The fourteenth amendment as an instrument in the protection of Civil Rights against state action

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THE FOURTEENTH AMENDMENT AS AN INSTRUMENT
IN THE PROTECTION OF CIVIL RIGHTS
AGAINST STATE ACTION

A THESIS
SUBMITTED TO THE FACULTY OF ATLANTA UNIVERSITY
IN PARTIAL FULFILLMENT OF THE REQUIREMENTS FOR
THE DEGREE OF MASTER OF ARTS

BY

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DEPARTMENT OF POLITICAL SCIENCE

ATLANTA, GEORGIA
JUNE 1950
PREFACE

The Supreme Court of the United States, in Barron v. Baltimore (1883), declared that the Bill of Rights was intended to protect the civil rights of the individual from encroachment by the Federal Government and not from state governments. This decision meant that there was no constitutional grant upon which individual liberty could be guaranteed against infringement by the various states. The Fourteenth Amendment was formulated and passed to remedy this situation.

The purpose of this amendment particularly, the first section, was to apply the guarantees of the Bill of Rights to state activities endangering civil rights. However, it was a long time before the Supreme Court began to interpret the Fourteenth Amendment in accord with its intended purpose.

Historically, the Fourteenth Amendment has been subject to various interpretations. A number of studies have been made on the application of the amendment to corporations and the Negro. This study differs from those in that it is a specialized investigation of the Fourteenth Amendment as an instrument in the protection of civil rights. Various writers have treated some aspect or another of this subject. Some of the outstanding writers in this area are the following: Robert K. Carr, Charles Warren, Pendleton Howard, Robert E. Cushman, Edward S. Corwin, and C. Herman Pritchett.

This study is an attempt to examine the Supreme Court's interpretation and application of the Fourteenth Amendment between 1873 and 1949 to determine the extent to which it has been used to
protect the civil rights of individuals from state action. Consequently, this investigation is primarily concerned with the Fourteenth Amendment, civil rights, state action and the Supreme Court.

The chief sources for this study are a number of selected cases from the United States Reports, decided between 1873 to 1949. In addition to this many secondary sources, especially law reviews, have been used to supplement the writers interpretation and analysis of those cases. The writer does not profess to have read all cases that came before the Supreme Court during this period which might have had some bearing upon this study.

The writer is greatly indebted to the direction and guidance given by his advisor, Professor William M. Boyd. To Professor Robert H. Brisbane, Jr., the writer is grateful for reading the manuscript and making invaluable suggestions and criticisms.

Atlanta University
Atlanta, Georgia
June 1950.

Horace T. Ward
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CHAPTER I

HISTORICAL SETTING

The American people have come to cherish certain fundamental freedoms — freedom of speech and of press, freedom of religion, the rights of assembly and petition, and the right of one accused of crime to fair and just treatment. As a matter of historical evolution the average American has been inclined to regard the state itself as the great enemy of these fundamental freedoms which are more commonly known as civil rights. Consequently, there has been a reliance upon written guarantees, enforced by the courts, as a means whereby the civil rights of the individual could be protected against governmental encroachment.

Due to the complexity of the American federal form of government it has become necessary to maintain two constitutional protectors of civil rights: the Bill of Rights directed against the national government on the one hand and the Fourteenth Amendment to the Constitution of the United States against the states on the other.

The experience of the American colonists with English rule led to the adoption of written guarantees or "bills of rights" designed to protect the individual against the state. These instruments varied in

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2 Ibid.
language from state to state, but the provisions were identical in substance and were concerned with two main objectives: the protection of free expression of opinion, secular as well as religious, and the prohibition of abuses of criminal law.

When the proposed United States Constitution was before the states for ratification, the fear of governmental infringement upon the civil rights of the individual was brought into the open. As the price of ratification, a number of states (especially Pennsylvania, New York and Virginia) recommended the adoption of a national bill of rights. Those recommendations had historical justification because "Bills of Rights are for the most part reactions against evils of the past rather than promises for the future." This agitation was attacked by Alexander Hamilton and others on the basis that the proposed federal government was one of the delegated powers. However, the argument of the states prevailed and when the first Congress convened seventeen amendments in the nature of a bill of rights were proposed. Of the proposed number, twelve were adopted and ten were finally ratified by the states. It is interesting to note that one of the proposed seventeen provided that "no state should infringe the right of trial by jury in criminal cases, nor the rights of conscience, nor the freedom of speech or of press."

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5Ibid.  
6Ogg and Ray, op.cit., pp. 31-32.  
8The Federalists, no. 84.  
10Ibid., p. 7.
The fact that the Bill of Rights was directed against the National

government is indicated by the language of the First Amendment, for it
begins, "Congress shall make no law...." The guarantees enumerated in
the first ten amendments to the Constitution of the United States are
below.

The First Amendment guarantees freedom of religion, speech, press
and assembly. The Second and Third deal with military problems which
were important when the Constitution was adopted, but are now largely
obsolete. The Fourth Amendment protects the security of the individual
"against unreasonable searches and seizures." The next two amendments -
the Fifth and Sixth - are concerned with criminal prosecutions. The
Fifth provides that no "capital, or otherwise infamous crime" shall be
prosecuted except upon indictment by a grand jury, prohibits self-
incrimination and second prosecution for the same offense. Also
incorporated in the Fifth Amendment is the "due process of the law"
clause, which along with its companion clause of the Fourteenth
Amendment is the most important clause of the Constitution. The Sixth
Amendment guarantees trial by jury, the right of counsel and to
confrontation by witnesses. The Seventh provides for jury trials in

11Fraenkel, op. cit., p. 2.
12Ibid.
13What "due process of law" means today is the result of the
historical evolution of this clause. Originally, it meant simply the
modes of procedure which were due at common law, especially in
connection with the accusation and trial of supposed offenders. But
today "due process of law" has a different meaning. It has come to mean
what a majority of the Supreme Court finds to be reasonable law and
procedure. That is, it has come to mean the "approval" of the Court.
See Edward Corwin, The Constitution and What It Means Today (Baltimore,
1942), pp. 153-54.
14Fraenkel, op. cit., p. 2.
civil cases involving more than twenty dollars. The Eighth along with
the Fourth, Fifth and Sixth amendments go to make up a "bill of rights" for accused people. It prohibits excessive bail and cruel and unusual treatments. The last two amendments - the Ninth and Tenth - reserve to the states and people all powers not expressly conferred on the National government.

As a matter of classification the Bill of Rights falls into two parts. One part pertains to "facts and essence" of freedom - substantive rights - and the other part relates to the methods by which freedom is protected - procedural rights. All of the provisions of the Bill of Rights protect aliens as well as citizens.

Historical evidence made it perfectly clear that the framers of the Bill of Rights intended that it would restrain only the actions of the National government. Nevertheless, it came to be argued that these guarantees of civil liberty ought to be construed as restraints upon the states as well as upon the Federal government. That was the issue involved in the last case in which Chief Justice John Marshall participated, Barron v. Baltimore. In delivering the majority opinion of the Court, the Chief Justice pointed out that the first ten amendments "contain no expression indicating an intention to apply them to the State governments." In expressing the opinion of the Court, Marshall

15Ibid.
16Ibid.
17Ogg and Hay, op.cit., p. 140.
18Fraenkel, op.cit., p. 2.
19Cushman, op.cit., p. 61.
20Peters 243 (1833).
21Ibid.
We are of the opinion that the provision in the Fifth Amendment to
the Constitution, declaring that private property shall not be taken
for public use without just compensation, is intended solely as a
limitation on the exercise of power by the government of the United
States, and is not applicable to the legislation of the states.22

Although the decision in Barron v. Baltimore established firmly the
nature and scope of the Bill of Rights, the struggle to protect the civil
rights of the individual against state action did not end there. With
the adoption of the Fourteenth Amendment, after the Civil War, a new
constitutional basis was provided upon which this struggle was resumed.

The Fourteenth Amendment was not the result of a spontaneous
creation. It was the product of many minds and the culmination of an
evolutionary process. The first step in the evolution of the Fourteenth
Amendment came with the passage of the Freedman's Bureau bill on February
25
19, 1866. President Johnson vetoed this bill and Congress sustained
the veto. That setback did not mean total defeat for the "radical
republicans." In March, 1866, the Civil Right Bill, an act which
attempted to guarantee federal protection of the civil rights of Negroes,
26
was passed. The first section of that act - later incorporated into

22Ibid. The decision in Barron v. Baltimore had the force of law
until 1931, when it was by-passed, however, not reversed. See Near v.
Minnesota, 283 U. S. 697 (1931).

23Carr, op. cit., p. 10.

24Horace E. Flack, The Adoption of the Fourteenth Amendment
(Baltimore, 1908), p. 55.

25The new Freedman's Bureau bill was designed to do two things: To
extend the life of the Bureau indefinitely, and to extend federal
jurisdiction over the civil rights of Negroes. Alfred H. Kelley and
Winfred Harbison, The American Constitution, Its Origin and Development

26Ibid.
the Fourteenth Amendment - declared that "all persons born in the United States and not subject to any foreign power, excluding Indian not taxed," were citizens of the United States. A number of congressmen, especially Representative John A. Bingham (Rep., Ohio), considered the Civil Rights bill unconstitutional and recommended a constitutional amendment to preserve the guarantees stipulated therein. Consequently, the Fourteenth Amendment was drawn up and presented to the states.

The first section of the Fourteenth Amendment dealt with civil rights. Due to the interpretation given it and the extent to which it has been invoked, this section has achieved an importance out of all proportion to the other four sections. Much can be discovered as to the intended meaning and purpose from the comments of its sponsor, Representative John A. Bingham.

Representative Bingham, in formulating Section One of the Fourteenth Amendment sought to get around the decision of Barron v. Baltimore by providing a constitutional means of extending the Bill of Rights to persons who might be oppressed by the state. Upon re-examination of

27Ibid.

28The question of who is the author of the Fourteenth Amendment has not been settled. Two notable contenders are Judge Stephen Neale and Robert Dale Owen, both of Indiana. However, the evidence points to Representative John A. Bingham as the author of Section One. See Flack, op.cit., pp. 69-71.

29Carl B. Swisher, American Constitutional Development (Boston, 1943), p. 329.

30Congressional Globe, 39th Congress, 1st Session pp. 1089-1090. Joint Resolution H.R. 63, proposing the Fourteenth Amendment to the Constitution of the United States, was first brought before the National House of Representatives on February 28, 1866. Mr. Davis of New York was entitled to the floor. He delivered a lengthy speech opposing the proposed amendment. Mr. Davis was followed by Representative Woodrigge of Vermont who spoke in defense of the resolution. Thereafter, Representative John A. Bingham of Ohio, the author of the first section of the proposed amendment, obtained the floor. Excerpts from his speech are given below:
the Barron v. Baltimore ruling, Section One was phrased so as to make it conform with the Fifth Amendment. Bingham, an ardent defender of civil rights for all people, made it clear that the proposed amendment was not limited to the protection of the rights of Negroes, but extended to the rights of white citizens as well.

The Fourteenth Amendment as reported from the joint committee on Reconstruction made no attempt to define citizenship. The House accepted it in the original form, but the Senate deemed it advisable to add the following clause: "All persons born in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside." That clause did the following things: remedied the lack of citizenship clause in the original Constitution; made national citizenship primary and state citizenship secondary.

