 (1954).
"the task of translating the majestic generalities of the Bill of Rights, conceived as part of the pattern of liberal government in the eighteenth century, into concrete restraints on officials dealing with the problems of the twentieth century is one to disturb self-confidence."  

However, he sees no escape from this situation:

"These principles grew in soil which also produced a philosophy that the individual was the center of society, that his liberty was attainable through mere absence of governmental restraints, and that government should be entrusted with few controls and only the mildest supervision over men's affairs. We must transplant these rights to a soil in which the laissez-faire concept or principle of non-interference has withered at least as to economic affairs, and social advancements are increasingly sought through closer integration of society and through expanded and strengthened governmental controls. These changed conditions often deprive precedents of reliability and cast us more than we would choose upon our own judgment. But we [the Court] act in these matters not by authority of our competence but by force of our commissions. We cannot, because of modest estimates of our competence in such specialties as public education, withhold the judgment that history authenticates as the function of this Court when liberty is infringed."  

In other words, Justice Jackson recognized the nebulous nature of the content of the old natural law when applied to twentieth-century legal problems by way of the due process concept. He believed that the old decisions of the Court are often based on ethical and socio-economic notions which changed conditions deprive of reliability as precedents, but where the Bill of Rights itself is asserted as the basis of a claimed right, the Court must determine what are the standards contained in the Bill of Rights, even though those standards are not well defined themselves.

The paradox of the present Court is that Justice Frankfurter and the right wing, while maintaining that judges should practice strict self-restraint in the matter of bringing their ethical notions into play in passing on the constitutionality of legislation, nevertheless insist upon testing such legislation by the standards of civilized decency, the conscience of mankind, and notions of justice of English-speaking peoples. A subjective content is thus infused into the Bill of Rights and even into the concept of due process outside of and beyond the

60. Id. at 639-40.
Bill of Rights as a referent, in the same manner as the old Court did, even if it has been to a lesser degree and in a narrower area thus far.

On the other hand, Justice Black, the leader of the left wing of the Court, is in what appears at first glance an almost equally paradoxical position. He is not an advocate of judicial self-restraint—yet, in the area of constitutional interpretation, he insists that the Court in effect must adhere to the letter of the instrument, and even to what Justice Frankfurter would call a strict mechanical interpretation, in order to uphold the constitutional validity of legislation whenever possible. As an adjunct to this position, he seizes upon the Bill of Rights as a referent for testing the guarantee of the privileges and immunities of the fourteenth amendment and at the same time renounces the concept of substantive due process, with all of its vast veto power, and probably the procedural due process concept as well.62 Their positions appear to be just the reverse of this in the area of general (non-constitutional) law, as will be seen from a consideration of two other cases.

In 1943, the Supreme Court decided Burford v. Sun Oil Co.,63 with a five to four division in the Court. The suit was one for injunctive relief against an order of the Texas Railroad Commission granting to Burford a permit to drill certain oil wells on property adjacent to lands owned by the complainant and the intervenor. Jurisdiction of the federal district court was invoked on the grounds of diversity of citizenship and denial of due process of law.64 It was found that the State of Texas had a uniform method for the formulation of policy and the determination of cases by the Commission and the state courts; the judicial review of Commission decisions in state courts was expeditious and adequate; and intervention by the lower federal courts was likely to occasion both delay and conflicts in the interpretation of state law dangerous to the success of state policies. The district court dismissed the complaint, the circuit court reversed the district court, and the Supreme Court reinstated the judgment of the district court.

Justice Black, speaking for the majority, viewed the matter as a simple proceeding in equity to enjoin the enforcement of the Com-

62. "But I am not prepared to say that the latter [that is, the fourteenth amendment] is entirely and necessarily limited by the Bill of Rights. Occasions may arise when a proceeding falls so far short of conforming to fundamental standards of procedure as to warrant constitutional condemnation in terms of a lack of due process despite the absence of a specific provision in the Bill of Rights." Murphy, J., dissenting, in Adamson v. California, 332 U.S. 46, 124 (1947).
63. 319 U.S. 315 (1943).
64. The question of diversity of citizenship was the only one which troubled the courts, however. Apparently, due process was not considered a substantial federal question in this instance.
mission's order. Admitting that the federal district court had jurisdiction of the matter, he held that as a court of equity, it could in its sound discretion refuse to protect legal rights the exercise of which might be prejudicial to the public interest. Here, the order was made by a state administrative agency with special competence in the field of regulation of the drilling of oil wells, an extremely complicated subject. Moreover, the administration of the conservation of oil as a natural resource was entrusted to the Commission, and the carrying out of this function depended upon uniform enforcement of its policies. Finally, it is on oil that the government of Texas depends for a substantial part of its revenues. The following language, quoted from an earlier opinion, sums up the views of Justice Black as to the case:

