

**AN ASIAN PERSPECTIVE ON THE AMERICAN
CONSTITUTIONAL INFLUENCE IN ASIA: ITS IMPACT ON
THE PHILIPPINE LEGAL SYSTEM***

It is a privilege highly esteemed to have been invited to take part, even in a modest capacity, in the bicentennial celebration of the American Declaration of Independence. Rightfully has it been observed by Laski that the history of this great nation "has changed the outlook of mankind wherever there has been power to reflect on the meaning of human affairs."¹ As he stated further: "No state, until our own day, has done so much to make the idea of progress part of the mental make-up of man. No state, either, has done more to make freedom a dream which overcame the claims both of birth and of wealth."² De Tocqueville³ and Bryce,⁴ writing at earlier periods, were similarly laudatory. There is considerable justification for this country then to take legitimate pride in what has been accomplished these past two hundred years and to look forward with reasonable and cautious optimism to what may be achieved in the next century.

The author of this paper is an Asian coming from a nation which for almost half a century, from 1898 to 1946, was under American sovereignty. Necessarily, he is a product of the American system of education then followed during such period. If the further consideration be borne in mind that the Philippines was likewise under Spanish colonial rule for over three hundred years dating from 1565, it may be readily discernible why his thinking is colored by Western legal ideas. There was a time when there was well-nigh an automatic acceptance of their applicability to local conditions. Fortunately, that time is no more. Since independence, there has been a greater sense of discrimination and likewise a greater appreciation of the nation's oriental heritage, even insofar as the ways of the law are concerned. The author, however, belongs to a generation that was not the beneficiary of such an approach. As a result, his study of the legal systems of neighbouring Asian countries is rather meager. He is the first to admit then that what may come from his pen in connection with their constitutional concepts would suffer from the vice of being sketchy and impressionistic at most, with the ever-present possibility of inaccuracies. Nonetheless, an attempt will be made to refer briefly to comparable constitutional provisions in the charters of Southeast Asian states including India, Pakistan and Sri Lanka, formerly Ceylon. Japan and South Korea will also receive some attention. The con-

* Paper submitted to the Association for Asian Studies in connection with the Bicentennial Celebration of the United States.

¹ Laski, *The American Democracy* 3 (1948).

² *Ibid.*

³ De Tocqueville, *Democracy in America* (1830).

⁴ Bryce, *The American Commonwealth* (1888).

centration though, for obvious reasons, will be on the legal system of the Philippines. The author intends to submit a few reflections of a general character. After which, an attempt will be made to make a brief survey of the Philippines and certain Asian constitutions in terms of two leading concepts, constitutional rights and judicial review, with a brief and possibly inconclusive survey of American Supreme Court decisions deemed relevant. It seems best to limit thus the field of inquiry as the equally significant aspects of American constitutionalism, federalism and the presidential form of government, by and large, have not recommended themselves for adoption in this part of the world.⁵

1. *Reflection on Asian Constitutions of Post World-War II Vintage: The United States as a Model*

It is to the credit of President Wilson that after World War I, he was a brilliant and persuasive advocate of the principle of self-determination—one nation, one state. That is to exemplify the concept of Esmein that a state is nothing but the juridical personification of the nation.⁶ This idealistic note struck a responsive chord. It intensified the feeling of nationalism among peoples still smarting under foreign rule. It evoked their enthusiasm and stirred their hopes. It signified for them the end of colonialism—and it was high time, too. For those in Asia and Africa, the regret was that the blessing of such a gospel was not extended to them until after World War II. Then, they had their day. Speaking of Asia alone, the Philippines gained her independence on July 4, 1946. In 1947, India, Pakistan, and Ceylon, now Sri Lanka, dissolved their ties with Great Britain. Burma followed early in 1948. So did Malaysia, but not until 1957. The Indonesians broke away from Dutch rule as early as 1945. The former French Indo-China now comprises Vietnam, Cambodia and Laos, the first of them asserting her freedom in 1945 and the last two in 1949. Singapore left Malaysia in 1965 and Bangladesh seceded from Pakistan in 1971. Korea, occupied by the United States and Russian armed forces after World War II, was lost to Japan in 1948, at present there being the Democratic Peoples Republic in the north and, in the south, the Republic of Korea.