"A gentleman...wanted to know if I could cite a decision showing that the power of the Federal Government to enforce in the United States Courts the bill of rights [against state action] under the articles of amendment. I answered that I was prepared to introduce such decisions; and that is exactly what makes plain the necessity of adopting this amendment....I refer the House and the country to Barron v. The Mayor and City Council of Baltimore involving the question whether the provisions of the Fifth article of amendments to the Constitution are binding upon the State of Maryland and to be enforced in the Federal courts [Mr. Bingham cited Chief Justice Marshall's opinion which held that the Bill of Rights could not be enforced against state action. He then stated that the individual was without remedy in respect to state encroachments]." See Congressional Globe, 39th Cong., 1st session, pp. 1084-1095; also Flack, op.cit., pp. 58-59.


32 In answer to a statement that the Fourteenth Amendment was "aimed simply and purely toward the protection of 'American citizens of African descent'..." Mr. Bingham replied that the amendment was proposed to protect "loyal white citizens" also. See Cong. Globe, 39th Cong., 1st session, p. 1065.

33 Ibid., pp. 2500, 2542.

34 Ibid., pp. 2890-97. See also Swisher, op.cit., pp. 333.
secondary; and reversed Dred Scott decision.

The three remaining clauses of Section One guaranteed civil rights against state interference:

No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law, nor deny to any person within its jurisdiction the equal protection of the law.

These provisions have been subject to varied meanings and interpretations. By "privilege or immunities of citizens of the United States" the framers of the Fourteenth Amendment meant the whole body of civil rights enumerated in the Bill of Rights to the federal Constitution. Unfortunately, the Supreme Court refused to accept this interpretation in the Slaughterhouse Cases. The "due process of law" clause was borrowed from the Fifth Amendment. The same injunction which was directed against the Federal government was now applied to the states. The "equal protection of the laws" clause seemed to re-enforce the Civil Rights act and warned the states not to discriminate against Negroes. However, this does not rule out legislative classifications such as segregated railroad accommodations. Contrary to the intention of its

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35 Kelly and Harbison, op. cit., p. 461.

36 Cong. Globe, 39th Cong. 1st session, pp. 2542, 2765-66. See also Cushman, op. cit., p. 41.

37 16 Wallace 36 (1873).


39 In reference to the equal protection of the laws clause Senator Howard stated that it "abolishes all caste legislation in the states and goes away with the injustices of subjecting one caste of persons to a code note applicable to another. Cong. Globe, 39th Cong., 1st session, p. 2766. See also Kelly and Harbison, op. cit., p. 461.

40 Plessy v. Ferguson, 163 U. S. 537 (1897).
framers, the equal protection clause has come to be used to protect
business interests from state regulation.

It is significant to note that the civil rights guaranteed by the
first section of the Fourteenth Amendment are not new ideas of law and
justice. They are as old as the Magna Charta and were embodied in the
constitutions of the states before the adoption of the federal
Constitution. The one new thing about this amendment is that it
shifted protection of civil rights from the states to the Federal
government. Unfortunately, the Fourteenth Amendment guarantees no
rights against invasion by private individuals or groups.

The foregoing material has been concerned only with Section One
of the Fourteenth Amendment. It must not be forgotten that there were
four sections to this amendment. These sections had contemporary
importance and were political in nature. Sections two and three dealt
with the problem of Southern representation. Section two, which provided
for a reduction of the representation of states in the House in proportion
to the number of persons disfranchised, was termed the most important
section of the Fourteenth Amendment by Thaddeus Stevens. The fourth

41Andrew C. McLaughlin, "The Court, the corporation, and Conkling," Historical Review, XLVI (October, 1940), 50.
43Ibid.
44The Fourteenth Amendment is directed only against state action. The Fifteenth Amendment is enforceable against both the Federal and state governments. Only the Thirteenth Amendment is enforceable against both the Federal and State governments and also private persons. Milton R. Konvitz, The Constitution and Civil Rights (New York, 1947), p. 30.
45Swisher, op. cit., p. 329.
46Ibid.
Section guaranteed the United States debt and outlawed the Confederate debt. The fifth and final section empowered Congress to enforce the amendment by appropriate legislation.

In the preceding pages there has been an attempt to give a brief historical retrospect of the plight of Federal protection of civil rights from the adoption of the Bill of Rights through the adoption of the Fourteenth Amendment. First, there was a recapitulation of the evolution of the Bill of Rights. It was pointed out that the Supreme Court put an end to efforts to persuade the Court to apply the Bill of Rights to state action (Barron v. Baltimore). Finally, the evolution, nature, scope, and purpose of the Fourteenth Amendment were considered. Special emphasis was placed on the fact that Section One of the Fourteenth Amendment was formulated for the expressed purpose of extending the Bill of Rights to state activities endangering civil rights. The remaining chapters of this study deal with the Fourteenth Amendment before the Supreme Court and the extent to which the Court has interpreted that amendment in accordance with the intention of its framers and the people who voted for it.

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47 Kelly and Harbison, op.cit., p. 463.

48 The Supreme Court has never conclusively determined the full extent of the power of Congress under Section Five. In the famous Civil Rights Cases (109 U. S. 3) the Court held void an act of Congress on the ground that the prohibitions of the opening section of the Fourteenth Amendment were intended to reach positive acts of State authorities and not acts of private individuals or acts of omission by the State itself. Corwin, op.cit., pp. 184-85.
CHAPTER II

NARROW INTERPRETATION, 1873 - 1922

A great many of the congressmen who voted for the Fourteenth Amendment thought as its framers did, that it would, somehow, make the first eight amendments binding upon the states. The debates in Congress on this amendment pointed out that the intention of its framers was to apply the Bill of Rights to state action endangering civil rights. This was to be done by converting the privileges of state citizenship into privileges of national citizenship. The power of enforcement of the provisions of the Fourteenth Amendment given Congress left the Supreme Court with only an intermediary role in this respect. However, the Supreme Court in 1868, and for a long time afterwards was not prepared to accept the intended purpose of the Fourteenth Amendment. A controlling majority of the Court felt it necessary to react against the extreme centralizing tendency of the Reconstruction program of the "radical republicans" on the ground that it sought to undermine the "federal equilibrium". As a result the Court refused to accept an intermediary role and set out to protect the federal system. However,

1 Congressional Globe, 39th Cong. 1st sess., pp. 1089, 2542, 2765-66.
4 Ibid.
the Court's devotion to the theory of federalism did not last very long. After 1877 the Supreme Court began to reinterpret the Fourteenth Amendment as a means of protecting business property.

A. The Slaughterhouse Cases And Privileges And Immunities

The Court was called upon for the first time to interpret the essential nature and meaning of the Fourteenth Amendment five years after its adoption. The Slaughterhouse Cases came about as a result of action on the part of the state of Louisiana.

On March 8, 1869, the legislature of Louisiana passed an act which granted to one corporation a monopoly of the slaughterhouse business in an area of 1154 square miles around and including New Orleans. This monopoly deprived over one thousand persons the right to engage in the meat packing business. A number of butchers, acting in concert, brought suit against this monopolistic grant on the grounds that it not only abridged the privileges and immunities of citizenship of the United States, but it deprived them of their property without due process of law, and denied to them the equal protection of the law. John A. Campbell was retained as chief counsel by the butchers. On April 14, 1873, Mr. Justice Miller delivered the majority opinion of the Court (Justices

5Slaughterhouse Case, 16 Wallace 36(1873). The first case in which the applicability of the Fourteenth Amendment was urged was Worthy v. Commissioners, 9 Wallace 611, but the Court dismissed the case for lack of jurisdiction.

6Slaughterhouse Cases, 16 Wallace 36(1873), pp. 38-43.

7Ibid., p. 43.

8Charles Warren, Supreme Court and United States History (Boston, 1928), II, pp. 536-37.

John A. Campbell had been a member of the Supreme Court at the time of the Dred Scott case, but he resigned the post when his home state, Alabama, left the Union. Corwin, Liberty Against Government, pp. 119-20.
Clifford, Davis Strong, and Hunt concurring). After having acknowledged the importance of the case at hand and the great responsibility of the pending decision, the Court rejected the argument of Campbell. Although this argument included three clauses of Section One of the Fourteenth Amendment, the Court concerned itself mainly with the first clause which stipulated that "No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States."

Following a consideration of the history of the Fourteenth Amendment and the evils it sought to remedy, Justice Miller stated that "the one pervading purpose" of this amendment (along with the Thirteenth and Fifteenth Amendments) was to protect the newly made freedman from oppression by the white man. It was further pointed out that the Fourteenth Amendment did not restrain the states in the exercise of police power for public good.

In reviving the dual citizenship issue which arose in the Dred Scott Case, the Court held that the citizenship clause of the Fourteenth Amendment recognized and reiterated the distinction which had always existed between United States citizenship and state citizenship. By the same token, the Court contended that the succeeding clause must be understood as distinguishing the privileges and immunities of the citizens of the United States from those of state citizenship.

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10 Slaughterhouse Cases, 16 Wallace 36(1873), p. 71.
11 Ibid., p. 66.
12 Ibid.
13 The words "privileges and immunities" occurred for the first time in American Constitutional history in the fourth of the articles of Confederation. In the Constitution of the United States there is a clause (Art. IV, Sec. 2) which reads as follows: "The citizens of each state shall be entitled to all the privileges or immunities of citizens of the several states."
After setting up this distinction, the Court declared that only the privileges and immunities of citizens of the United States fell under the protection of the Fourteenth Amendment. However, no conclusive attempt was made to define what privileges and immunities of national citizenship included. In regard to the due process clause Justice Miller declared:

"It is sufficient to say that under no construction of the provision that we have ever seen, or any that we deem admissible, can the restraint imposed by the state of Louisiana upon the exercise of their trade by the butchers of New Orleans be held to be a deprivation of property within the meaning of that provision."

The majority opinion was unacceptable to the four judges - Associate Justices Field, Swayne, Bradley, and Chief Justice Chase. These dissenting judges insisted that the fundamental rights of citizens were protected by the Fourteenth Amendment against state encroachment. They further pointed out that the narrow interpretation of the majority rendered this amendment ineffective. The decision in the Slaughterhouse cases culminated the changed attitude of the Court in favor of states' rights.

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14 Ibid., p. 77.
15 In reference to privileges and immunities of citizens of the United States the Courts referred to Crandall v. Nevada, 6 Wallace 35(1868), which held that privileges and immunities owe "their existence to the Federal Government, its National character, its Constitution, or its laws."
16 Slaughterhouse Cases, 16 Wallace 36(1873), pp. 80-81.
17 The interpretation advocated by the dissenting justices was similar to some of the arguments in Congress when the Fourteenth Amendment was up for discussion. See Cong. Globe, 39th Cong., 1st sess., pp. 2542,2765-66.
18 Slaughterhouse Cases, 16 Wallace 36(1873), pp.95-100, 123.
19 Ibid., pp. 94, 125. See also Andrew C. McLaughlin, A Constitutional History of the United States (New York, 1933), p. 730.
Following the Slaughterhouse cases the Court was able to maintain a firm policy because, from 1873 to 1881, there were but two vacancies and more than a majority of the judges served throughout this period. In 1875, one year after Morrison R. Waite became Chief Justice, the Court affirmed its adherence to the narrow construction of the Fourteenth Amendment as outlined in the Slaughterhouse cases. This case, Minor v. Happersett, came before the Supreme Court on a writ of error. Virginia Minor had been denied the right to vote on the basis that she was not a male citizen. She brought suit against the registrar, Happersett, on the ground that this act was an abridgement of the privileges and immunities of citizens of the United States. The Court rejected Minor's argument stating that the right of suffrage was not one of the privileges and immunities of citizenship before the adoption of the Fourteenth Amendment and this amendment did not add to those privileges and immunities. It provided for additional protection of the civil rights that citizens already had before its adoption.