"'Few public interests have a higher claim upon the discretion of a federal chancellor than the avoidance of needless friction with state policies. . . . These cases reflect a policy of abstention appropriate to our federal system whereby the federal courts, "exercising a wise discretion," restrain their authority because of "scrupulous regard for the rightful independence of state governments" and for the smooth working of the federal judiciary..." 65

Justice Frankfurter, speaking for the minority, maintained that the federal statutory law provides for federal jurisdiction when properly invoked upon the ground of diversity of citizenship and that there was nothing the district court could do but accept the case and hear it. He considered that the acceptance of such cases was "a duty enjoined by Congress and made manifest by the whole history" of diversity jurisdiction matters. He reaffirmed that "[J]udicial law to me implies at least some continuity of intellectual criteria and procedures in dealing with recurring problems." 66 He did not consider the defects of the Judiciary Act of 1791 germane to the issue:

"... [T]hese are matters which are not my concern as a judge. They are the concern of those whose business it is to legislate, not mine. I speak as one who has long favored the entire abolition of diversity jurisdiction. . . . But I must decide this case as a judge and not as a legislative reformer." 67

While the Burford case might be explained on the ground of Justice Black's aversion to judicial interference with the smooth administration of the state government, the subject to which he devotes so

66. Id. at 336.
67. Id. at 337.
many pages of his careful opinion, it is submitted that basically the
decision reflects a creative judicial philosophy. The act providing for
federal jurisdiction in diversity cases was passed in 1791 before ad-
ministrative law had been born. It did not and could not contemplate
a situation like that in the administration of oil law in Texas in the
mid-twentieth century. Moreover, its purpose was to enable citizens
of foreign states to seek the protection of the federal courts in order
to avoid local prejudices, a factor which seldom appears in diversity
cases today and could hardly have been shown to exist in the Burford
situation.

Justice Black was not flouting the law. He was willing to accept
judicial responsibility in a non-constitutional area for applying a previ-
ously established equitable principle in a new situation which in effect
went in the face of the statute. However, this exception was made in
an area where the statute did not work well and in a situation which
was not contemplated when the statute was enacted. It is submitted
that this is creative judicial work in the finest spirit of the empiricism
of the common law tradition.

Again, the paradox is that Justice Frankfurter, who goes so far
in the constitutional field, cannot hurdle a statute in a situation where
the statute was never meant to apply when it was enacted. Perhaps
the answer lies in the fact that in each instance he was upholding the
status quo. But to maintain the status quo is not enough for judges if
they would be instruments for the growth of the law. Legal history
is ample testimony to that. The key to Justice Frankfurter’s position
in the Burford case is to be found in his rigid adherence to Holmesian
positivism in the area of statutory construction.

Riggs v. Palmer, is another if somewhat more shocking situation
in which the same principle was applicable as that which came before
the Court in the Burford case. While not a decision of the United
States Supreme Court, it is important for purposes of analogy, as well
as for the light which it throws upon Justice Cardozo and those who

68. “We have to distinguish between the precedents which are merely static, and
those which are dynamic,” Cardozo has said. THE NATURE OF THE JUDICIAL PROCESS
163-64 (1921). This is true, it is submitted, both of statutes and the extent of their
applicability.

Cardozo’s judicial attitude toward statutes and constitutions is indicated in the
following: “Statutes are designed to meet the fugitive exigencies of the hour.
Amendment is easy as the exigencies change. In such cases, the meaning, once
construed, tends legitimately to stereotype itself in the form first cast. A constitution
states or ought to state not rules for the passing hour, but principles for an ex-
panding future. Insofar as it deviates from that standard, and descends into details
and particulars, it loses its flexibility, the scope of interpretation contracts, the mean-
ing hardens. While it is true to its function, it maintains its power of adaptation,
its suppleness, its play.” Id., 83-84.

