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Procedure to Substance — Extra-Judicial Rise of Due Process, 1830-1860

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THAT due process of law has undergone dazzling metamorphosis in the United States is venerable law review learning.¹ That the transition from procedure to substance, which began to gain momentum about 1890, eventually changed the scope and form of judicial review and recast relations of the three branches of both state and federal governments is equally familiar.² Let it be added immediately, therefore, that our purpose in this paper is not to attempt another exercise in judicial taxidermy. Nor is it to rehearse and reargue the familiar phases of the "due process revolution." It is rather to challenge certain basic assumptions, to point out oversights and astigmatism which mask and blur some of the most significant phases of due process-law of the land history. If emphasis is to be mainly on popular usage and on lay conceptions of these two constitutional phrases, it is with no thought of denying their fundamentally legal character, nor of questioning the final responsibility which judges today must have for construction of these as well as other constitutional guarantees. Iconoclasm, so far as it exists, is directed, not at the fruits or character of judicial review, but at prevailing conceptions of the setting in which review operated, and the neglect of contributions made by extra-judicial forces during the forma-

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¹ See Corwin, *The Doctrine of Due Process of Law Before the Civil War*, 24 HARV. L. REV. 366, 460 (1911); 1 SELECTED ESSAYS CONSTITUTIONAL LAW 203 (1938); CORWIN, *LIBERTY AGAINST GOVERNMENT* CC. 3-5 (1948); Haines, *Judicial Review of Legislation in the United States and the Doctrine of Vested Rights and of Implied Limitations on Legislatures*, 3 TEX. L. REV. 1 (1924); *retitled*, 1 SELECTED ESSAYS CONSTITUTIONAL LAW 268 (1938); Hough, *Due Process of Law Today*, 32 HARV. L. REV. 218 (1919), 1 SELECTED ESSAYS CONSTITUTIONAL LAW 302 (1938); Grant, *Natural Law Background of Due Process*, 31 COL. L. REV. 56 (1931); Howe, *The Meaning of Due Process Prior to the Adoption of the 14th Amendment*, 18 CALIF. L. REV. 583 (1930); Hamilton, *The Path of Due Process of Law in THE CONSTITUTION RECONSIDERED* (Read ed. 1938); MOTT, *DUE PROCESS OF LAW* (1926); Shattuck, *The True Meaning of the Term "Liberty" in Those Clauses in the Federal and State Constitutions which Protect "Life," "Liberty," and "Property."*, 4 HARV. L. REV. 365 (1891), 2 SELECTED ESSAYS CONSTITUTIONAL LAW 185 (1938); Warren, *The New "Liberty" Under the Fourteenth Amendment*, 39 HARV. L. REV. 431 (1926); 2 SELECTED ESSAYS CONSTITUTIONAL LAW 237 (1938).

² See HAINES, *AMERICAN DOCTRINE OF JUDICIAL SUPREMACY* c. 15 (2d ed. 1932); COLLINS, *THE FOURTEENTH AMENDMENT AND THE STATES* (1912); Cushman, *Social and Economic Interpretation of the Fourteenth Amendment*, 20 MICH. L. REV. 737 (1922), 2 SELECTED ESSAYS CONSTITUTIONAL LAW 60 (1938); BROWN, *Due Process of Law, Police Power, and the Supreme Court*, 40 HARV. L. REV. 943 (1927), 2 SELECTED ESSAYS CONSTITUTIONAL LAW 94 (1938).

tive period. How the due process phraseology gained great popular currency—how it originally came to be employed by the Civil War generation, rather than precisely what it meant, overall, to the framers and ratifiers of 1866, is our chief concern in this paper.

From the time of Professor Corwin's path-breaking articles³ the prevailing view of American due process development has been that, except for perhaps a dozen major cases—generally treated as "sports" or mutations—pre-Civil War use and understanding of the phrases "due process of law" and "law of the land" were overwhelmingly procedural. That is to say, they were in accord with ancient English origins. Casebooks and law review contributions without number have plotted these landmarks—*University v. Foy*,⁴ the Tennessee cases,⁵ *Hoke v. Henderson*,⁶ *Taylor v. Porter*,⁷ *Wynehamer v. People*,⁸ and *Dred Scott v. Sandford*.⁹ Occasionally intermediate or secondary landmarks have been added to narrow the gaps in the otherwise jagged skyline. But these efforts at continuity rarely have changed the picture, and almost never the conclusions or the assumptions. The peaks still rise majestically from a broad procedural plain. Connecting ranges are shrouded and obscure. The fracturing upthrust through and from the procedural strata was sharp, sporadic, unpredictable. Above all, the primitive shaping force was judicial craftsmanship. Learned, strong-willed judges—men like Ruffin, Bronson, Taney—judges with the powerful minds and temperaments of Creators, marshalled their dicta and syllogisms, "divided the light from darkness, called the light Day and the darkness Night," and from "waste and void" fashioned the peaks and firmament. Their basic stuffs of creation were the natural rights-higher law prepossessions common to American political thinking down to the Civil War. Lockean premises regarding liberty and property guided the syllogisms. Once the original extra-constitutional doctrine of vested rights was no longer able to canalize the volcanic forces, and once the contract clause had begun to suffer the repressive effects of the *Charles River Bridge* decision,¹⁰ due process of law and law of the land clauses became the vents out of which the lava intermittently poured.

Always central to, and underlying this legal cosmology—truly a "Great lawyers" theory of Creation—has been the premise that throughout the formative period due process remained essentially, predominantly procedural. Contemporaneous substantive use and understanding were meager at best, even by lawyers; laymen of course lacked not only insight but interest. Not until the post-Civil War period was there any general apprecia-

³ See, in addition to the works cited *supra* note 1, his *Extension of Judicial Review in New York*, 15 MICH. L. REV. 281 (1917).

⁴ 5 N.C. 58 (1805).

⁵ *Vanzant v. Waddel*, 2 Yerg. 259, 271 (Tenn. 1829); *State Bank v. Cooper*, 2 Yerg. 599 (1831); *Tate v. Bell*, 4 Yerg. 202 (1833); *Officer v. Young*, 5 Yerg. 320 (1833); *Jones Heirs v. Perry*, 10 Yerg. 59 (1836); *Budd v. State*, 22 Tenn. 483 (1842).

⁶ 15 N.C. 1 (1833).

⁷ 4 HILL 140 (N.Y. 1843).

⁸ 13 N.Y. 378 (1856).

⁹ 19 How. 393, 450 (U.S. 1856).

¹⁰ 11 Pet. 419 (U.S. 1837).

tion of the grandeurs and wonders of due process substantively conceived.