In spite of the Court's continued adherence to doctrines of the Slaughterhouse cases, protection was still sought under the privileges

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21 Justice David Davis resigned in January, 1877, to become Senator from Illinois. John Marshall Harlan was appointed to fill his place. In 1880 Justice Strong resigned and William D. Woods of Georgia was appointed to fill this vacancy. Woods was the first judge from the South since the appointment of Judge Campbell in 1852. See Cortez A. M. Ewing, The Judges of the Supreme Court, 1789-1937: A Study of their Qualifications (Minneapolis, 1938, pp. 23-24, 97).

22 Minor v. Happersett, 21 Wallace 176 (1875).

23 Ibid., pp. 163-64.

24 Ibid., p. 164.

25 Ibid., pp. 170-1.

26 Ibid.
and immunities clause of the Fourteenth Amendment. The same was true of 27
the Walker v. Sauvinet. In that case Walker was tried and convicted
by a judge under a Louisiana statute which provided for trial by a judge
in the event that the jury did not agree and failed to render a verdict.
Following his conviction and sentence, Walker sued out a writ of error to
the United States Supreme Court on the ground that the proceedings in
the state court was a direct violation of the privileges and immunities 29
clause of the Fourteenth Amendment. The Court rejected this argument
and affirmed the judgement of the state court declaring:

A trial by jury in suits at common law [guaranteed by the Seventh
Amendment] pending in State Courts is not, therefore, a privilege
or immunity of national citizenship, which the states are forbidden
by the Fourteenth Amendment to abridge. 30

After 1876 it became evident that the privileges and immunities
clause of the Fourteenth Amendment, as interpreted by the Supreme Court
afforded slight protection of the civil rights of individuals. Only the
"due process of law" clause remained as a constitutional basis from
Federal protection of civil rights. Consequently, litigants and their
counsel began to use the "due process" clause as an instrument of appeal
to the Supreme Court.

B. Due Process of Law: Procedural And Substantive

The changes in tactics on the part of appellants to persuade the

27 92 U. S. 90 (1876).
28 Ibid., p. 91.
29 Ibid.
30 Ibid., p. 92.
31 Benjamin F. Wright, The Growth of American Constitutional Law
Supreme Court to use the due process clause of the Fourteenth Amendment to protect civil rights against state action was resisted in the beginning. Those persons who sought favorable decisions in this respect argued that the word "liberty" (and some time the word "life") in the clause - "nor shall any state deprive any person of life, liberty, or property, without due process of law;" - should be interpreted to include any and all of the civil rights enumerated in the Bill of Rights. That is, those persons who sought protection against state interference with life or liberty were generally concerned with the question whether or not there had been a lack of "due process" in methods of judicial or administrative procedure. That was to be distinguished from "due process" as a means of protection from state interference with property. However, between 1877 and 1898 the Court was more concerned with substantive due process and the protection of business property than it was with protection of personal liberties.

In 1884 the Court was called upon to decide whether or not there had been a violation of due process of law with respect to just procedure in a state court. In the case, Hurtado v. California, one Joseph Hurtado was indicted, tried, convicted and sentenced to death on a murder charge. Prior to the trial he had been indicted under a provision of the California Constitution which authorized prosecutions for felonies by information, after examination and commitment by a magistrate, without indictment by a grand jury.

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32 Carr, op. cit., p. 11.
33 Warren, op. cit., p. 568.
34 Hurtado v. California, 110 U. S. 516 (1884).
35 Ibid.
Hurtado through his counsel instigated an appeal to the Supreme Court on the ground that he had been tried and illegally convicted without an indictment by a grand jury. And if executed he would be deprived of his life and liberty without due process of law as guaranteed by both the Fifth and Fourteenth Amendments.

The opinion of the Court was begun with a brief historical retrospect of the evolution of the due process of law clause. That clause was traced from the Magna Charta down to its incorporation in the Fifth Amendment to the Constitution of the United States. In upholding the action of the state the Court held: that the due process clause of the Fifth Amendment was not intended to include the institution and procedure of grand jury in any case, and the due process clause of the Fourteenth Amendment means the same as the one in the Fifth. Furthermore, the due process clause of the Fourteenth Amendment was intended only to secure "those fundamental principles of liberty and justice which lie at the base of all our civil and political institutions."

Mr. Justice Harlan refused to accept the majority opinion. He dissented on the grounds that the similarity of the due process clauses of the Fifth and Fourteenth Amendments was not accidental. Justice Harlan went on to point out that the due process clause of the Fourteenth Amendment was intended to impose the same kind of restraints upon the states as the Fifth Amendment imposed upon the Federal Government. The decision

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36 Ibid., pp. 518-19.
37 Ibid., pp. 534-35.
38 Ibid., p. 535.
40 Ibid.
of the Court in this case was in keeping with an earlier decision, in which the Court held that the Fourteenth Amendment did not provide for uniformity of law throughout the United States because each state prescribes its own modes of judicial proceedings.

In addition to seeking protection under procedural due process, there were numerous attempts to persuade the Supreme Court to accept substantive due process and the protection of business property between 1877 and 1897. In the beginning the Court had refused to accept the argument that corporations could seek protection under the due process clause of the Fourteenth Amendment. In the Slaughterhouse cases (1873) the majority apparently assumed that due process meant due procedure, but the dissenting justices, especially Swayne and Bradley, insisted upon a broader interpretation of the due process clause.

In 1877, in Munn v. Illinois, the Supreme Court was presented with an opportunity to consider the applicability of substantive due process. That case arose out of an act passed by the Granger-controlled legislature of Illinois fixing the rates for storage of grain in warehouses located in cities of one hundred thousand population or more. The grain elevator operators challenged the constitutionality of the statute on the grounds that it was an infringement upon the power of Congress to regulate interstate commerce and that it violated the due process clause of the Fourteenth Amendment.

The majority opinion, presented by Mr. Chief Justice Waite, upheld

42 Wright, op. cit., p. 99.
43 94 U. S. 113(1877).
44 Ibid., p. 119.
the state law. The Chief Justice pointed out that when private property is devoted to public use it is subject to public regulation. Following this decision the business interest began a widespread campaign to protect its interests. First, it got corporation attorneys elected to state legislatures. Secondly, business interests carried its fight to the courts, where, after a long fight, it won a substantial victory in the Court's acceptance substantive due process in cases dealing with governmental restrictions upon private property.

The rise of substantive due process in the United States was made possible through the Court's acceptance of the business corporation as a "person" under the Fourteenth Amendment. It is interesting to note that in 1883 Roscoe Conkling, one of the members of a Joint Committee on Reconstruction which drew up the Fourteenth Amendment, argued before the Supreme Court that the Fourteenth Amendment was intended to give protection to corporate property as well as to civil rights. Conkling in his advocacy of this conspiracy theory was on weak ground because the secret journal of the Joint Committee gives little or no evidence to support his contention.

After 1890, the Supreme Court decided a number of cases which indicated the trend in substantive due process. Outstanding among these


46 Kelly and Harbison, op. cit., p. 510.

47 Ibid.


The Minnesota rate case originated out of the controversy caused by a state statute which set up a rate commission with final authority in rate fixing. Speaking through Mr. Justice Blachford, the Court held the Minnesota statute unconstitutional on the ground that it deprived the railroad of its rights under the due process clause to have a judicial determination of the reasonableness of rates.

In 1897, in Allgeyer v. Louisiana, the Supreme Court set forth the liberty of contract doctrine. That case involved a statute which forbade any person in Louisiana from making a contract for marine insurance with a firm which had not complied with laws of the state. In delivering the opinion of a unanimous court, Mr. Justice Peckham stated:

The liberty mentioned in that amendment [the Fourteenth] means not only the right of the citizen to be free from the mere physical restraint of his person, as by incarceration, but the term is deemed to embrace the right of the citizen to be free in the enjoyment of all of his faculties; to be free to use them in all lawful ways; to live and to work where he will; to earn his livelihood by any lawful calling; to pursue any livelihood or avocation, and for that purpose to enter into all contracts which may be proper, necessary and essential to his carrying out to a successful conclusion the purpose above mentioned.

51 165 U. S. 578(1897).
52 169 U. S. 366 (1898).
53 198 U. S. 45(1905).
54 208 U. S. 412(1908).
56 Ibid., p. 589.
The Liberty of contract doctrine was not fully accepted "by the Court 58 until some years later. In 1898, in Holden v. Hardy, the Supreme Court sustained an eight-hour law and refused to invoke the liberty of contract. 59 However, in Lochner v. New York, the Court declared unconstitutional a New York law limiting the hours of labor in a bakery shop to sixty hours in one week or ten hours in any one day. Mr. Justice Peckham, speaking for the majority, cited the right of free contract established in Allgeyer v. Louisiana (1897), and held that the right to purchase or sell labor was an important part of the liberty guaranteed by the Fourteenth Amendment. Justices Harlan, White, Day and Holmes dissented. In denouncing the majority opinion Justice Holmes wrote:

This case is decided upon an economic theory which a large part of the country does not entertain.... The Fourteenth Amendment does not enact Mr. Herbert Spencer's Social Statics...a Constitution is not to embody a particular economic theory, whether paternalism and the organic relation of the citizen to the state or laissez-faire. It is made for people of fundamentally differing views, and the accident of our finding certain opinion natural and familiar, or novel and shocking, ought not to conclude our judgment upon the question whether statutes embodying them conflict with the Constitution of the United States.61

Apparently Justice Holmes' dissenting opinion (along with the "Brandeis brief") had some influence upon the other justices. Because 62 three years later, in Muller v. Oregon, the Court unanimously upheld

58169 U.S. 366(1898).
59198 U.S. 45 (1905).
60Ibid., p. 53.
61Ibid., pp. 75-76. Justice Holmes' dissenting opinion in Lochner v. New York was one of his greatest opinions. Between 1902 and 1932 he dissented 173 times. But it was not the number of dissents that won for Holmes the title of the Great Dissenter, because some of his colleagues dissented more often than he did. It was the quality of Holmes' dissents that made them famous. See Catherine D. Bowen, Yankee From Olympus: Justice Holmes and His Family (Boston, 1944), pp. 372-376, 456.
62208 U.S. 412 (1908).
the constitutionality of an Oregon statute which prohibited the employment of women in mechanical establishment, factories, and laundries for more than ten hours in any one day.

The Supreme Court's preoccupation with the acceptance of substantive due process and the protection of business property, between 1877 and 1897, explains in part why so little attention was given to interpreting the Fourteenth Amendment as an instrument of protecting civil rights. However, the Court's concern with substantive due process reached its peak from 1921-1930.

C. Following Old Paths, 1900 - 1922

The Supreme Court's narrow interpretation of the Fourteenth Amendment as an instrument in the protection of civil rights against state action continued until 1922. This trend will be analyzed in seven cases: Maxwell v. Dow, West v. Louisiana, Patterson v. Colorado, Twining v. New Jersey, Weeks v. United States, Gilbert v. Minnesota, and Prudential v. Cheek.