69. 115 N.Y. 506 (1889).
view the judicial position in the same light. In *Riggs v. Palmer*, it was held that a legatee who had murdered his testator would not be permitted by a court of equity to enjoy the benefits of the testator's will. The administrator and the legatee were enjoined from using the property for the benefit of the latter. The bequest was declared ineffective, and to that extent a court of equity re-wrote the testator's will. The judges had much difficulty with the matter, however. "Conflicting principles were there in competition for the mastery." 70 Those who favored the result reached relied upon public policy, principles of natural law and natural justice, citing eighteenth-century writers and certain rules of statutory construction.

The dissenters considered that "the matter does not lie within the domain of conscience." They felt themselves to be "bound by the rigid rules of law, which have been established by the legislature, and within the limits of which the determination of the question is confined." The statutory regulation of wills and the devolution of property thereunder was deemed to be a matter in which the legislature "has left no room for the exercise of equitable jurisdiction . . ." 71

The late Justice Cardozo left no doubt as to how he would have decided *Riggs v. Palmer*:

"There was the principle of the binding force of a will disposing of the estate of a testator in conformity with law. That principle, pushed to the limit of its logic, seemed to uphold the title of the murderer. There was the principle that civil courts may not add to the pains and penalties of crimes. That, pushed to the limit of its logic, seemed again to uphold his title. But over and against these was another principle, of greater generality, its roots deeply fastened in universal sentiments of justice, the principle that no man should profit from his own inequity or take advantage of his own wrong." 72

Aside from the choice between conflicting logical principles, "[O]ne path was followed, another closed, because of the conviction in the judicial mind that the one selected led to justice." 73 After the analogies and precedents and the principles behind them had been weighed and considered, that principle prevailed which "was thought to be most fundamental, to represent the larger and deeper social interests. . . . I am not greatly concerned about the particular formula through which justice was attained." 74

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71. 115 N.Y. 506, 515-16 (1889).
73. *Ibid*.
74. Id. at 42.
The murderer lost his legacy because the "social interest" served by this result was greater than that served by the strict preservation and enforcement of the legal rights of ownership. It is only in such crucial cases, however, that difficulties arise. The judges go along with their various philosophies together until they reach a certain point. Then, they begin to diverge, and a choice must be made. "History or custom or social utility or some compelling sentiment of justice or sometimes perhaps a semi-intuitive apprehension of the pervading spirit of our law, must come to the rescue of the anxious judge, and tell him where to go."

When the writer studied the Burford case in law school, he had just finished reading Professor Fuller's delightful little book, The Law in Quest of Itself. After considering the able discussion of the philosophies of Holmes and Cardozo, he had, it seemed, a certain flash of insight — which seems at times almost intuitive — that had the Burford case come before Justice Holmes, he would have dissented, while Justice Cardozo would have decided with the majority. If this is true for Holmes, of course, it means that he would have refused to move by "molecular motion" even in the face of an "antiquated" statute, while Cardozo would have had no trouble in finding an exception to the statute as not having been meant to cover the particular situation.

But can we so rely on theory in the face of known judicial idiosyncrasies? Even Justice Black has been known to hedge on the question of complete incorporation of the Bill of Rights into the fourteenth amendment. Here we are generalizing, however; and on the basis of patterns and theories, we can make general predictions. It is the positive approach of philosophies like that of Black and Cardozo that enables the law to grow and thrive, to adapt itself to the exigencies of new situations in times of transition and stress. It is the creative approach.

To sum up, Justice Black accepts the Constitution for what it is, a product of the eighteenth century, and endeavors to interpret it by eighteenth-century standards carried forward to the extent of their logical implications by the impact of twentieth-century problems — and elsewhere to apply a kind of new and relative natural law; while

75. Id. at 43.
76. See Id. at 40 and 154. Yet, Cardozo would agree with Justice Frankfurter in matters of due process. See Id. at 76. Palko v. Connecticut, 302 U.S. 319 (1937), is the best example and a leading case on due process of law.
77. "I recognize without hesitation that judges do and must legislate, but they can do so only interstitially; they are confined from molar to molecular motions." Holmes, J., in Southern Pac. Co. v. Jensen, 244 U.S. 205, 221 (1917).
Justice Frankfurter endeavors to follow a selective process, adapting the eighteenth-century document to a criterion of twentieth-century values by the process of inclusion and exclusion and elsewhere restricting himself to the positivism of Justice Holmes. The apparent inconsistency lies in the fact that the new natural law can best be applied in the non-constitutional area. Frankfurter's objection to this would be his positivism; but in the constitutional area, he believes that he is required to make an interpretation, and his objective is constitutional flexibility. Thus, in his own way, he is thoroughly consistent, though, paradoxically, he introduces values to some degree, thereby violating the positivist principle of maintaining the strict separation of law and morals. 78

VI.