The conventional views in this regard have been admirably summarized by the late Professor Haines:¹¹

Prior to the adoption of the Fourteenth Amendment to the Federal Constitution, due process of law was of little significance in American constitutional law, as a standard to test the validity of legislative acts. For about three-quarters of a century after the introduction of the term in the first state constitutions, it was seldom used as a basis for the protection of either personal or property rights. Few legislative enactments were held invalid as contravening due process of law, and some of the most important attempts to define the phrase were made in dicta in cases upholding the validity of the laws attacked. Several attempts were made to give force and meaning to the term, such, for instance, as those of North Carolina and of the Tennessee courts, but with relatively little success. Then a renewed effort was made by the courts of Massachusetts and of New York to construe due process of law into a general limitation on legislative powers, but this effort met with only meager acceptance until changes in economic and political conditions after 1860 favored extensive expressed and implied restrictions on legislative powers. On the whole, the interpretation of the phrases "due process of law" or "the law of the land" prior to 1870 had placed few restrictions on legislatures which were not merely procedural in character and had merely suggested ideas or principles which under a different environment were soon to be received favorably. Due process of law and other implied limits on legislative powers were slowly interpreted so as to serve as adjustable standards for the maintenance of the principles of the new conservatism.

More guarded, yet obviously of the same conviction, was the late Judge Hough:¹²

That all men of that day [1856, the date of the Supreme Court's procedural definition in *Murray v. Hoboken*] had no conception of due process other than a summary description of a fairly tried action at law, is not asserted; but I do submit that reports before the Civil War yield small evidence that there was any professional conviction that it was more than that.

And speaking of Thomas M. Cooley's role in preparing the ground for substantive interpretations by his treatment of the early cases in the first edition of *Constitutional Limitations*, 1868, Benjamin Twiss concluded: "Previously this clause had been looked upon almost universally as only a procedural guarantee."¹³ One might quote many more statements to the

¹¹ Haines, *supra* note 1.

¹² Hough, *supra* note 1 at 223; 1 SELECTED ESSAYS CONSTITUTIONAL LAW at 306. Note that Judge Hough, by confining his statement to the "reports" and "professional opinion" seems to make allowance for extra-judicial factors. Professor Corwin and other writers likewise have been well aware of abolitionist use of due process, and occasionally have alluded thereto, but no one, to the writer's knowledge, has seriously examined the extent of influence.

¹³ TWISS, LAWYERS AND THE CONSTITUTION 26 (1942). This admirable work, with Professor Hurst's GROWTH OF AMERICAN LAW (1950), is one of the few which have focused attention on the guiding role of the bar in constitutional construction.

same effect. The conclusion has taken its place almost as an historical axiom.

Naturally, therefore, certain corollaries have been drawn. Perhaps most important is what might be called the "perversionist thesis." Because, under pressure of economic usage after the Civil War, interpretations eventually departed so radically from prewar understandings, it has been argued that both the due process and equal protection guarantees were misapplied. Especially were they perverted when used to engraft onto the Constitution the postwar laissez-faire doctrine "liberty to contract"¹⁴ and its interference runner, corporate personality.¹⁵ Nor have the critics of the modern laissez-faire applications stopped here. Still assuming a fundamentally non-economic and procedural usage prior to 1866, they have at times argued that the framers and ratifiers of the Fourteenth Amendment could scarcely have foreseen, much less intended, that the word "person" might be construed to include corporations. That the due process and equal protection clauses as a whole might be employed to overturn social, economic, or administrative regulation was scarcely dreamed of in 1866—such has been the thesis.¹⁶ To assume otherwise, in the words of Walton Hamilton,¹⁷ would be to endow the drafters, and the "captains of a rising industry with a capacity for forward plan . . . which they are not usually understood to possess."

Thus, the narrow procedural beginnings of the clause have been used, not only to attack later "perversions," but to question the very possibility of awareness in 1866 that due process might eventually become a formidable weapon against legislative power. Far from being academic matters, it is plain that these assumptions about the character of pre-Civil War due process go to the roots of some vital constitutional problems.

It has seemed to the writer that several *a priori* considerations alone are enough to raise cautionary doubts about these assumptions. First is the fact that law review constitutional history seldom has been institutional history; the political juices, and even the chronology, generally are lost in extracting the rules. More and more, what we get is the story of a few major cases; then ultimately merely a truncated analysis of the prevailing appellate opinions. Thus, almost inevitably in this process, far too little attention is paid to, and far too little allowance is made for, the general public's stake and participation in vital constitutional decisions. Furious public debates are eventually boiled down to neatly stated rules. Constitutional law, in more senses than one, emerges as digested politics!

Serious enough at any time, this source of potential error could be deadly when applied to the formative period. For the Constitution then was

¹⁴ For the doctrinal growth, see Pound, *Liberty of Contract*, 18 YALE L.J. 454 (1909), 2 SELECTED ESSAYS CONSTITUTIONAL LAW 208 (1938).

¹⁵ For the history of this development, see Graham, *The "Conspiracy Theory" of the Fourteenth Amendment*, 47 YALE L.J. 371, 48 YALE L.J. 171, 1 SELECTED ESSAYS CONSTITUTIONAL LAW 236 (1938); McLaughlin, *The Court, the Corporation, and Conkling*, 46 AM. HIST. REV. 45 (1940); Graham, *Justice Field and the Fourteenth Amendment*, 52 YALE L.J. 851 (1943).

¹⁶ Boudin, *Truth and Fiction About the Fourteenth Amendment*, 16 N.Y.U.L.Q. REV. 19 (1938).

¹⁷ Hamilton, *Property—According to Locke*, 41 YALE L.J. 864, 875 (1932), 2 SELECTED ESSAYS CONSTITUTIONAL LAW 115, 126 (1938).

plastic; many clauses were wholly uninterpreted, others barely outlined. Judicial review was in its infancy. Issues were wide open, authorities meager or non-existent. Not until 1819, for example, was even the *Journal* of the Federal Convention published.¹⁸ Madison's *Debates* came a full twenty years later.¹⁹ It was 1833 before the Supreme Court, in *Barron v. Baltimore*, held the Bill of Rights inapplicable to the states.²⁰ And as late as 1845 we find the whole Illinois Supreme Court apparently unaware of Marshall's decision.²¹ Yet during this period occurred the great constitutional debates. One after another came those on the Missouri Compromise, the Tariff, Nullification, the Bank Charter, and above all, the interminable crises and debates over Slavery. Nor were these passive television shows. The *Annals*, the *Register of Debates* and the *Congressional Globe* were read cover to cover by thousands, and excerpted in hundreds of papers; every crossroads had its debating society. Public law and politics were indeed democracy's lifeblood.