Of the 141 cases in which state legislation was invalidated between 1921-1930, about two-thirds involved the Fourteenth Amendment. While between 1899-1921, 94 of 1194 state statutes invalidated involved that amendment. See Wright, op.cit., p. 113.

64 Carr, op.cit., p. 11.
65 176 U. S. 581 (1900).
66 194 U. S. 254 (1904).
67 205 U. S. 454 (1907).
68 211 U. S. 78 (1908).
69 232 U. S. 383 (1914).
70 254 U. S. 325 (1920).
71 259 U. S. 530 (1922).
In 1900 the Court was called upon to reconsider the privileges and immunities clause as a means of federal protection of civil rights. This case involved modes of judicial procedure in the state of Utah. The plaintiff in error was indicted on information filed by the prosecutor rather than by grand jury, and subsequently tried and convicted by a jury of eight people and sentenced to eighteen years imprisonment. He then applied for a writ of habeas corpus on the ground that indictment by information abridged the privileges and immunities of national citizenship, and that the subsequent trial by a jury of eight rather than of twelve deprived him of his liberty without due process of law. The state denied the writ and an appeal was made to the Supreme Court of the United States.

The opinion of the Supreme Court affirmed the action of the state court. It by-passed the due process clause by stating that in a Federal Court all indictments must be brought by a grand jury. This rule, however, does not apply to proceedings in state courts. Turning to the privileges and immunities clause, the Court held that this clause does not necessarily include all the rights enumerated in the first eight amendments to the Constitution.

Mr. Justice Harlan in objecting to the majority opinion declared

\[ \text{Maxwell v. Dow, 176 U. S. 581 (1900).} \]
\[ \text{Ibid., p. 582.} \]
\[ \text{Ibid.} \]
\[ \text{Ibid., pp. 583-84.} \]
\[ \text{Ibid., pp. 583-85. The decision in this case put a final block (at least until 1935) to all attempts to secure federal protection of civil rights under the privileges and immunities clause. See Charles Warren, "The New Liberty under the Fourteenth Amendment," Harvard Law Review, XXXIX (1926), 439.} \]
that conviction by a jury of eight rather than a jury of twelve was a violation of the federal Constitution. He denounced the Court's interpretation as being opposed to the plain words of the Constitution and that it defeated the manifest objectives of the Fourteenth Amendment. Justice Harlan's position indicates that he did not feel that the states should be left individually to determine when their citizens had been deprived of the fundamental rights of freedom.

Four years later, 1900, an appellant attempted to persuade the Court to interpret the Fourteenth Amendment as a means of applying the Sixth Amendment to state proceedings at common law. The Court rejected this argument and upheld the action of the state - indictment by information and subsequent imprisonment. In following its own precedence, the Court ruled that the Sixth Amendment did not apply to criminal proceedings in state courts. Furthermore, it pointed out that the states could alter common law at any time.

Although the Court consistently interpreted the Fourteenth Amendment contrary to its intended purpose, there were always justices who refused to accept this construction. The extent to which those dissenting opinions were in keeping with the purpose of the Fourteenth was illustrated in Justice Harlan's dissenting opinion in Patterson v.

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78 Ibid., p. 612.
80 West v. Louisiana, 194 U. S. 258 (1904).
81 Ibid., pp. 161-63.
82 Ibid.
Colorado. In that case, Patterson was charged with contempt of court because he refused to abide by an injunction. This injunction was issued in an attempt to stop the publishing of certain articles which reflected on the motives and conduct of the Supreme Court of Colorado on cases still pending. An appeal was made by Patterson's counsel to the Supreme Court of the United States declaring that the contempt charge was in violation of the Federal Constitution because it abridged freedom of speech and of press.

The Court accepted the argument of the state which held that freedom of speech and of press were necessary in a republican form of government, but they could not be carried to such an extreme so as to unjustly influence the orderly administration of justice. The Court refused to decide whether or not freedom of speech and press were protected by the Fourteenth Amendment. Justice Harlan in refusing to accept the position of the court declared:

I go further and hold that the privileges of free speech and free press, belonging to every citizen of the United States, constitute essential parts of every man's liberty, and are protected against violation by the 14th Amendment forbidding a state to deprive any person of his liberty without due process of law...

In 1908 the Court was called upon to determine the applicability of the self incrimination clause of the Fifth Amendment in a state court.

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83 205 U. S. 454 (1907).
84 Ibid., pp. 558-59.
85 Ibid.
86 Ibid., p. 559.
87 Ibid., p. 458.
88 Ibid., p. 462.
89 Ibid., p. 465.
Albert C. Twining and his associate were indicted for knowingly exhibiting a false report to a government examiner. When the case was tried, Twining heard accusations and testimonies made against him, but did not go upon the stand to deny those charges. In his charge to the jury, the judge made mention of the fact that the defendant did not deny the direct charges made against him.

Twining's counsel made an appeal to the United States Supreme Court stating that the mere comment of the court upon the failure of the accused to testify was a violation of both the Fifth and Fourteenth Amendments, because it compelled him to be a witness against himself. The Court admitted that the action of the state constituted self-incrimination. Contrary to this acknowledgement, the Court affirmed the act of the state on the ground that exemption from compulsory self-incrimination in state courts is secured by neither the Fifth nor Fourteenth Amendments. Mr. Justice Harlan objected to the majority opinion in the following words:

I cannot support any judgment declaring immunity from self-incrimination is not one of the privileges or immunities of national citizenship, nor a part of the liberty guaranteed by the Fourteenth Amendment against hostile state action.

Undoubtedly it has been noticed that historically a majority of the Court has, while refusing to apply the guarantees enumerated in the Bill of Rights to state activities, insisted that the first eight amendments

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91 Ibid., pp. 81-3.
92 Ibid.
93 Ibid., p. 84.
94 Ibid., p. 114.
95 Ibid.
96 Ibid., p. 126.
to the Constitution are directed against the Federal Government. In 1914 the Court was presented with an opportunity to implement this doctrine in the case of Weeks v. United States. Weeks, the defendant, was arrested; his home searched and personal possessions taken by police officers without a warrant. This property was turned over to a United States Marshall. The defendant then petitioned the Federal District Court to recover his property and the court responded by returning a portion of it. The portion of the property retained was used as evidence against the defendant. Following conviction he appealed the case to the Supreme Court on the contention that this act was in violation of both the Fourth and Fourteenth Amendments.

The Supreme Court reversed the decision of the lower court stating that it constituted unreasonable search and seizure and was, therefore, in violation of the Fourth Amendment. In the same opinion, the Court pointed out that the Fourth Amendment only protected the individual against the Federal Government and its agencies and not against the misconduct of state officers.

Although the Court's interpretation of the Fourteenth Amendment, civil rights and state action was consistent down to 1922, it appeared weakened in 1920, when the Court was called upon to consider the constitutionality of a Minnesota anti-sedition statute. In sustaining

\[98\] Ibid., p. 386.
\[99\] Ibid., pp. 387-9.
\[100\] Ibid., p. 389.
\[101\] Ibid., p. 398.
\[102\] Ibid., p. 398.
\[103\] Gilbert v. Minnesota, 254 U. S. 325 (1920).
the state statute as lawful limitation upon the freedom of speech, the Court alluded to the possibility of freedom of speech being protected by the Fourteenth Amendment but did not pass on it. Chief Justice White and Justice Brandeis dissented.

In 1920 the Supreme Court alluded to the possibility of the freedom of speech being protected by the Fourteenth Amendment. But in 1922, in the case of Prudential Insurance Company v. Cheek, when it decided upon the constitutionality of the Missouri letter law, it reverted back to its old position. The opinion of the Court in upholding the state law declared in no uncertain terms that "neither the Fourteenth nor any other provision of the Constitution of the United States imposed upon the states any restraints about 'freedom of speech'."

The foregoing material in this chapter has dealt with the Fourteenth Amendment, civil rights, and state action before the Supreme Court of the United States from 1873 to 1922. It served to highlight the fact that for nearly fifty years the Court interpreted the Fourteenth Amendment contrary to its framers. The framers of that Amendment had intended that it would make the first eight amendments binding upon the states, but the Court refused to accept that purpose. In the Slaughterhouse Cases (1873) the privileges and immunities clause was rendered ineffective leaving only the due process clause as a constitutional basis for federal protection of civil rights. In Hurtado v. California (1884), the due

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104 It is interesting to note that in this case Chief Justice White who had been a confederate drummer boy, supported national supremacy, while Justice Holmes, who fought with the Union Army, upheld state rights. See Chaffee, Jr., Free Speech in the United States (Cambridge, 1942) p. 290.


106 Ibid., p. 543.
process clause as a means of protecting civil rights was knocked out. However, between 1877 and 1897 the Supreme Court was preoccupied with the acceptance of a broadened conception of substantive due process as a means of protecting business property. Between 1900 and 1922, the Court consistently refused to revive either of these clauses of protecting the personal rights of the individual against state interference. But there were always justices who refused to accept the construction of the Fourteenth Amendment and it was interesting to notice to what extent those dissenting opinions were to become majority opinions in the future.
CHAPTER III

CHANGE TOWARD A LIBERAL INTERPRETATION, 1923-1936

In 1933 the Court began to retreat from the position which it had held for fifty years in regard to the Fourteenth Amendment as an instrument in the protection of civil rights against state action. The changed attitude of the Court was the result of its acceptance of a liberal conception of the word "liberty" in that clause of the Fourteenth Amendment which reads: "nor shall any state deprive any person of life, liberty, or property without due process of law." In addition to the liberalization of the due process clause, the privileges and immunities clause of the Fourteenth Amendment was revived in 1935.

A. Liberal Conception of Due Process of Law

In 1923 the Court was called upon to consider the constitutionality of a Nebraska statute which prohibited the teaching of a modern foreign language to children in the first eight grades. The appellant in that case, an instructor in a private school, was arraigned for teaching German to a student who had not successfully passed the eighth grade. Following the conviction the appellant filed an appeal to the Supreme Court upon the premise that the right to choose and pursue a lawful

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1Cushman, op.cit., p. 101


vocation was within the rights guaranteed by the Fourteenth Amendment. The counter-argument of the state was twofold: that the statute in question was a legitimate exercise of police power, and that it fostered the work of Americanization.

In delivering the majority opinion of the Court which held the state statute invalid, Mr. Justice McReynolds declared that the liberty guaranteed by the Fourteenth Amendment included the right of one to teach and the right of parents to engage the same to instruct their children according to the dictates of individual conscience. This case illustrated the liberal conception of the term "liberty". However, the actual decision went no further than previous decisions had gone in upholding the right of a man to engage in a lawful occupation without arbitrary or unreasonable restraints by the state.

On June 1, 1925, the Court gave an even broader interpretation to the meaning of the word "liberty" in the due process clause when it decided the validity of the Oregon Private-School law. The law provided that all children between the ages of eight and sixteen should attend public school. Two private corporations, Society of Sisters and Hill Military Academy - challenged the constitutionality of the statute.