At long last, a number of Asian peoples of diverse creeds and cultures but with the common objective of freeing themselves from the grip of alien rule assumed their independent status, full of hopes and aspirations for a better way of life. Stevenson, writing in 1954, could speak of millions of human beings from Africa to Indonesia, “emerging from foreign domination and fiercely demanding relief from hunger, pestilence, and oppression.”⁷ There was, and understandably so, the flowering of nationalism, as a means of attaining what he had so felicitously termed as their “suddenly unchained aspirations.”⁸ Competent observers of the Asian scene, orientals and occidentals alike, are thus unanimous in their view of its potent influence at work. Holland could picture it “as a huge and often uncontrolled source of

⁵ India and Malaysia are now the only two countries that have a federal structure. It was so with Pakistan until Bangladesh seceded in 1971. The presidential system is likewise in disfavor, except in Indonesia and Korea.

⁶ Cf. Cohen, *Recent Theories of Sovereignty* 15 (1937).

⁷ Stevenson, *Call to Greatness*, 38.

⁸ *Ibid.*, 43.

energy.”⁹ Asian peoples, according to Buss, “usually cool and unemotional about political programs, become heated over nationalism.”¹⁰ As Rosinger stated, the “fires of nationalism” burn brightly, having been fed by the “poverty and discontent of masses of people” and “the deep Asian resentment at Western racial attitudes.”¹¹ The same thought is echoed by Stevenson: “Nationalism is rampant. And the West, identified with the hated colonialism, is suspect.”¹² Taylor, with specific reference to American foreign policy, was quite categorical: “Mutual confidence is hard to establish for most of the countries of Southeast Asia have been colonies for varying lengths of time and their nationalist movements have a history of anti-West and often anticapitalist feeling.”¹³

There is pertinence to the query, therefore, of the effect of such dominant sentiment on the influence of American constitutional ways in the framing of the fundamental laws of each of these new states. The question does not admit a uniform answer. The fires of nationalism burned just as brightly in the Philippines in the past as they do now, but there has never been any occasion for deep resentment, much less bitter hostility, against the West, except perhaps during her armed conflict, first with Spain to fight for independence and then with the United States at the beginning of the century to keep it, in view of her being ceded by the former to the latter under the Treaty of Paris of 1898, when in her view Spain had lost the right to do so as the revolt against her by the Filipinos was successful. It is a matter of history that the Philippines fought the United States in the early years of this century, but was overcome by superior force of arms. Thereafter the relationship was peaceful. At present, it may be affirmed that the majority of Filipinos look back with satisfaction at the introduction of the Christian religion by Spain and of the democratic ways and institutions by the United States. What is more, the years immediately after World War II witnessed a most cordial era as it was the American armed forces with the assistance of the local guerilla units that ended the grim period of Japanese occupation.¹⁴ The question, moreover, lacked the immediacy then of a vital contemporary issue as it was the decision arrived at in the Constitutional Convention of 1934-1935 that the charter to be drafted would be not only for the Commonwealth, a transition stage from an American unincorporated territory to an independent existence but also for the future Republic of the Philippines a decade hence. The 1935 Constitution of the Philippines, as could have been expected in view of the training in self-government under American tutelage, embodied certain basic features of American polity as the presidential form of government, the function of judicial review and a bill of rights. It must be made

⁹ Holland, *Asian Nationalism and the West* 5 (1953).

¹⁰ Buss, *The Arc of Crisis* 24 (1961).

¹¹ Rosinger and Associates, *The State of Asia* 3 (1953).

¹² Stevenson, *op. cit.*, 73.

¹³ Taylor, *The Philippines and the United States* 8 (1964).