Here obviously are signals for caution. A nation that dessicates its history in the course of extracting and studying its law risks feeding itself pap. Yet more and more, constitutional history is written as if interpretation of the Constitution always had been solely the business of lawyers and the prerogative of judges. Because in the course of a century the law of the Constitution has become a highly technical field—the province and specialty of an elite, and the public responsibility of judges alone—like conditions are assumed to have prevailed in Madison's day. The faith of Jefferson and his generation in free discussion by a free press and free yeomanry ought to be warning enough against such conceits.

With reference to our problem of the character of early due process usage there are two other factors which make these considerations seem even more vital. One is the strong natural rights orientation of our early constitutional law,²² the other, the inherent textual advantages which the due process clause enjoyed as an artful question beggar and as a lever in the hands of those trying to shift final responsibility for social decisions from

¹⁸ JOURNAL, ACTS AND PROCEEDINGS OF THE CONVENTION ASSEMBLED AT PHILADELPHIA . . . 1787 (1819). YATES, SECRET PROCEEDINGS AND DEBATES OF THE CONVENTION ASSEMBLED AT PHILADELPHIA . . . 1787 . . . INCLUDING THE "GENUINE INFORMATION" . . . by LUTHER MARTIN was published in Albany, 1821.

¹⁹ MADISON PAPERS (Gilpin ed., 1840).

²⁰ 7 Pet. 242, 247 (U.S. 1833).

²¹ *Rhinehart v. Schuyler*, 7 Ill. 375, 414 (1845). After quoting the due process clause of the Fifth Amendment, and noting "the words 'due process of law' have been shown to correspond in meaning to the words 'law of the land' . . . in our state constitution," the majority opinion declared "Now, as the constitution of the United States, in this respect is obligatory upon all the States of the Union, is it not strange" if plaintiff's contention be sound and "'due process of law' means trial judgment and execution [in a tax sale case] that of all these states, from the foundation of the government up to the present time, Tennessee and Illinois alone should have made the discovery that they were violating the constitution of the United States, which is everywhere admitted to be the Supreme law of the land . . ." See *infra* text of notes 60-61.

²² See HAINES, REVIVAL OF NATURAL LAW CONCEPTS (1930); and WRIGHT, AMERICAN INTERPRETATIONS OF NATURAL LAW (1931); Corwin, *The Basic Doctrine of American Constitutional Law*, 12 MICH. L. REV. 247 (1914), 1 SELECTED ESSAYS CONSTITUTIONAL LAW 101 (1938).

the legislatures to the courts. Little need be said about the natural law foundations. They repeatedly have been demonstrated, and are now universally conceded. Substantivized due process is essentially constitutionalized natural law.²³ Thus the "due processing" of the law of nature has been a basic theme of law review writing.

Much less commonly noted have been the advantages of the due process guarantee itself. Unlike the contract clause and the later restraint wording of the Fourteenth Amendment, the original due process guarantee of the Fifth Amendment—as well as the due process-law of the land phraseology of most of the state constitutions—made no reference to law making or law passing. A user thus could side-step the really touchy issues and concentrate on the merits, or, if preferable, on abstract justice. Moreover, the word "person" obviously embraced all mankind; "life," "liberty," and "property," virtually all human affairs. Finally, the categorical prohibition is stated in a form that is even more impressive to the uninitiated than to professionals. More than any other single clause of the Constitution, it seems *on its face* to guarantee, so far as any such provision can, both universal and personal justice. No doubt the principal reasons are that one synonym of "due process" is "just" process, and one popular connotation of "law" is "right and equity." The ideal or substantive element thus is inherent in the terms. If an intelligent child or layman is asked the meaning of these phrases he almost invariably replies: "It guarantees you a square deal." "It means you can protect your rights against anybody." "It protects human rights and freedom."

Now all this is relevant to the matter at hand. *If* this is the natural import of these phrases, and if in the early days of our Republic citizens were intensely, and at times fanatically excited about such issues as slavery, women's rights, and the evils and profits of the liquor traffic, and if the zealots who became most wrought up over these matters were not only highly literate and articulate but a bit on the stiff-necked, cantankerous side, both as to the maintenance of their rights and the salvation of those who disagreed with them, then surely, we may suspect that these hardy individuals, if no others, came naturally and effectively to the use of a weapon ideally suited to their needs. If so, it seems quite likely that there was considerable substantive "due processing" of natural law, and powerful pressure was exerted for expansion of judicial review—far more indeed, than has generally been credited.

Recent studies of the antislavery backgrounds of the Fourteenth Amendment offer strong support for this hypothesis.^{23a} They suggest that the twin forces in the rise and growth of substantive due process were (1) the "common sense" lay interpretations conceived and broadcast by these

²³ See, in addition to the works cited *supra* note 1, Grant, *The "Higher Law" Background of the Law of Eminent Domain*, 6 WIS. L. REV. 67 (1931), 2 SELECTED ESSAYS CONSTITUTIONAL LAW 912 (1938).

^{23a} See Graham, *The Early Antislavery Backgrounds of the Fourteenth Amendment*, [1950] WIS. L. REV. 479-507, 610-661; TENBROEK, *THE ANTISLAVERY ORIGINS OF THE FOURTEENTH AMENDMENT* (1951).

dedicated, highly articulate reformist and counter-reformist groups—mainly Abolitionists and anti-Abolitionists; (2) the ease and persistence with which such elements in their thinking and propaganda, not only exploited prevalent Lockean, natural rights interpretations of the key words “life,” “liberty” and “property,” but also benefited by the inherent textual advantages of the phrase “due [i.e. just] process” as a means of “constitutionalizing” their earlier natural rights arguments. Due process thus was snatched up, bandied about, “corrupted and corroded,” if you please, for more than thirty years prior to 1866. For every black letter usage in court there were perhaps hundreds or thousands in the press, red schoolhouse and on the stump. Zealots, reformers, and politicians—not jurists—blazed the paths of substantive due process.