In giving the opinion of the Court, Mr. Justice McReynolds pointed

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4 Ibid., p. 391.
5 Ibid., pp. 393-94.
6 Ibid., p. 399.
9 Ibid., pp. 530-31.
out that the term "liberty" included the right of parents to direct the upbringing of their children, but no parent was involved as a party to the case. The parties involved were corporations and the Court had held that a corporation could not claim protection for "liberty" under the Fourteenth Amendment. Therefore, the Court declared the Oregon law unconstitutional because it interfered with the property rights of the corporations without due process of law.

B. Freedom of Speech, Press, Religion, Assembly and the Right of Counsel

One week after the Court decided upon the Oregon Private-School law, it considered the constitutionality of a New York statute defining and punishing criminal anarchy, commonly defined as the doctrine that organized government should be overthrown by force and violence. Benjamin Gitlow was tried and convicted for violating that law on two counts: (1) that he had knowingly published and circulated a revolutionary paper, The Left Wing Manifesto, and (2) that he had advocated and taught the necessity of overthrowing organized government by force and violence. Gitlow's attorney appealed the case to the Supreme Court on the contention that the statute in question was repugnant to the due process clause of the Fourteenth Amendment.

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10 Ibid., p. 534.
11 Northwestern Life Insurance Co. v. Riggs, 203 U. S. 243, 255 (1906). This rule was somewhat modified with the Court's acceptance of substantive due process and the protection of business property.
12 268 U. S. 510 (1925).
14 Ibid., pp. 655-56.
15 Ibid., p. 654.
Historically, that clause had never been interpreted as obligating the several states not to infringe freedom of speech and of press.

In 1907 the Court refused to decide on the applicability of the due process clause in the protection of freedom of speech and of press; in 1920 it alluded to the possibility of the clause being applied but did not pass upon it, and in 1922 the Court frankly stated that neither the Fourteenth Amendment nor any other provision of the Constitution protected freedom of speech and of press from state restriction.

The Supreme Court upheld the New York statute stating that it merely punished advocacy of behavior inherently unlawful under a constitutional government. In taking that course of action the Court rejected the "clear and present" doctrine, and accepted the "bad tendency test." In the obiter dictum, Mr. Justice Sanford delivered an all important statement which salvaged victory out of defeat:

For the present purpose we may and do assume that freedom of speech and of press—which are protected by the First Amendment from abridgement by Congress—are among the fundamental personal rights and 'liberties' protected by the due process clause of the Fourteenth Amendment from impairment by the states. We do not regard the incidental statement in Prudential Insurance Co. v. Cheek, 259 U. S. 530, 543, that the Fourteenth Amendment imposes no restrictions on the States concerning freedom of speech, as determinative of this question.

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The decision was an illuminating example of the means by which American constitutional law grows, and indicated how a dissenting opinion - that of Mr. Justice Harlan in Patterson v. Colorado - at a later date became the majority opinion of the Court.

Justices Holmes and Brandeis ruled against the opinion of the majority and stood by the clear and present danger test. Justice Holmes felt that the state law was unconstitutional under that doctrine:

The question in every case is whether the words used are used in such circumstances and of such a nature so as to create a clear and present danger that they will bring about the substantive evil that the State has a right to prevent.

This case indicated a definite expansion in the word "liberty" in the due process clause of the Fourteenth Amendment, because it was the first time that the Court had included within its meaning freedom of speech and of press.

Following the Gitlow case the opponents of criminal syndicalism statutes began to consider the possibility that the Supreme Court might set aside convictions under these laws. Their hope was realized on May 16, 1927, when the Court decided upon the constitutionality of the California Criminal Syndicalism law. That test case was brought against the California law by Miss Anita Whitney who was arrested for

24 Supra, p. 20.
taking part in the Communist Labor Party convention. Mr. Justice Sanford, who spoke for the majority, assumed that the Fourteenth Amendment protected freedom of speech from state interference, but contended that her presence at the Communist convention was enough to keep her outside of the shelter given to liberty by that amendment. Thus, the state law was held to be constitutional because freedom of speech did not mean an absolute right to speak without responsibility. Justice Holmes and Brandeis concurred with the majority, but took pains to point out that Miss Whitney, through her counsel, should have sought redress under the "clear and present danger" doctrine.

In the 1930's, other cases followed which confirmed the new association between the due process clause of the Fourteenth Amendment and the guarantees of the Bill of Rights. In 1931 the Supreme Court heard and decided the "red flag salute" case, Stromberg v. California. In that case Yetta Stromberg, a member of the Young Communist League, was tried and convicted under a California law which condemned the display of a red flag in public "as a sign, symbol, or emblem of opposition to organized government." Miss Stromberg accepted the instructions of the state court but later made an appeal to the Supreme Court insisting that the California law placed an unwarranted limitation upon the freedom of speech, and was therefore in violation of the Fourteenth Amendment.

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30 Ibid., pp. 371-72.  
31 Ibid., p. 371.  
32 Ibid., p. 379.  
33 283 U. S. 359 (1931).  
34 Ibid., p. 361.  
The opinion of the Court reiterated its earlier judgment that the conception of liberty under the Fourteenth Amendment embraced the right of free speech. The Court went further and held that the section of the law which forbade the display of a red flag was unconstitutional, because it was vague and infringed the right of peaceful and orderly opposition to government. In a dissenting opinion (in which Justice McReynold concurred) Justice Butler observed that a flag did not talk, and, therefore, could not come under freedom of speech.

On June 1, 1931, the Supreme Court greatly strengthened the connection between the first eight amendments and the Fourteenth Amendment. Since 1923 the Court had fostered, largely through obiter dicta, the Fourteenth Amendment as a protector of freedom of speech and of press, but Near v. Minnesota was the first case in which it actually passed on the subject. That case was prosecuted under the Minnesota "newspaper gag law" which provided for the abatement as a public nuisance of any "malicious, scandalous, and defamatory" newspaper, magazine or periodical. In 1927 articles were published in the Saturday Press charging gross neglect of duty to law-enforcement officers in connection with gambling, bootlegging, and racketeering. The county attorney sued to suppress the newspaper and secured a temporary order forbidding its publication and circulation on the basis that it was "malicious, scandalous, and defamatory." When the case came up for

36 Ibid., pp. 368-69.
37 Ibid., pp. 70-74.
38 283 U. S. 697 (1931).
39 Ibid., pp. 701-03.
40 Ibid.
trial its manager, Near, demurred to charges on the ground of a lack of facts. The state Supreme Court affirmed the injunction and, thereafter, Near appealed the case to the Supreme Court of the United States.

The Court held the Minnesota statute unconstitutional on the contention that it was a violation of the freedom of the press which is safeguarded by the Fourteenth Amendment. In the obiter dictum it was pointed out that the freedom of press was not an absolute right and the state could punish its abuse. Justices Van Devanter, McReynold, Sutherland, and Butler dissented. The "Minnesota gag law" case was significant in the evolutionary development of the nationalization of civil rights. It represented the first time that the Supreme Court had flatly invalidated a state law on the ground that it violated one of the liberties enumerated in the Bill of Rights. Furthermore, the majority opinion, delivered by Chief Justice Hughes, was supported by old-time dissenters, Justices Holmes and Brandeis.

Through a careful analysis of the preceding cases which expanded the meaning of the word "liberty" in the due process clause of the Fourteenth Amendment, it becomes apparent that protection was extended only to the civil rights guaranteed by and enumerated in the first Amendment to the Constitution. In 1932 the identity between the guarantees of due process clause, and the guarantees of the first eight amendments was widened to include the right provided for in the Sixth

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41 Ibid., p. 706.
42 Ibid., p. 707.
43 Ibid., p. 708.
44 Carr, op.cit., p. 12.
45 Chafee, op.cit., pp. 377-78.
Amendment, the right of the assistance of counsel.

Powell v. Alabama, the first of the Scottsboro cases, originated out of the indictment of Powell and eight other Negro men for the alleged rape of two white women in Alabama. After trial for three days, the men were convicted and sentenced to death. Attempts to get a new trial were denied by the trial court and that judgment was affirmed by the Supreme Court of Alabama, however, Chief Justice Anderson dissented. Thereafter, counsel for Powell applied for and received a writ of certiorari whereby the Supreme Court of the United States decided to review the judgment of the state courts.

Powell's counsel assailed the judgment of the state courts declaring that the defendants had been denied their constitutional rights on three counts: (1) a fair, impartial, and deliberate trial.

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48 In dissenting from the opinion of the majority, Chief Justice Anderson of the Alabama Supreme Court pointed out that the defendants were non-residents and had had little time and opportunity to get in touch with their families and friends. Furthermore, they were not represented by able counsel. 224 Alabama, 824, 554-55.

49 The National Association for the Advancement of Colored People employed Clarence Darrow and Garfield Hays to defend Powell and the others, convicted at Scottsboro, before the Alabama Supreme Court. When Darrow and Hays arrived in Birmingham they were presented with a petition signed by all of the men stating that they were not needed. Following this incident Darrow and Hays were asked to withdraw from the employment of the NAACP and appear for the International Labor Defense, a Communist organization. They refused to do this and stated that they would work with the ILD attorneys provided both organizations withdrew from the case. The ILD attorneys refused their offer, and the NAACP and its representatives withdrew from the case. See Clarence Darrow, "Scottsboro," The Crisis, XXXIX (March, 1932), 81.

had not been afforded; (2) the right of the assistance of counsel had been denied; (3) qualified Negroes had been excluded from the juries that indicted and convicted Powell. Counsel for Alabama argued that due process of law should not be interpreted in such a manner as to restrain the states in their methods of judicial procedure. The state also contended that adequate counsel had been provided.

The majority opinion was delivered by Mr. Justice Sutherland. Although three constitutional issues were presented, the Court chose to decide the case on one issue, the denial of the right of counsel. In doing so the Court departed from its practice of refusing to invoke a new constitutional issue whenever a case could be determined on an earlier decision. Precedents had already been established on the other two issues: exclusion of Negroes from jury service and on mob-dominated trials. Speaking for the majority, Mr. Justice Sutherland held that the Sixth Amendment provided that in all criminal cases, the accused should enjoy the right of counsel, and "it is the duty of the Court, whether requested or not, to assign counsel" where the defendant is unable to employ one. In reversing the judgement of the state courts Justice Sutherland ruled that failure to give the defendants "reasonable time and opportunity" to secure counsel was a clear denial

51 Ibid., p. 47.

52 Nelson, op. cit., p. 69.

53 The Court had already ruled that the denial to Negroes of the right to serve on juries was a clear violation of equal protection of the law. See Strader v. West Virginia, 100 U. S. 303 (1879); Virginia v. Rivers, 100 U. S. 31 (1879); Neal v. Delaware, 103 U. S. 370 (1880).


of due process, and was therefore in violation of the Fourteenth Amendment. Justices Butler and McReynold in dissenting opinions, contended that the defendants had been ably represented by counsel, and the evidence from the case failed to show the lack of opportunity of the defendants to properly prepare their case.

Powell v. Alabama represented the first time in the history of the Court that it had twice reversed the decision of a lower court in a case involving capital punishment. The decision in this case was in contradiction to that of Hurtado v. California, where the Court had refused to identify due process guaranteed by the Fourteenth Amendment with the full content of the Fifth Amendment.