¹⁴ As noted in *Commissioner of Internal Revenue v. Guerrero*, L-20812, September 22, 1967, 21 Supreme Court Reports Annotated, hereinafter referred to as SCRA, 180, at p. 188, the role that the United States played in liberating the Philippines, considering that from 1942 to 1945 the Japanese army during the occupation period enforced repressive measures, severe in character, “elicited a vast reservoir of goodwill for the United States, one that has lasted to this day notwithstanding irritants that mar ever so often the relationship even among the most friendly of nations.”

clear that the need for a strong executive and the guarantees of individual rights could be traced to the Malolos Constitution of 1898, the fundamental law of the Filipinos just shortly after her successful revolution against Spain and before the American regime.

South Korea, now the Republic of Korea, is equally nationalistic, but her having been spared from domination by a Western power ruled out any sense of dissatisfaction with the United States, to which, moreover, she is bound by ties of gratitude, as it was her troops that played a decisive role in the bitter fratricidal conflict between her and the North. India, Pakistan, Burma, Sri Lanka, Malaysia and Singapore, all former colonies of Britain, even if there were long pent-up grievances against the latter, appeared content with the introduction in their respective legal systems of the English common law, the merits of which they were cognizant. It is easily understandable then why for them there may be certain American constitutional concepts that could serve as models for possible inclusion in their respective charters. Indonesia, formerly a Dutch possession, was hardly an enthusiast as far as occidental culture is concerned. It does not mean, however, that the United States has nothing to offer as far as drafting a constitution is concerned.¹⁵ Considering recent events, it will be highly unrealistic to look for traces of American influence in the fundamental laws still in the making in Vietnam, Cambodia, and Laos.

The case of Japan is unique. She has been and is now fiercely nationalistic. For a long time she kept the West away from her shores, but from the Meiji era in the third half of the nineteenth century, she had successfully made use of occidental institutions and practices suitable to her needs. Then came World War II, where she was among the vanquished. That was followed by the framing of her present Constitution, when she was under Allied occupation with General Douglas MacArthur as the Supreme Commander. There is nothing surprising then in her incorporating therein quite a number of wellknown American doctrines, especially where individual rights are involved. There is, in addition, the adoption of the concept of judicial review. The words of the distinguished Japanese constitutionalist, Professor Masami Ito,¹⁶ are instructive:

The Japanese Constitution legalizes the doctrine in two ways. In the first place, fundamental human rights receive strong guarantees against arbitrary exercise of any governmental power. Under the present Constitution, even a law enacted by the Diet, which under Article 41 of the Constitution is the highest organ of state power, shall not have legal force when it invades the constitutional area of individual freedoms and rights. In the second place, judicial review of legislation is recognized. Modeled after American constitutional practice, article 81 vests the courts, especially the Supreme Court, with the power to determine the constitutionality of any law, order, regulation, or official act. The power of judicial review seems to be the most universally typical institution embodying rule of law. 'It was Coke's version of the supremacy of the common law principles as exemplification of rules of reason and of

¹⁵ Fortunately, Chief Justices Tun Mohamed Suffian of Malaysia and Omar Seno Adji of Indonesia as well as Dr. P.K. Tripathi of the India Law Commission are distinguished participants of this program and thus could supply whatever deficiency may be detected in this paper as far as those countries are concerned.

¹⁶ Again, the presence of this noted scholar in this bicentennial seminar is to the advantage of all participants including the writer, who is thus relieved of the task of delving more deeply into Japanese constitutionalism.

justice that served as a convenient precedent when American justices were confronted with the demand that limits must be placed on legislative powers in order to safeguard individual rights and privileges.¹⁷