What a thoroughly professional job of it they did is evidenced by the fact that at a very early date due process became an element in a constitutional trinity. By the late thirties it already was a part of the three-clause system which was to be employed thirty years hence by the drafters of Section One. Moreover, the drafters of that section—Bingham, Stevens, Conkling, Washburne, Fessenden, Morrill, Howard, Blow, and perhaps others—were men who in their youth and early manhood are known to have been thoroughly exposed to this doctrinal system.²⁴

The story has its beginning deep in colonial history. Ethics, religion, political theory, all contributed to the ultimate pattern. Before the Revolution, Quakers and Puritans attacked slavery as a violation of the social compact and Christian ethic. After 1776 the “self-evident truths” put a much keener edge on all such pleas. “That all men are created equal . . . [and] endowed by their Creator . . . with . . . unalienable rights [of] Life, Liberty, and pursuit of Happiness” became one of the cornerstones of nearly every antislavery argument. What emerged was an ethical interpretation of our national origins and history. In 1783, for example, Chief Justice Cushing cited the “All men are born free and equal” clause of the Massachusetts Bill of Rights and declared slavery “inconsistent with our conduct and Constitution.”²⁵ Four years later Congress passed the Northwest Ordinance outlawing slavery in the territories. During this period the “self evident truths,” the provisions of the state bills of rights, even the text of the comity clause of the still unratified Articles of Confederation²⁶ were all employed as weapons against slavery and race discrimination. By the 1820's, moreover, slavery's utter absence and denial of legal protection had

²⁴ Brief biographical data on members of the Joint Committee is given in KENDRICK, *THE JOURNAL OF THE JOINT COMMITTEE OF FIFTEEN ON RECONSTRUCTION* c.2 (1914). Regarding Stevens and Bingham see notes 23a *supra* and 27 *infra*. Fessenden was the son of the Abolitionist leader of Maine (see Graham, *supra* note 23a, at 658). Blow was a member of the anti-slavery family responsible for freeing Dred Scott and pushing his case (see HOPKINS, *DRED SCOTT'S CASE* 14, 180 (1951)). Morrill grew up in Vermont; Conkling and Harris in New York; Grimes in New Hampshire; Boutwell in Massachusetts; and Washburne in Maine—all regions where organized abolitionist activity was strong from the thirties on.

²⁵ See Graham, *supra* note 23a, at 616-17.

²⁶ *Ibid.* The use was in 1778 by Dr. Gordon, later historian of the Revolution; see MOORE, *NOTES ON THE HISTORY OF SLAVERY IN MASSACHUSETTS* 186 (1866).

been fully explored by critics both North and South. The dominating thought that governments were instituted for protection and derived their just powers from consent of the governed already had begun to make slavery untenable.

Tremendous reach and impact were given to these doctrines, and the whole movement accelerated, by organization, in 1833, of the American Antislavery Society. Taking as a model the British society, which, after a fifty year campaign, had just succeeded in forcing Parliament to abolish slavery in the West Indies, the sponsoring group of philanthropists headed by the wealthy Tappan brothers, launched one of the most extraordinary campaigns in American history. Soon a well educated, dedicated group of antislavery "agents" or evangelists, employing both religious revivals and a well-financed pamphlet campaign, were at work abolitionizing whole communities in Ohio, western New York and Pennsylvania. "Immediate abolition" was their slogan, moral suasion the strategy, conversion of doubters and "sinning slaveholders" the tactic. Under leadership of the brilliant orator and organizer, Theodore Weld, and the converted Alabama slaveholder, James G. Birney, success in the North was sensational. Appeals were directed at the leaders in each community. Lawyers in particular were recruited, and Weld and Birney and their agents were responsible for enlisting a host of influential antislavery leaders—Joshua Giddings, Philemon Bliss, Salmon P. Chase, Thaddeus Stevens, the Wades, among others.²⁷ The range of the agent-lecturers' argument was likewise amazing—the Common law, the Bible, history, Constitution and economics were all covered, often in the course of a two weeks' revival. Weld's disciples literally talked down and routed their opponents, foot and horse.

High idealism distinguished the early campaign, as did strict regard for constitutional requirements. Originally the hope was to achieve abolition in many states by judicial decisions based on the *Sommersett*²⁸ and *Aves*²⁹ precedents. Congress was flooded with petitions appealing for abolition in the Federal District and territories. Yet in the South action was to await the force of enlightened opinion, as slaveholders and yeomen were gradually converted. To hasten and reinforce these changes, and to demonstrate the irrationality of race prejudice and the prevailing beliefs in Negro inferiority, free Negroes in the North were given schooling and vocational training. Discriminatory "Black laws," particularly those denying free migration and access to schools, thus became prime targets.

In 1834 a brilliant opening attack was launched on the statute which barred non-resident Negro children from private boarding schools of Con-

²⁷ See Graham, *supra* note 23a, at 487-90, 622-3 for details regarding influential converts; Thaddeus Stevens, for example, later to be a member of the Joint Committee, was enlisted by Jonathan Blanchard, one of the A.A.S.S. agents assigned to Pennsylvania; Chase was enrolled by Birney, and Bliss and Giddings by Weld.

²⁸ *Sommersett's Case*, 20 How. St. Tr. 1 (1772) wherein Chief Justice Mansfield held slavery incompatible with the Common law of England.

²⁹ *Commonwealth v. Aves*, 35 Mass. (18 Pick.) 193 (1836).

necticut. Defending Prudence Crandall,³⁰ a Quakeress convicted of violating the act, were W. W. Ellsworth and Calvin Goddard, both leading lawyers and statesmen of Connecticut, hired by the Tappans. In the course of their arguments Ellsworth and Goddard first elaborated a concept of paramount national citizenship within the meaning of the comity clause, using the even-then familiar natural rights dicta of Justice Washington's opinion in *Corfield v. Coryell*.³¹ Next, they beautifully synthesized the whole early ethical interpretation case against Negro discrimination. The ideals of human equality, of a general and equal law, of reciprocal protection and allegiance, of reason and substantiality as the true bases for necessary discriminations and classifications by government—all were employed to give both form and substance to the defense of Negro rights.

The Ellsworth-Goddard arguments made no reference to due process, and little to slavery. Yet they mark a basic crystallization of abolitionist constitutional theory. Two of the three elements—equal protection and a nascent concept of national citizenship—were given polished statement. A year later, at the founding of the Ohio Antislavery Society—in preparation for launching their state campaign—Weld's lieutenants submitted a report on Ohio's Black laws.³² These odious statutes, enacted in 1807, excluded Negroes and mulattoes from common schools, limited use of their testimony in court, interfered both with migration and livelihood. Against the infringement of livelihood the report cited and itself italicized Article Eight, Section One of the Ohio Constitution: "*All are born free and independent, and have certain natural, inherent, and inalienable rights, among which are the enjoying and defending life and liberty, acquiring, possessing, and protecting property, and pursuing and attaining happiness and safety.*" Against the provision which virtually excluded Negroes from use and protection of the courts, they pointed to Article Eight, Section Seven: "All courts shall be open, and every person, for an injury done him in his lands, goods, person, or reputation, shall have remedy by due course of law, and right and justice administered without denial or delay." Finally, the restraints on ingress and egress were declared gross violations of the federal comity clause and of the privileges and immunities of national citizenship. Throughout, stress was on the denial, to Negroes and mulattoes, of protection of the laws, and on the outrageous inequalities of treatment as between Negroes and whites.