In 1934 the word "liberty" in the due process clause of the Fourteenth Amendment was interpreted to include another of the liberties guaranteed by the Bill of Rights—freedom of religion. In that case, Hamilton v. Regents of the University of California, the court was concerned with the validity of a regent's order. The order suspended two students who were conscientious objectors. They had refused to comply with the state university ruling requiring students to take a course in military science. The Court assumed that the religious beliefs of the two students were protected by the due process clause of the Fourteenth Amendment. But the Court held that since they were

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57 Ibid., p. 76.
59 110 U. S. 516 (1884).
60 Kelly and Harbison, \$p. cit., p. 704.
61 293 U. S. 245 (1934).
not being compelled to attend the university, there was no basis for an assertion of constitutional right to do so without complying with the state's requirement of military training.

In 1936 the Supreme Court of the United States confirmed its position in earlier cases that freedom of press (along with freedom of speech) was protected from state interference by the due process clause of the Fourteenth Amendment. In the case at hand, Grosjean v. American Press Company, the Court was asked to consider a new sort of restraint on the press: a heavy tax on the newspapers. The state of Louisiana had, in addition to all other taxes, imposed a two per cent tax on the gross receipts of any newspaper or magazine engaged in the selling of advertisements in the state and having a circulation of more than twenty thousand per week. That figure was shrewdly selected to hit all newspapers opposed to the Huey Long "dictatorship" and exempt all the small papers which supported it. The publishers involved brought suit in the United States District Court and received a permanent injunction against the enforcement of the law.

The Attorney General of Louisiana thereupon appealed the decree of the federal District Court to the Supreme Court of the United States. The Supreme Court affirmed the decree of the lower court and held the Louisiana statute unconstitutional on the ground that it violated the

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62 Ibid., p. 262.
64 297 U. S. 233 (1936).
65 Chafee, op. cit., p. 382.
66 Ibid.
freedom of press which was protected against state aggression by the due process clause of the Fourteenth Amendment.

C. The Revival of Privileges and Immunities and Colgate v. Harvey

Material in this chapter has been presented and analyzed to point up the changed attitude of the Supreme Court in interpreting the Fourteenth Amendment as an instrument in the protection of civil rights against state action. The Court's change toward a liberal interpretation (beginning in 1923) has been true of only the due process clause and more specifically the word "liberty" in that clause. Unfortunately, the scope of the privileges and immunities clause had not been widened any further than it was in the Slaughterhouse Cases (1873). As late as 1934 the Court refused to revive that clause, indicating that the Fourteenth Amendment had placed the Federal government only under obligation to protect those privileges and immunities which appertain to national citizenship.

Among the guarantees of civil rights contained in the Bill of Rights, the following have been held (either directly or indirectly) not to be privileges and immunities of federal citizenship: the right of suffrage (not a civil right and not in the Bill of Rights); the right of trial by jury in common law suits guaranteed by Seventh

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68 Supra, p. 12-16.
70 A more complete list of cases in this respect will be found in the following article: Pendleton Howard, "The Privileges and Immunities of Federal Citizenship and Colgate v. Harvey," University of Pennsylvania Law Review, LXXXVII (1939), 272-73.
71 Minor v. Happersett, 21, Wallace 162 (1875).
Amendment; the right to bear arms, protected by the Second Amendment; the prohibition of prosecution of serious crimes except upon a grand jury indictment, contained in the Fifth Amendment; trial by jury in criminal cases set forth in the Sixth Amendment; the privilege in criminal cases to be confronted by witnesses, included in the Sixth Amendment; and the freedom from compulsory self-incrimination, afforded by the Fifth Amendment.

For sixty-two years, 1873 to 1935, the Supreme Court had adhered to the doctrines of the Slaughterhouse cases. It had been generally supposed by "constitutional commentators that the privileges and immunities clause of the Fourteenth Amendment was a dead letter." But in 1935 the Supreme Court took a new position with regard to that clause.

The Court's revival of the privileges and immunities clause came about as the end-product of its decision in Colgate v. Harvey. The opportunity to broaden the applicability of the privileges and immunities clause occurred when the Court considered the validity of a Vermont tax law. The law in question provided that income from money loaned outside of the state would be taxed at a higher rate than that loaned inside the

72 Walker v. Sauvinet, 92 U. S. 90 (1876).
74 Hurtado v. California, 110 U. S. 516 (1884), decision under due process.
75 Maxwell v. Dow, 176 U. S. 581 (1900).
76 West v. Louisiana, 194 U. S. 258 (1904).
78 Pendleton Howard op. cit., p. 262.
79 296 U. S. 404 (1935).
state. Colgate, a resident of Vermont, challenged the constitutionality of the law on the contention that it was discriminatory. Because of the statute's discriminatory nature, Colgate declared that it violated both the equal protection and the privileges and immunities clauses of the Fourteenth Amendment. The Supreme Court accepted the argument of Colgate. It invalidated the state income tax law on two counts: (1) that it violated the equal protection of the law, and (2) that it was an abridgment of a privilege and immunity of citizens of the United States (the right to carry on business freely across state lines).

There was no precedent for the decision in that case and it was denounced in a dissenting opinion by Mr. Justice Stone, in which Justices Brandeis and Cardozo concurred. The novelty of the Court's decision, as well as its possibilities for the future, were explored by Justice Stone:

Since the adoption of the Fourteenth Amendment at least forty-four cases have been brought to this Court in which state statutes have been assailed as infringements of the privileges and immunities clause. Until today none has held that state legislation infringed that clause. If its sweep were now to be broadened to include protection of every transaction across state lines, regardless of its connection with any relationship between the citizen and the national government, a step would be taken, the gravity of which might well give us concern...

Between 1935 and 1940 it seemed as though the Supreme Court would broaden the applicability of the privileges and immunities clause of the Fourteenth Amendment. In 1939, in Hague v. C.I.O., two justices (Black and Roberts) of the majority held that freedom of assembly was

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80Cushman, op.cit., p. 42.
81Pendleton Howard, op.cit., p. 273.
83Ibid., pp. 455-46.
84307 U. S. 496 (1939), Infra., pp. 53-4.
a privilege or immunity of citizens of the United States. However, in 1940, in Madden v. Kentucky, the Court overruled the decision of Colgate v. Harvey and returned to the narrow construction of the privileges and immunities clause embodied in the Slaughterhouse cases.

In this chapter an attempt has been made to develop into a meaningful treatment the Supreme Court's interpretation of the Fourteenth Amendment as an instrument in the protection of civil rights against state action, from 1923 to 1936. In 1923 the Court shifted from narrow interpretation in that respect to a liberal one. The changed attitude of the Court was begun by a broadening of the term "liberty" in the due process clause to include a number of the civil rights enumerated in the Bill of Rights. Between 1923 and 1934 the word "liberty" was interpreted to include the following rights: the right to choose and pursue a lawful vocation; the freedom of parents to direct the upbringing of their children; freedom of speech and of press; and freedom of religion. In addition to the broadening of the due process clause, the Court revived the privileges and immunities clause.

85 309 U. S. 83 (1940).
CHAPTER IV

NEW ERA IN CIVIL LIBERTIES AFTER 1937

After 1937 the Supreme Court was called upon to review a large number of cases dealing with civil liberties. A majority of the civil liberty cases involved the constitutionality of state statutes under the Fourteenth Amendment. In this respect the Court continued the trend which was begun in 1923, and also extended the protection of the Fourteenth Amendment to a new series of constitutional rights associated with liberty and democracy in a modern society. There was also developed a new philosophy of judicial review in which three important principles were fused: (1) the primacy of the liberties guaranteed by the First Amendment; (2) the presumption of unconstitutionality to any statute which appeared to abridge any of those rights; and (3) the doctrine of "clear and present danger". The new philosophy of judicial review was clearly stated by Mr. Justice

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1 Kelly and Hartison, op.cit., p. 793.


3 The presumption of unconstitutionality to a statute is an exception to the principle which had been the governing factor in the judicial review of legislation for more than a hundred years. In Ogden v. Saunders 12 Wheaton (U. S.) 213 (1827), Mr. Justice Washington stated: "It is but a decent respect to the wisdom, integrity, and patriotism of the legislative body, by which any law is passed, to presume in favor of its validity, until its violation of the Constitution is proved beyond all reasonable doubt." See Cushman, op.cit., p. 113.

Rutledge in the case of Thomas v. Collins:

Any attempt to restrict those liberties [freedom of speech, press, religion, and assembly] must be justified by a clear public interest, threatened not doubtfully or remotely, but by a clear and present danger. The rational connection between the remedy provided and the evil to be curbed, which in other contexts might support legislation against attack on due process grounds, will not suffice. These rights rest on firmer foundation. Accordingly, whatever occasion would restrain orderly discussion and persuasion, at appropriate time and place, must have clear support in public danger, actual or impending. Only the gravest abuses, endangering paramount interests, give occasion for permissible limitation.6

The evolution of the new judicial philosophy had undoubtedly been a concomitant factor to the development of a new court - the Roosevelt Court.7 Among other things, that court has been characterized by the presence of a double standard of judicial review. That is, while the Court was engaged in the process of terminating the application of substantive due process to state social legislation, it was at the same time constructing a new law of substantive due process in civil liberties cases.

The Court's new philosophy of judicial review has been applied more extensively to cases involving substantive rights - freedom of speech, religion, press, etc. - than in the area of procedural rights - right of counsel, trial by jury, etc. In the domain of procedural due process, especially in state criminal cases, the Court had concerned itself with the fairness of the particular trial.

5323 U. S. 516 (1944).
6Ibid., p. 530.
8Ibid., p. 92.
A. Classification of Cases, Palko v. Connecticut

The application of the Fourteenth Amendment to state civil liberties cases was made possible through a partial identity of that amendment with the guarantees of the federal Bill of Rights. The first enunciation of that identity was in 1925, in Gitlow v. New York. However, it was reasserted in the following cases: Whitney v. California (1937), Stromberg v. California (1931), Near v. Minnesota (1931), Powell v. Alabama (1932), Hamilton v. Regents (1934), Grosjean v. American Press Company, (1936), and Dejonge v. Oregon (1937).

In all of the cases, with the exception of Powell v. Alabama, in which the Fourteenth Amendment was used to protect the guarantees of the Bill of Rights, connection was drawn only between that amendment and the First Amendment. Consequently, there was uncertainty as to whether the Fourteenth Amendment could be interpreted to include all the civil rights enumerated in the first eight amendments. That question was partially settled by the Supreme Court in 1937, in Palko v. Connecticut.

In that case, Palko was convicted and sentenced to life imprisonment. Thereafter, the state of Connecticut, in pursuance to a law adopted in

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10 268 U. S. 652 (1925).
11 274 U. S. 357 (1927).
12 283 U. S. 359 (1931).
13 268 U. S. 697 (1931).
14 287 U. S. 45 (1932).
15 293 U. S. 245 (1934).
16 297 U. S. 233 (1936).
1866, appealed the case to the Supreme Court of errors. In the new trial the defendant was found guilty of murder in the first degree and sentenced to death. Counsel for Palko appealed the judgment of the state court to the Supreme Court of the United States on the contention that the new trial placed his client twice in jeopardy for the same offense, and therefore, was in violation of the Fourteenth Amendment. He further argued that all rights which the Bill of Rights prohibited the Federal government from abridging were protected from state interference by the Fourteenth Amendment.