CONCLUSION.

While the old natural law must be buried for good, and the concept of liberty even subjected to more stringent regulation under the police powers in the future, it is submitted that constitutional philosophy should not permit a canon of interpretation that can disallow validity to laws "beyond the absolute compulsion of the words" of the Constitution, even though the states or the federal government should undertake experiments which seem futile or even noxious to you and me. 79 It is not enough that a change of spirit throughout the world should result in new juristic theory with an aim and goal of law as something nobler than free individual self-assertion. 80 Rather, if judicial review is to stay, it must uphold, not strike down, legislation which is not specifically prohibited by express language of the Constitution, or, if state legislation, when not so prohibited and not in conflict with the actual policy of federal legislation. In other words, legislation must be most liberally construed in favor of constitutionality. Here, Holmes was on sound ground, even though he never got around to raising philosophical objections to substantive due process.

On a lesser scale, however, it is important that judges continue to act by that molecular motion of positive judicial empiricism 81

78. Cardozo's position is more consistent than that of Frankfurter, at least from the standpoint of logic, as he followed the creative or new natural law approach in both areas, that is, the constitution and general law. See Cardozo, J., in Palko v. Connecticut, 302 U.S. 319 (1937); discussion of Riggs v. Palmer, 115 N.Y. 506 (1889), in JUDICIAL PRCTICE, 40, also considered supra, in text following note 69.
80. See text at note 32, supra.
which has created great legal systems in the past and enabled such systems to grow and develop to meet the changing needs of society in its dynamic states. This should be true, it is submitted, even when to do so requires the circumvention of an obsolete statute, at least as to its applicability in an area of law still unborn at the time of its enactment. Justice Black was right in his evaluation of the *Burford* case. The principle should prevail outside the area of constitutional interpretation.

It is one of the unavoidable difficulties of any system of law that it must be a force making for stability, that progress can only follow change of opinion, that opinion can only change after conditions have changed, and conditions can only change when new needs arise in society — and all of this must take place gradually. In other words, the law must inevitably and in the nature of things be always "catching up." Justice Holmes put the idea in this intriguing metaphor:

"It cannot be helped, it is as it should be, that the law is behind the times. . . . As law embodies beliefs that have triumphed in the battle of ideas and then have translated themselves into action, while there is still doubt, while opposite convictions still keep a battle front against each other, the time for law has not yet come, the notion destined to prevail is not yet entitled to the field." 82

Therefore, it is well that judges should use all reasonable means at their disposal to bring progress as rapidly as possible within the framework of the constitutional system and "within the narrow confines of judicial power." 83 To turn Justice Frankfurter's phrase against him, judges should be ever "mindful of reconciling the needs both of continuity and of change in a progressive society." 84 We are assured of progressive growth of the law in great periods of change, like the present age of social upheaval, if judges act in the finest tradition of judicial empiricism, utilizing reason, history, and the scientific materials of the twentieth century, and, within the limits of their power of innovation, maintaining a relation between law and morals, between the precepts of jurisprudence and those of good conscience. 85

On the constitutional level, it is imperative to a sound basis for our law that the judges should ever remember that they are not "God" and that our little systems are not cosmic. 86 But on a lesser level, 82. Holmes, *Law and the Court*, in *Speeches by Oliver Wendell Holmes* 98-103 (1913); reprinted in *Mark, The Holmes Reader* 94, 96-97 (1955).
84. *Id.* at 172.
the Supreme Court has a great role to play, and incidentally the one which the founding fathers designed for it. And in this traditional area of judicial decision, "law-making" looms larger than in most courts. 87 Here, the positive approach to its role by the Court if aptly played out can be a big factor in the law's catching up. Not only constitutional law but the bulk of the work of the Supreme Court might aptly be termed "statecraft." 88 It is in this non-constitutional area that a revived natural law can do its greatest work. It is here that the words of the late Justice Cardozo are so cogently applicable. 89

88. See text at note 41, supra.
89. Judicial Process 113; quoted in text at note 14, supra.