The significance of these arguments in Connecticut and Ohio inheres in the fact that they were anything but happenstance. It is true they originally were directed against the Black laws of the North; that at the outset they were used to prove merely the expediency and justice of abolition. By

³⁰ *Crandall v. Connecticut*, 10 Conn. 339 (1834). The Ellsworth-Goddard arguments, summarized in this official report, were printed verbatim in a pamphlet; see Graham, *supra* note 23a, at 498-506 for analysis and discussion.

³¹ 4 Wash. C.C. 371, 380-381, 6 Fed. Cas. 546, No. 3230 (E.D.Pa. 1823).

³² PROCEEDINGS OF THE OHIO ANTISLAVERY CONVENTION HELD AT PUTNAM 36-40 (April 22-24, 1836). See Graham, *supra* note 23a, at 494-498.

1836, however, abolitionists had been thrown on the defensive. Obligated to defend, first their right to proselytize, then the power of Congress to abolish slavery in federal territory, leaders combed the constitutions and digests for support. Moreover, the proslaveryites' counter-offensive was itself suggestive: in both the congressional debates and the Pinckney report³³ of 1836 the due process clause of the Fifth Amendment was set up as an absolute barrier to abolition in the Federal District. This sweeping vested rights usage of the clause—a perfect precedent for Chief Justice Taney's blunder twenty years later—touched off furious debate over slaves as "persons" versus slaves as "property." Abolitionists of course read the phrase as "No person shall be deprived of his self-ownership and earning power;" slaveholders as, "No person shall be deprived of his slave property."

With the Pinckney report as the turning point, battle now thickened. Their hopes of a gradualist solution frustrated, denied use of the mails, and even liberty of speech and press, antislavery militants began to discover for themselves the full potentialities of due process. Overnight the phrase became a battle cry—employed not only in defense of abolitionist rights to speak and write and petition, but also counter-offensively against slavery itself.

For those wishing to trace the steps by which abolitionist leaders explored the substantive content of the guarantee, Birney's editorials and articles³⁴ in the *Philanthropist* (1836-37) and Professor ten Broek's chapters³⁵ offer a fascinating study, not only for the light they throw on the evolution of abolitionist constitutional theory, but for insight they afford into the similar use of the same premises by other groups currently and later. An able lawyer, trained in the Philadelphia office of A. J. Dallas, Birney was one of the first to spell out the affirmative protections which abolitionists now began to argue were implicit in the Federal Bill of Rights. To understand these contentions one must remember that Marshall's decision in *Barron v. Baltimore* was barely three years old, its significance not yet generally known or appreciated even by some state judges.³⁶ Moreover, since practically all state constitutions contained similar guarantees, and above all, since men possessed such inherent and inalienable rights irrespective of guarantee by government, abolitionists regarded the holding as academic. Thus the upshot was simply that various clauses *restraining* the powers of Congress began to be popularly regarded as *sources* of congressional power to enforce civil rights nationally. It was reasoned that provisions of the Bill of Rights were guarantees; and guarantees customarily presumed intent, capacity, and duty to make them good.³⁷ From the late thirties this was familiar abolitionist doctrine; moreover, as Dr. tenBroek

³³ H. R. REP. NO. 691, 24th Cong., 1st Sess. (1836); discussed in Graham, *supra* note 23a, at 634-636, and TENBROEK, *op. cit. supra* note 23a, at 16-17, 79.

³⁴ See Graham, *supra* note 23a, at 638-58.

³⁵ *Op. cit. supra* note 23a, cc.1-3.

³⁶ See *supra* note 21.

³⁷ See Graham, *supra* note 23a, at 654-657.

shows,³⁸ the more radical theorists, like Alvan Stewart, even began to find in due process a source of congressional power to abolish slavery *in the states*.

During this period, simply as an incident of the intensive revival campaigns, equal protection-due process-privileges and immunities theory became the core of thousands of abolitionist petitions, resolutions and lectures. Now one, now another of the elements was accented, depending on the need and circumstances, but in an astonishing number of cases two or three parts of the trilogy were used.³⁹ The whole thus became, even before 1840, a form of popular constitutional shorthand.

After that date even stronger forces enter the picture. First were the compilers and synthesizers—pamphleteers and journalists like Tiffany and Goodell and Mellon who wrote the articles and treatises on the “Unconstitutionality of Slavery” which Dr. tenBroek analyzes so well.⁴⁰ Others annotated copies of *Our National Charters*,⁴¹ setting down after each clause or phrase of the Constitution and the Declaration (much as Birney had done in his early articles) the antislavery arguments and doctrines gleaned “both from reason and authority.” Such materials, broadcast by the thousand, reprinted, condensed and paraphrased, were themselves powerful disseminators.

It was the minority party platform, however, that gave abolitionist theory its most concise, effective statement.⁴² Drafted generally by Salmon P. Chase or Joshua Giddings, these documents, first of the Liberty and Free Soil parties in the forties, then of the Free Democracy and Republican Party in the fifties and in 1860, all made use, in slightly varying combination, of the cardinal articles of faith: human equality, protection, and equal protection from the Declaration, and due process both as a restraint and a source of congressional power. Such consistent repetition, of course, testifies both to the nature and extent of previous distillations and to the power and significance of current ones. That historians—both general and constitutional—have almost completely ignored the party platform as a source for understanding the Fourteenth Amendment itself testifies to serious oversights and misconceptions.⁴³

With the essence of antislavery theory thus finding expression in treatises and party platforms it was only natural that it be increasingly employed in congressional debate and on the stump. Known uses by men like Bingham and Bliss in the fifties can now be viewed in proper perspective. Far from being isolated or creative instances, they probably reflected merely a

³⁸ *Op. cit. supra* note 23a, c.3, especially at 43-48, 54-67; Graham, *supra* note 23a, at 644, n.224.

³⁹ *Id.* at notes 227, 232, 255 for examples.

⁴⁰ *Op. cit. supra* note 23a, c.3 and 86-91.

⁴¹ GOODELL, *OUR NATIONAL CHARTERS: FOR THE MILLIONS* (1863); on the Fifth Amendment, due process and *Taylor v. Porter*, see pp. 74-75.

⁴² See TENBROEK, *op. cit. supra* note 23a, especially c.6, n.3, for relevant planks; 1 STANWOOD, *HISTORY OF THE PRESIDENCY* (1928) for full texts of platforms.