Mr. Justice Cardozo, in delivering the opinion of the Court, affirmed the action, and subsequent judgment of the state. In answer to the argument of Palko's counsel, Justice Cardozo stated that the Fourteenth Amendment did not *ipso facto* extend to all the civil rights protected by the first eight amendments. However, the Court held that the Fourteenth Amendment did protect those rights found to be "implicit in the concept of ordered liberty," and those "principles of justice so rooted in traditions and the conscience of our people as to be ranked as fundamental." Furthermore, the opinion of the Court included a list of the rights which had been previously held as not being protected by that Amendment, namely, indictment by a grand jury, right

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19. The law provided that appeals from the rulings and decisions of the superior court or of any criminal court of common pleas, may be taken by the state, with permission of the presiding judge, to the Supreme Court of Errors, in the same manner and to the same effect as if made by the accused. See Connecticut General Statutes, section 6494.

of trial by jury, protection against unreasonable searches and seizures, and protection against compulsory self-incrimination. It is interesting to note that the classification of cases set forth in Palko v. Connecticut was divided into two groups: those dealing with substantive due process on the one hand and those involving procedural due process on the other. Historically, the Fourteenth Amendment had been expanded to cover the former group, but only once Powell v. Alabama, had it been interpreted to protect a right included in the latter group. The opinion of the Court in that case appeared to restrict the applicability of the Fourteenth Amendment in state civil liberties cases. On the contrary, after 1937, the Court expanded the applicability of that amendment to a whole new series of constitutional rights.


In DeJonge v. Oregon the Court was presented with an opportunity to include the freedom of assembly under the protection of the Fourteenth Amendment. That case originated out of the indictment and conviction of Dirk DeJonge for violating the Oregon Criminal Syndicalism law. The

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27For a similar classification see Balzac v. Porto Rico, 258 U. S. 298 (1922).
29Criminal Syndicalism was defined as the "doctrine which advocates crime, physical violence, sabotage or any unlawful act or method as a means of effecting industrial or political change or revolution." Oregon Code, 1930, sections 14-3110.
charge was that he had assisted in the conduct of a meeting which was called under the auspices of the Communist Party, an organization advocating criminal syndicalism. After having received a sentence of seven years imprisonment, DeJonge made an appeal to the Supreme Court contending that the Oregon law was in violation of the Fourteenth Amendment.

Mr. Chief Justice Hughes, in delivering the unanimous opinion of the Court, held the Oregon statute unconstitutional on the ground that it was a curtailment of both freedom of speech and of assembly. In outlining the scope of the free speech and free assembly, the Chief Justice stated:

The holding of meetings for peaceable political action cannot be proscribed. Those who assist in the conduct of such meetings cannot be branded criminal on that score. The question, if the rights of free speech and peaceable assembly are to be preserved, is not as to the auspices under which the meeting is held, but as to its purpose; not as to the relation of the speakers, but whether their utterances transcend the bounds of the freedom of speech which the Constitution protects.

Three months after the DeJonge case, the Court decided the case of Herndon v. Lowery. In that case, the first sedition case to come from the South, the Court took steps toward the revival of the "clear and present danger" doctrine. The case of Herndon v. Lowery arose out of the arrest and conviction of Angelo Herndon, a Negro Communist organizer, in Atlanta, Georgia. He was arrested for distributing

30 299 U. S. 357.
31 Ibid., pp. 357-58.
32 Ibid., p. 362-63.
33 Ibid., p. 365.
34 301 U. S. 242 (1937).
35 Chafee, op.cit., p. 388.
Communistic literature, and for having in his possession a pamphlet, The Communist Position on the Negro Question, which advocated the establishment of a "Black Belt" republic in the South. Herndon was convicted for violating an ancient Georgia anti-insurrection statute. After a period of imprisonment, he applied for a writ of habeas corpus. His request was denied by the Georgia Supreme Court, and he thereupon filed an appeal to the Supreme Court of the United States.

Mr. Justice Roberts delivered the opinion of the Court which held the Georgia law unconstitutional on two counts: that the law applied in the case was an unwarrantable invasion of the right of free speech, and that the law as construed to punish mere bad tendency constituted a violation of due process of law. Justices Van Devanter, McReynolds, Sutherland, and Butler, dissenting, argued that the revolutionary tendency of the appellant's conduct was punishable under the Georgia law.

In addition to being applied to limitations on the freedom of speech and of assembly, the clear and present danger doctrine was applied to contempt of court and freedom of speech in Bridges v. California. In that case Barry Bridges, a labor leader, was convicted for contempt of court because he commented upon a case still pending. In delivering

36 301 U. S. 242 (1937).
37 The Georgia anti-insurrection statute was inspired by the Nat Turner insurrection (1832). But it was first used against Communist organizers, i.e., Angelo Herndon and Mary Dalton, over a hundred years after that incident. See Chafee, op. cit., pp. 388-90.
38 301 U. S. 259-60.
39 Ibid., pp. 261-64.
40 Ibid., pp. 264-78.
41 314 U. S. 252 (1940).
the opinion of the Court which reversed the judgment of the state court, Mr. Justice Black cited the "clear and present danger" doctrine and held that the evils in prospect must be both substantial and serious. He further pointed out that the "assumption that respect for the judiciary can be won by shielding judges from published criticism wrongly appraises the character of American public opinion."

In Hague v. C.I.O., the right of peaceable assembly, which had been identified with the due process clause of the Fourteenth Amendment in DeJonge v. Oregon, was reasserted. Jersey City, New Jersey had an ordinance which provided that permits should be secured from a director of public safety before public meetings could be held. The C.I.O. brought suit in the United States District Court to enjoin the mayor from enforcing the ordinance. An injunction was granted, and thereafter, the city officials appealed the decree to a higher court.

After reviewing the case the Court, by a vote of five to two, held the ordinance unconstitutional and affirmed the decree of the lower court. The majority of the Court was divided three ways. Justice Roberts and Black felt that the ordinance was invalid because it abridged a privilege

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42 Ibid., p. 263.

43 Ibid., p. 270. See also Pennekamp v. Florida, 328 U. S. 331 (1946).

44 307 U. S. 496 (1939). Back of this case the state of New Jersey had a long history of industrial conflicts. Its industries had been unionized slower than those of neighboring New York City. The unions were constantly attempting to introduce the closed shop. The mayor of Jersey City, Frank Hague, chose to fight the closed shop with a closed city. It is interesting to note that not only labor leaders were denied permits to hold public meetings, but other people like Roger Baldwin and Norman Thomas were denied permits. However, the supporters of Hague could always obtain permits. See Chafee, op.cit., pp. 409-11.

45 299 U. S. 353 (1937).

or immunity of citizens of the United States — the right of peaceable assembly. Justices Stone and Reed protested against the use of the privileges and immunities clause and held that the ordinance was a violation of due process of law. Chief Justice Hughes concurred in part with both opinions, but he tended to agree with the opinion of Stone and Reed. In addition to the three opinions in the majority, there were two dissenting opinions, those of McReynold and Butler. McReynolds argued that wise management of local affairs was outside of the jurisdiction of the federal court.

In 1941, in Cox v. New Hampshire, the Supreme Court held that the freedom of assembly was not an absolute right and therefore was not immune to reasonable regulation. That case originated out of the conviction of five Jehovah witnesses for violating a state statute which prohibited parades upon public streets without a special license. In delivering the opinion of the Court which upheld the state statute, Mr. Chief Justice Hughes observed that civil liberties, as guaranteed by the Constitution, implied "the existence of an organized society maintaining public order without which liberty itself would be lost in the excess of unrestrained abuses."

In addition to protecting the civil rights enumerated in the Bill of Rights, the Court discovered new liberties that might be protected.

48 Ibid., p. 519.
49 Ibid., p. 532-33.
50 312 U. S. 569 (1941).
51 Ibid., pp. 571-72.
52 Ibid., p. 574.
by the Fourteenth Amendment. An outstanding example of that new tendency was the interpreting of peaceful picketing as a form of free speech.

That new liberty was first alluded to in the majority opinion in Senn v. Tile Layers Union. Mr. Justice Brandeis, speaking for the majority stated:

Clearly the means which the statute [Wisconsin law legalizing peaceful picketing] authorizes—picketing and publicity—are not prohibited by the Fourteenth Amendment. Members of a union might, without special statutory authorization by a state, make known the facts about a labor dispute, for freedom of speech is guaranteed by the Federal Constitution.54

Brandeis' statement in the Senn case was accepted and confirmed in Thornhill v. Alabama. In that case, Byron Thornhill was convicted for violating an anti-picketing statute. The statute prohibited any person "without just cause" to go near or loiter about any place of lawful business. Following conviction Thornhill appealed the case to the Supreme Court. Speaking through Mr. Justice Murphy, the Court held the Alabama statute unconstitutional on the ground that it abridged both free speech and free assembly. He further contended that "the dissemination of information concerning the facts of a labor dispute must be regarded as within that area of free discussion that is guaranteed by the Constitution...." In a later case, Milk Wagon Drivers Union v. Meadowmoor Dairies, the Supreme Court pointed out that the right to

53 301 U. S. 468 (1937).
54 Ibid., p. 478.
55 310 U. S. 28 (1940).
56 Ibid., p. 91.
57 Ibid., p. 92-3.
58 Ibid., p. 102.
59 312 U. S. 287 (1941).
picket was not an absolute right. In that case it held that a state
court might lawfully enjoin picketing marked by violence and distraction
of property.

C. Freedom of Religion and Jehovah's Witnesses Cases

After 1937 the Supreme Court added decisions of greater importance
to the case law of religious freedom than had been accumulated in all
years since the adoption of the Bill of Rights. Those cases, in which
the freedom of press was merged with the freedom of religion, were
brought before the court by the Jehovah's Witnesses (a minority religious
sect). Of the twenty-five cases that the Jehovah's Witnesses brought
before the Court, between 1937 and 1947, only four will be analyzed here:
The first Jehovah's Witnesses' case, Lovell v. Griffin; the one in
which the freedom of religion was explicitly affirmed, Cantwell v.
Connecticut; and the most spectacularly controversial, Minerville
School District v. Gobitis, and West Virginia State Board of Education
v. Barnette.

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60 Ibid., 292.
61 Victor W. Rotnem and F. G. Folsom, Jr., "Recent Restrictions
Upon Religious Liberty," American Political Science Review XXXVI
(December, 1942), 1053.
62 The Jehovah's Witnesses are followers of the religious doctrines
formulated by the late Charles T. Russell. Pastor Russell was born in
Pittsburg in 1852 and was brought up in the Presbyterian faith. At the
age of sixteen, he decided that the then existing schools of religious
thought were wrong, and built up a religion of his own, centered around
calculations as to the second coming of Christ and the battle of
Armageddon. His followers adopted the name of Jehovah's Witnesses in
63 303 U. S. 444 (1938).
64 310 U. S. 296 (1940).
65 310 U. S. 586 (1940).
66 319 U. S. 624 (1943).
The first of the Jehovah's Witnesses' cases, Lovell v. Griffin, arose out of the conviction of Alma Lovell for violating a Griffin, Georgia ordinance. The ordinance prohibited the distributing of leaflets and handbooks without first obtaining written permission from the city manager. Upon conviction the defendant sued out a writ of error to the Supreme Court. Chief Justice Hughes, who spoke for a unanimous court, held the Griffin ordinance unconstitutional on the ground that it violated freedom of speech and of press. He further stated that the character of the ordinance was such "that it strikes at the very foundation of the freedom of press by subjecting it to license and censorship."