⁴³ Even McLAUGHLIN, *CONSTITUTIONAL HISTORY OF THE UNITED STATES* (1935) makes no reference to the significance of the due process planks. Writers occasionally have noted the Republican plank of 1856, but rarely those before and after.

more intensive exposure or conditioning. Bingham, for example, is known to have attended Franklin College, an abolitionist stronghold near New Athens, Ohio, in 1836-37. This was during the period the Ohio crusade was at its height. Later, he practiced law in Cadiz, where prevailing antislavery sentiment was exceptionally strong. Indeed, we today find record of petitions and resolutions adopted by the Cadiz societies in 1837 which employed the identical due process-comity clause phraseology for which Bingham, thirty years later, showed preference in his drafts.⁴⁴

Finally, one is better able to understand Chief Justice Taney's catastrophic use of due process in the *Dred Scott* case. That he should revive the doctrine of the Pinckney report was quite as natural as that his heresy be furiously proclaimed and combatted, and ultimately overcome by forces unleashed by the abolitionists' broader usage.

What would seem to be the implications of these discoveries? Are we not obliged to consider whether, in the attempt to avoid certain notorious pitfalls of historical interpretation, legal scholarship has not lapsed into errors almost as serious? Skepticism apparently has magnified the obstacles to early due process usage, mistaken its character, even overlooked its real foundations. Grant that the pioneer users could scarcely have foreseen post-Civil War developments, much less have been guided or benefited by them. Does it follow that they lacked incentive and grounds for interest; that arguments *ad hominem* were scorned, or, if made, that they were insignificant?

Our thinking on these matters has gone aground on the very rocks it would avoid. Hindsight has projected backward the current, yet highly artificial, distinction between procedure and substance. And it has missed almost entirely the significance of the then universal belief in natural and inalienable rights. Concerned with only a few major cases, and with prevailing opinions in those, with little attention to the briefs, and often none to chronology, assuming public apathy and indifference to follow as a matter of course because due process *today* is a highly technical field, and even then was an ancient one, we have emasculated both the law and lawyers and conjured up some strange anachronisms: "Bible and Blackstone," "hammer and tongs" counsel and their circuit riding judges—often armed only with a Kent or Story, and arguing mainly from Locke, the self-evident truths and the Preamble—such men still supposedly approached problems of legislative power and judicial relief with the nice distinctions of a third-year class dissecting *Taylor v. Porter*. Yet these were days when the cleaver did duty as scalpel, and both amputees and surgeons were concerned more with self preservation than with scarless sutures. Modern rule-minded lawyers and connoisseurs of technique therefore must make heroic efforts to understand the primitives. Starting points in this regard are simply (1) the natural rights philosophy and limited government premises were controlling, not the historic limits of the clause; and (2) that any natural rights-natural justice usage was potentially (if not actually) a substantive usage.

⁴⁴ Graham, *supra* note 23a, at 623-624, and especially notes 150, 255.

If the facts of a case, on modern analysis, reveal it as strictly procedural, well and good. But no such sophisticated nonsense need be imputed, for example, to the Tennessee counsel and judges who seized on Justice Catron's dictum in *Vanzant v. Waddel*,⁴⁵ using it time and again in the thirties and forties, to kill outrageous special acts. If we are obliged to make assumptions regarding the mental set and motivation of such pioneers, it seems far more likely they were conscious of that clause in the Tennessee Constitution which declared "non-resistance against arbitrary power and oppression, is absurd, slavish, and destructive to the good and happiness of mankind,"⁴⁶ than they were of any shadowy distinctions between procedure and substance. No introspection, little hesitancy, no divining rods were needed by these counsel and judges confronted with the practical problem of doing justice as they saw it. For in addition to the usual narrow law of the land clause taken bodily from Magna Carta, the Tennessee Constitution contained the same wording which the Ohio abolitionists used against their Black laws. "[A]ll courts shall be open; and every man, for an injury done him . . . shall have remedy by due course of law, and right and justice administered without sale, denial, or delay."⁴⁷ Obviously this guarantee of judicial redress, which appeared also in the Constitution of Pennsylvania,⁴⁸ was a powerful factor in encouraging strong use of the due process-due course-law of the land concept as a weapon against legislative excesses. Equally important were the preambles and opening sections of many of the state bills of rights. In various forms, these repeated the Lockean-Dclaration of Independence postulates regarding human freedom and equality, and man's inherent and inalienable rights of "acquiring, possessing and protecting property."

In short, it may be said that the most expansive interpretations of due process did not flow from the sparse Magna Carta-Fifth Amendment wording. They emerged from the broader state clauses related to (and used in conjunction with) sweeping Lockean phraseology which gave free wheeling to such premises as "Due process requires judicial process . . . reasonableness . . . equality of protection . . . substantiality of purpose." Thus the due process funnel originally was inverted. Dicta and holdings were caught from numerous guarantees, pooled under the one heading, which in time became shorthand for a whole reservoir of concepts.

That something of this sort is the heart of the matter is evident when we take a look at the early law journals and reports. Observe, for example, what is found regarding due process as understood and discussed in 1843-45, immediately after Judge Bronson's opinion in *Taylor v. Porter*.

The *Western Law Journal*, edited in Cincinnati by Timothy Walker, carried a fierce, rambling debate on the subject of "Curative Statutes" or

⁴⁵ *Supra* note 5. Paraphrasing Webster's *Dartmouth College* definition, Catron had declared "The clause 'law of the land' means a general and public law, equally binding upon every member of the community."

⁴⁶ TENN. CONST. Art. I, § 2 (1836).

⁴⁷ *Id.* Art. I, § 17.

⁴⁸ PA. CONST. Art. IX, § 11 (1838).

"Retrospective Laws" dealing with the Ohio legislature's power, just denied by a divided Supreme Court,⁴⁹ to validate married women's conveyances defective for want of proper acknowledgments. Fifty pages, scattered through three numbers,^{49a} of attack, counter-attack, rebuttal, rejoinder were written by two able lawyers in a roundhouse argument that speaks volumes. G. M. Tuttle defended the clumsy legislative shortcut as the necessary price of preventing Elizabeth Zercher from avoiding her contract; Simeon Nash ignored the sharpers as the necessary price for maintaining a doctrinaire's hostility to all retrospective laws. In some respects the performance merits inclusion in a *Readings in Jurisprudence*. Even Tuttle, who clearly saw and exposed the fallacies whereby the Court and Nash elevated existent acts into constitutional limitations, and who stood staunchly on the positive law as the determinant of what actually is "property" protected by the Constitution, became so ensnared in his natural rights rhetoric that his case was weakened and undermined.⁵⁰ Nash, on the other hand, chided Tuttle for relying on higher law premises, blissfully unconscious of his own!

Yet Nash knew his Ruffin, Kent, and Bronson; he was destined for the Bench and already could improvise with the best of them.⁵¹

I deny that such a law, if law it may be called, is passed in reasonable exercise of legislative authority. It not only operates retrospectively and thus contradicts the essence and nature of law, but in thus attempting to deprive one man of a vested right for the benefit of another, it violates the natural and unalienable rights of humanity; rights which are superior to and beyond the reach of any earthly authority whatever. What these rights are is settled by the constitution itself The first section . . . declares that every person has a natural right of possessing and defending property and [the 7th] that for an injury to his property, or his personal rights he shall have a remedy by due course of law. The right of possessing and acquiring property is not only declared inviolate, but the courts are required to remain ever open to afford a speedy remedy, by due course of law, to every person for any injury done him in his person or property. How then can the legislature deprive him of this right to appeal to the courts for a remedy, for what was at the time an injury to his property as vested in him by law, by enacting that what *was* an injury to his property, or person, is not injury, and shall be so adjudged by the courts. What was once an injury to him in his person or property must ever remain such; and no authority known to our constitution can alter its character.

⁴⁹ *Good v. Zercher*, 12 Ohio 364 (1843). The decision was followed and affirmed in numerous other cases 1844-47 (*Meddock v. Williams*, 12 Ohio 377 (1843); *Silliman v. Cummins*, 13 Ohio 116 (1844); *Robb v. Lessee of Irwin*, 15 Ohio 689, 704 (1846)) but finally was overruled in December, 1847, after arguments by Henry Stanbery, Rufus King and Thomas Ewing, *Chestnut v. Shane's Lessee*, 16 Ohio 599, 611 (1847).

^{49a} The controversy began in the January, 1845, number of 2 *WESTERN L.J.* with simultaneous publication of *Remarks on . . . Good v. Zercher* by G. M. Tuttle, at 154, and *The Constitutionality of Retrospective Statutes* by Simeon Nash, at 170. Nash's article was continued in the February number, at 197; his *Reply to the Review of Good v. Zercher* appeared in March at 257. Tuttle's rejoinder, published in the September number, at 534, concluded the debate.

⁵⁰ *Id.* at 157-159, 537-539; cf. Nash, *supra* note 49a at 177, 263-265.

⁵¹ *Id.* at 177-178.

Then comes the clincher, as italicized by Nash himself.⁵²

The *private* property of one man cannot be taken for the *private uses of another* in any case. It cannot by a mere act of the legislature be taken from one man, and vested in another directly; nor can it, by the *retrospective operation* of laws be indirectly transferred from one to another; or subjected to the government of principles in a court of justice, which must necessarily produce that effect.

Next, turn to the *American Law Magazine*, the oracle of Philadelphia lawyers, which carried a thirty page anonymous article in July, 1843, entitled "The Security of Private Property."⁵³ The thesis is implicit in the title: man's happiness and progress have been in direct proportion to the security accorded property. Property, moreover, is timid, unstable—"in need of every parchment barrier which has been or can be thrown around it." "In a republic, where the legislature . . . is annually elected, and where . . . legislation partakes . . . of the passions and impulses of the moment, it is important to inquire into the extent of the power possessed by the majority, to encroach upon the fruits of honest industry, or interfere with the proprietor in his free and undisturbed possession and enjoyment."⁵⁴

Promising beginning! And the author revealed immediately what was on his mind: "The right of eminent domain"—a power of sovereignty—and incidentally the subject of *Taylor v. Porter*! Lengthy quotations then followed from Grotius, Rutherford, Pufendorf, Burlamaqui, Vattel, and Kent—all stressing the bounds of the power and its limitation to "cases of urgent state necessity, or obvious public utility."

Chief Justice Gibson had gone astray, alarming the property-conscious. Three years before, speaking for the Pennsylvania court in *Harvey v. Thomas*,⁵⁵ he upheld an act of 1832 which authorized construction and outlined procedure whereby owners of property along railroads or canals might build connecting roads or sidings, the eminent domain power being expressly conferred for "public or private use." Neither the propriety nor grounds of the decision were questioned. Pennsylvania did indeed have, said the author, quoting the Chief Justice, "an incalculable interest in her coal mines; nor will it be alleged that incorporation of railroad companies for the development of her resources . . . would not be a measure of public utility; and it surely will not be imagined that a privilege constitutionally given an artificial person, would be less constitutionally given to a natural one."⁵⁶

The grievance was rather the unparsimonious language in which the Chief Justice, near the close of his opinion, had sustained the power as

⁵² *Id.* at 179. Nash incorrectly cited 3 Greenleaf 290. He quoted C. J. Mellen's opinion in *Kennebec Purchase v. Laboree*, 2 Me. 253, 267, 2 Greenl. 275, 290-291 (1823)—a strong use of Lockean state constitutional clauses which itself supports our thesis regarding such phraseology.

⁵³ 1 AM. L. MAG. 318.

⁵⁴ *Id.* at 319.

⁵⁵ 10 Watts 63, 36 Am. Dec. 141 (Pa. 1840). COOLEY, CONSTITUTIONAL LIMITATIONS 357, 531 (3d ed. 1874) contrasted *Taylor v. Porter* and *Harvey v. Thomas*.

⁵⁶ *Harvey v. Thomas*, *supra* note 55 at 66-67, 36 Am. Dec. at 144.

applied to private, that is, quasi-public use: the just compensation clause was a limitation, "and the [sovereign] right would have existed in full force without it." Hence, there was "nothing in the Constitution to prevent" such legislation.

The remaining half of the article therefore, was an implied rebuke to the Chief Justice. More than that, it was a searching exploration of the due process-law of the land phraseology, both as to constitutional texts and cases (including elaborate quotations from *Hoke v. Henderson* and the Tennessee and South Carolina landmark cases, ending with a review of the early New York eminent domain cases from which *Taylor v. Porter* had been synthesized just a few months before).

The writer began by acknowledging that the state governments, unlike the federal, are governments of general powers.⁵⁷

Yet what are the general powers of government in a civilized society? Is there no *lex legum*, independent of express constitutional restrictions? It may be a wide and dangerous door to open to judicial discretion, to say, that they shall apply to the question of validity or invalidity of legislative acts, the general principles of just government as laid down by the most eminent jurists and text writers. Yet suppose the legislature to pass a law arbitrarily depriving a citizen of life or liberty, without fault or crime on his part, must we look to the constitution for an expressed disaffirmance of such a power?

If so, he continued,

There exists a disaffirmance of it, clear, positive, and unequivocal in the words of magna carta transferred into the bill of rights of every state of the Union which has a bill of rights, and standing out in bold relief in the . . . constitution of Pennsylvania.

After quoting the full texts, and Coke's familiar elucidation:

The same provision which secures our lives and liberties against an arbitrary exercise of legislative power, and there is no other, extends to our property.

Following brief reference to other clauses deemed potential bulwarks, he continues:⁵⁸

Fortunately, these broad positions of the Supreme Court of Pennsylvania are not sustained by the current of American decisions.