A similar position was adopted by the Court in Cantwell v. Connecticut. In that case the Court explicitly ruled upon state action and freedom of religion. That case originated out of the violation of a state law prohibiting solicitation of money for religious causes without the prior approval of the local secretary of public welfare. Cantwell was convicted on two counts: (1) soliciting without required certificate, and (2) inciting a breach of peace.

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67303 U. S. 444 (1938).
68 Ibid., p. 447.
69 Ibid., p. 451.
70 Ibid.
71310 U. S. 296 (1940).
72 In Hamilton v. Regents, supra, p. 40, there was intimated in the opinion of the Court that the freedom of religion came under the due process of law clause.
73310 U. S. 301-02.
74 Cantwell's street corner phonograph recital had attacked institutionalized religion and had aroused the ire of a Catholic audience. See Rotnem and Folsom, op.cit., pp. 1057-58.
The unanimous opinion of the Court, delivered by Mr. Justice Roberts 75 invalidated the state law as a violation of religious liberty. After recognizing the general right of the state to regulate solicitation, Justice Roberts denounced the censorship power of the secretary as a clear and obvious abridgement of the freedom of religion and conscience.

While some of the issues involved in Jehovah's Witnesses cases have been settled easily, others have been controversial. For example, of the sixteen cases decided between 1937 and 1942, the Court has reversed itself twice, divided five to four in three cases, and six to three in another, and produced some twenty-seven opinions.

The most controversial of the Jehovah's Witnesses cases were the "flag salute cases" — Minerville School District v. Gobitis, and West Virginia State Board of Education v. Barnette. The Minerville case arose out of the refusal of the children of Walter Gobitis, a Jehovah's Witness, to comply with a state law which required all children in public schools to salute the flag of the United States and recite the pledge of allegiance. Upon refusal to do so the children

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75 310 U. S. 296 (1940), pp. 300-01.
76 Ibid., pp. 303-04. It was pointed out that the First and Fourteenth Amendments embraced two concepts with respect to religion — freedom to believe and freedom to act. The first is an absolute right and the second is not.
80 310 U. S. 586 (1940).
81 319 U. S. 579 (1943).
82 310 U. S. 586 (1940).
were expelled from school. Gobitis, their father, applied to a Federal District Court for an injunction against enforcement of the expulsion order. The injunction was granted by the District Court and sustained by the Circuit Court of Appeals (third circuit).

The opinion of the Court, delivered by Mr. Justice Frankfurter, reversed the decisions of the lower courts and upheld the state law. Justice Frankfurter held that the law was constitutional because the interests of the state were more fundamental than minority rights. Furthermore, he added that the flag salute was intended to build up a sentiment of national unity which is the base of national security.

The decision in this case was out of harmony with the spirit of the Court in broadening the area of civil rights and the protection of minority rights against state coercion.

In 1943, in West Virginia State Board of Education v. Barnette, the Court overruled the Gobitis decision and declared unconstitutional a West Virginia statute essentially the same as the Pennsylvania rule. Speaking for the majority, Mr. Justice Jackson stated that "the freedom asserted by the appellees does not bring them into collision with rights asserted by any other individual." He also added, "censorship or suppression of opinion is tolerated by our Constitution only when the expression presents a clear and present danger." Justice Frankfurter

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83 Ibid., p. 592.
84 Ibid., pp. 593-94.
85 Ibid., p. 594.
86 Kelley and Harbison, op. cit., p. 810.
87 319 U. S. 624 (1943).
88 Ibid., p. 630.
89 Ibid., p. 633.
denounced the majority opinion of the Court stating that it attempted to substitute judicial decree in the place of legislative function.

D. Procedural Due Process in Criminal Cases

It has been stated that the Supreme Court between 1937 and 1947 was a "Bill of Rights Court". That statement was totally valid in so far as substantive rights were concerned, and partially valid in the consideration of procedural rights. The Court has consistently seen to it that the Fourth, Fifth, Sixth, Seventh and Eighth Amendments were enforced in Federal courts. In state criminal cases involving procedural due process, the Supreme Court has concerned itself with the fairness of a particular trial. The Court's criterion of the fairness of state cases involving criminal due process has centered around the following principles: prohibition of forced confessions, the right of counsel, and the representative character of juries.

In 1940, in the case of Chambers v. Florida, the Supreme Court held that forced confessions, "third degree", were in violation of due process of law. That case originated out of the conviction of Chambers and three other Negroes for the alleged murder of a white man in Florida. The confession was received after the defendants had been kept in custody and questioned, one by one, with no opportunity between grilling to obtain rest or sleep, for five days and nights. After

90 Ibid.
91 Pritchett, op.cit., p. 137.
92 Ibid., p. 137
93 Nutting, op.cit., p. 246.
94 309 U. S. 227 (1940).
95 Ibid., pp. 239-40.
being sentenced to death, counsel for the defendants appealed the case to the Supreme Court on the contention that his clients had been denied due process of law. In delivering the opinion of the Court which set aside the state conviction, Mr. Justice Jackson stated:

We are not impressed by the argument — that enforced methods such as those under review are necessary to uphold our laws....Due process of law, preserved for all by our Constitution, commands that no such practice as that disclosed by this record shall send any accused to his death.96

In 1942, in the case of Betts v. Brady, the Court modified its ruling in an earlier case, Powell v. Alabama. Norman Betts, the defendant, was indicted for robbery in Maryland. Due to financial inability, Betts requested the court to appoint counsel for him. His request was denied on the ground that it was not customary in Maryland to provide counsel for indigent defenders, except in prosecutions for murder and rape. Upon conviction Betts appealed his case to the Supreme Court.

Speaking through Mr. Justice Roberts, the Court affirmed the judgment of the state court and held that due process of law does not under all circumstances compel a state to appoint counsel at state expense for any indigent defendant. Justice Roberts further added:

Asserted denial is to be tested by an appraisal of the totality of facts in a given case. That which may, in one setting, constitute a denial of fundamental fairness, shocking to the universal sense of justice, may, in other circumstances, and in the light of other consideration, fall short of such denial.101

96Ibid., p. 241.
97316 U. S. 455 (1942).
98287 U. S. 45 (1932).
99316 U. S. 457.
100Ibid., pp. 461-62.
101Ibid., p. 461.
The reasoning of the majority was denounced "by Justices Black, Douglas and Murphy on the ground that the refusal of the state provide the defendant with a counsel was a clear violation of due process of law."

Another aspect of criminal due process which has received much attention from the Supreme Court after 1937 is the representative character of juries. Usually this question has been raised by the absence of Negroes from juries in the South. Precedents for these cases date back to 1879. In that year a West Virginia statute requiring juries to be composed exclusively of white male citizens was declared unconstitutional on the ground that it violated the equal protection clause of the Fourteenth Amendment. This was reasserted in 1935, in Norris v. Alabama, the second scottsboro case, and further enforced by the "Roosevelt Court."

In the case of Smith v. Texas, the Court set aside a state conviction on the ground that Negroes had been discriminated against. The county jury commissioner in a county where the Negro population was over twenty per cent, denied that there was any discrimination against Negroes, and explained that the reason why only 5 of the 384 jurors serving over a period of eight years were Negroes was because "he was not personally acquainted with any member of the Negro race." Assuming that this story was true, the Court pointed out that for a jury commissioner to limit jurors to his personal acquaintances was in itself a discriminatory procedure.

The case of Adamson v. California further indicated the nature

102 Ibid., pp. 474-77.
103 Strauder v. West Virginia, 100 U. S. 303 (1879).
105 311 U. S. 128 (1940).
of the Courts criterion of a fair trial. In that case the Supreme Court was called upon to consider the constitutionality of a California statute which permitted comment by the trial court on the failure of a defendant to testify and permitted the jury to consider the same. The Court upheld the state law and the conviction thereunder on the ground that the guarantee against self-incrimination is not included in due process of law except where such would result in an unfair conviction, or where the testimony is obtained through "fear of hurt, torture, or exhaustion." In a separate concurring opinion, Mr. Justice Frankfurter stated that he supported the ruling in Twining v. New Jersey in reference to state criminal cases, and due process. He further pointed out in state criminal cases, natural law provided a better basis for decision and "a much longer and much better founded justification" than "subjective" selections from the first eight amendments for incorporation into the Fourteenth Amendment.

107 Ibid., pp. 53-54.
108 Ibid.
109 211 U. S. 78 (1908).
CONCLUSION

Historically, the Fourteenth Amendment has been subject to various interpretations. Since 1873, no other part of the Constitution of the United States has been the source of as much litigation as the Fourteenth Amendment. In view of the fact that this amendment has often been the source of litigation, it has been interesting to observe and analyze the extent to which the Supreme Court has interpreted it in accordance with the intended purpose of its framers.

According to Representative John A. Bingham, the Fourteenth Amendment, particularly, the first section - and this section in effect is the amendment- was formulated to protect civil rights from the various states. This was to be done by bringing the full weight of the guarantees of civil rights enumerated in the Bill of Rights to bear upon state activities endangering civil liberty. It is important to note, however, that in 1873, and for fifty years afterwards, the Supreme Court refused to accept the intended purpose of this amendment. The Court was more concerned with interpreting the Fourteenth Amendment as a means of protecting business property from state regulation.

In 1923, the Supreme Court, through the acceptance of a changed conception of due process of law, began to give a liberal interpretation to the Fourteenth Amendment. This liberal interpretation was made possible by associating the due process clause of the Fourteenth Amendment with the guarantees of the first eight amendments, especially, the First Amendment. The liberal interpretation of this amendment was concerned
largely with a reinterpretation of due process of law, however, the
privileges and immunities clause received a brief revival (from
1935 to 1940).

After 1937, the Supreme Court consistently reasserted the liberal
interpretation of the Fourteenth Amendment which was begun in the 1920's.
In addition to this, the Court discovered new liberties (peaceful
picketing, contempt of court, etc.) which might be protected under the
amendment. The new era in civil liberties, after 1937, has been
conditioned by the evolution of a new court, the so-called "Roosevelt
Court." A concomitant factor of the evolution of a new court has been
the development of a new philosophy of judicial review with regard to
civil liberty cases, at least, in cases involving substantive rights.
This new doctrine provided that the guarantees of the First Amendment
freedom of speech, press, religion, and assembly - are important that
legislative restrictions upon them will be presumed to be unconstitutional
unless shown to be justified by a clear and present danger. In the
domain of procedural due process and state criminal cases, the
application of the Fourteenth Amendment has been less extensive.

The Supreme Court's interpretation of the Fourteenth Amendment,
in regard to civil rights, may be classified into two groups, substantive
and procedural. In the area of substantive rights the Court has been
consistent in its application of that amendment. It has interpreted the
Fourteenth Amendment as a means of protecting the following rights from
state encroachment: freedom of speech (including peaceful picketing
and contempt of court), press, religion, and assembly. In the area of
procedural rights the Court has been reluctant to apply the Fourteenth
Amendment unless there has been an unfair administration of justice.
The Court's criterion of fairness in state criminal cases has been
centered around the following principles: the right of counsel, prohibition of forced confessions, and the representative character of juries. In the final analysis the writer is inclined to conclude that the Supreme Court has never fully interpreted the Fourteenth Amendment in accordance with its intended purpose - protection of civil rights against state action.
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