Then follows the elaborate case analysis, ending:

The authorities might be multiplied. It is consoling to find the sound positions of the general writers thus practically enforced through an independent judiciary; and the reader of this article will lay it aside with the reflection that the liberty of the republican states of America will owe their perpetuity to their courts, executing the supreme will of the people against

⁵⁷ *Supra* note 53, at 334-335.

⁵⁸ *Id.* at 337-338.

acts of tyranny and oppression, whether proceeding from the executive or the legislature.

It would be interesting indeed to know who was the author of this remarkable piece. It was written, during the very months when the New York Court was hearing and deciding *Taylor v. Porter*, or shortly thereafter.⁵⁹ One feels safe only in suggesting that, whoever he was, he could hardly have been surprised or disappointed when he learned of Judge Bronson's opinion. And across the line in New York, Judge Bronson must have welcomed, and perhaps wondered a little, at such timely support. Only those who have missed the implications, and indeed our whole thesis, will need to consider correspondence or telepathy!

Finally, turn to the cases from Illinois, at the December term, 1845. How far, how fast, did the magic spread? Or was it endemic, indigenous?

*Rhinehart v. Schuyler*⁶⁰ held the revenue laws of the State of Illinois, from 1823 to 1829 inclusive, constitutional, and held further that the registry laws did not apply to patents or deeds emanating from the state or the United States. An auditor's deed, therefore, was admissible in evidence, without proof of its execution, and without showing that it had been regularly acknowledged and recorded, as required in cases of conveyances affecting only the interests of private individuals.

The report runs sixty-eight pages; with a three to two decision, two judges not sitting, and a strong dissent. "Judgment entered December term, 1843; opinion of the court not delivered until the present term"—two years later! There are twenty pages of briefs and arguments: N. H. Purple, A. Williams, J. Butterfield were all fighting to overturn tax laws and titles twenty years old or more; three of the ablest lawyers in the state—O. H. Browning, S. T. Logan, E. D. Baker, all friends of Lincoln (and Logan, his partner),⁶¹ staved off chaos by a single vote. Due process was the spearhead of the attack—obviously inspired by reconstitution of the Court. *Taylor v. Porter* and *Hoke v. Henderson* were both heavily relied on by Williams, who never had heard of the goose and golden egg.⁶² Laws of nineteen states

⁵⁹ *Taylor v. Porter* was decided "Jan. term, 1843"; and volume four of Hill's *Reports* was published late in 1843 or early in 1844 and is digested in 7 MONTHLY LAW REPORTER 481 (January 1845). Since the author of *The Security of Private Property*, *supra* note 53 (July, 1843) made no reference to the case, when he had every reason for doing so, one concludes he was unaware of it. The strong reliance on continental authors, together with the *lex legum* argument in favor of general jurisprudential authority, suggest Peter Stephen du Ponceau, 1760-1844, the eminent Franco-American lawyer of Philadelphia, as a likely author. Cf. the similar *lex legum* ideas advanced in his DISSERTATION ON THE NATURE AND EXTENT OF THE JURISDICTION OF THE COURTS OF THE UNITED STATES (1824) p. 126-132; and see BAUER, COMMENTARIES ON THE CONSTITUTION, 1790-1860 (1952) for a recent biographical sketch.

⁶⁰ 7 Ill. 375, 2 Gil. 473 (1845).

⁶¹ *Id.* at 377, 390, 2 Gil. at 476, 491 (Browning); *id.* at 387, 2 Gil. at 488 (Baker); *id.* at 389, 2 Gil. at 491 (Logan). Baker's argument that the "law of the land" meant a "law as defined by Blackstone and Demosthenes," and Logan's contention that the principle of separation of powers had been "proclaimed hundreds of years ago at Runnymede" dramatize the handicaps of blackletter research at circuit. Fortunately, soundness of public policy and common sense counted most heavily with such men.

⁶² *Id.* at 382, 2 Gil. at 482 (Williams).

out of twenty provided for summary tax sales, and most of them made tax deeds prima facie evidence of title. Even the minority bowed out, confining dissent to the valuation requirement.

In short, due process was condemned to vegetate a while longer, not from ignorance of its potentialities, but from overdemonstration and abuse of them.

CONCLUSION

Obviously there have been blind spots in evaluations of the factors responsible for the shifts in due process. Widespread popular and forensic use of the guarantee did not depend on, nor wait upon, either a correct appreciation of historic meanings or the *judicial* discovery of substantive values. Reluctance to endow corporation lawyers and drafters of the Fourteenth Amendment with intuition and foresight has obscured the fact that in many of these matters intuition and foresight were not required.

Far from deriving from professional usage of the clause, public use—and misuse—preceded, stimulated, and at times unquestionably conditioned use by the Bench and Bar. Perhaps in some cases our premises need to be almost inverted. Generally speaking, political, party platform and congressional uses have been assumed to have derived from the judicial,⁶³ whereas evidence clearly points as often in the opposite direction. Idealism and opportunism, both born of the almost universal reliance on natural rights principles, gave due process its tremendous popularity and built on its inherent advantages.

Declining public interest in constitutional law, the current trend toward judicial self-limitation, the modern tendency toward more sophisticated forms of natural rights thinking, all combine to make these facts a bit difficult to grasp. Yet in so far as the public's contributions are concerned, there should be little cause for wonder. Laymen rarely have needed lessons from lawyers or judges to uncover and exploit a nice rhetorical question beggar. And it is no reflection on due process to acknowledge that the clause was one of the neatest, as certainly it is still one of the noblest formulas of this type ever devised. Why wonder then, at these parallel uses and explorations by the public and judiciary? Together they simply give a new twist to Professor Powell's celebrated dictum: "Much of the logic and rhetoric of constitutional law may be peculiar; but it is not peculiar to constitutional law."⁶⁴ Americans may be proud and thankful to discover, certainly in these times, that broadened and discretionary due process, far from being an excrescence or tool of ambition, is in reality so deeply enrooted in our national consciousness that its judicial achievement was quite as much a result as a cause of widespread popular usage.

⁶³ Originally, in discussing the Bingham-Bliss use of due process in the slavery debates of the fifties, the writer so assumed: (Graham, *supra* note 15); he herewith recants. Granted strong natural law, premises and habits of thought, the professional compulsions of law and politics were about equally efficient as triggers of due process usage. Cross-fertilizations undoubtedly were common, but need not be assumed.

⁶⁴ Powell, *The Logic and Rhetoric on Constitutional Law*, 15 J. PHIL. PSYCH. AND SCI. METHOD 654 (1918), 1 SELECTED ESSAYS CONSTITUTIONAL LAW 474, 487-488 (1938).