What may be impressed with more significance, however, is not so much the absence of any evidence indicative of displeasure with or resentment against the United States as a major Western power, this in the face of the brand of nationalism aroused in these new Asian states. It is the relative freedom possessed by them in the framing of their constitutions upon assuming their independent status. They could then examine the contents of existing charters and determine which were suitable. They had, as it were, quite a counter from which to make their selection. To paraphrase Hamilton, they were given the opportunity to show their capability of establishing a good government from reflection and choice rather than depend solely on accident and force.¹⁸ They could, and did envision their constitutions as a vehicle, in the language of Zurcher, "to codify a rational and progressive political order [and] to discourage the abuse of political power."¹⁹ Not only could they serve as symbols of political unity or as instruments of political discipline. They could also demonstrate political maturity. Perhaps, much more so, they could serve to stress the basic principle of constitutionalism, the idea of a higher law, one which has superior obligation and validity, intended to give assurance that membership in an independent political community is not incompatible with respect and deference for individual rights. With such ideals in mind, certainly, the American Constitution of 1787, as amended and as interpreted in landmark decisions, could very well serve as fit model. That would be to reinforce their faith in the possibility that what Jefferson called "the disease of liberty" may be spread in distant lands and far-off domains.

To be realistic about the matter, the American influence may be limited to the incorporation, whether in express terms or by implication, of selected provisions or doctrines traceable to its Constitution. It may, therefore, be on a purely verbal level. For the warning of its great jurist, Oliver Wendell Holmes, is ever timely. Constitutional provisions are not to be considered in the light of mathematical formulas having their essence in their form. They are organic living institutions. Their significance is vital, not formal.²⁰ As was so emphatically pointed out by him: "Constitutions are intended to preserve practical and substantial rights, not to maintain theories."²¹ It would be then to err on the side of undue optimism if the presence in the charters of these new Asian states of juridical formulations traceable to the American Constitution would be equated with the complete acceptance of what they signify for the American legal system. It does not admit of doubt though that by their inclusion, there is at least manifest an intention not to ignore the meaning attached to them in the country of origin. There is likely to be that subtle weaving

¹⁷ Ito, Masami, *The Rule of Law: Constitutional Development in Law in Japan*, von Mehren, ed., 207-208 (1962).

¹⁸ Cf. Hamilton, *The Federalist*, Modern Library Edition 3 (1937).

¹⁹ Zurcher, *Constitutions and Constitutional Trends Since World War II* 1 (1951).

²⁰ Cf. *Gompers v. United States*, 233 US 604, 610 (1914).

²¹ Cf. *Davis v. Mills*, 194 US 451, 457 (1904).

of what is native with what is foreign. It would be disappointing if the result is merely a canonization of accepted and traditional concepts, divorced from the actualities in their new locales. No juridical bridge of firmness could be built on so shaky a foundation.

2. *The American Bill of Rights: Its Impact on Asian Nations*

The United States Constitution as drafted by the Philadelphia Convention in 1787 and as ratified had no separate article on a Bill of Rights. It would be inaccurate to assert, however, that the subject was completely ignored. The first Article, dealing with legislative power explicitly provides: "The Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public safety may require it."²² The very next paragraph reads: "No Bill of Attainder or ex post facto law shall be passed."²³ Moreover, as far as a State of the Union is concerned, it is prohibited from passing "any Bill of Attainder, ex post facto Law, or Law impairing the Obligation of Contracts,...."²⁴ It is to the first eight Amendments adopted in 1971 that the term is more often applied. It extends the so-called Civil War Amendments, the Thirteenth ratified in 1865 prohibiting slavery and involuntary servitude,²⁵ the Fourteenth in 1868 providing for national citizenship and exacting that state action conforms to the standard of due process and equal protection,²⁶ and the Fifteenth in 1870 assuring the right to vote to any American citizen irrespective of race, color, or previous condition of servitude.²⁷ The Nineteenth Amendment approved in 1920 extended the right of suffrage to the female sex.²⁸ It can be affirmed then that it was in 1791 that the prime safeguards of American freedom became part and parcel of the United States Constitution. That famed American jurist, Learned Hand, stated that what has come to be called the American Bill of

²² Article I, Section 9, par. (2) of the United States Constitution.

²³ Article I, Section 9, par. (3) of the United States Constitution.

²⁴ Article I, Section 10, par. (1) of the United States Constitution.

²⁵ The first Section of the Thirteenth Amendment to the United States Constitution reads: "Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist with the United States, or any place subject to their jurisdiction." The second Section empowers Congress to adopt appropriate legislation.

²⁶ The first Section of the Fourteenth Amendment to the United States Constitution provides: "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. 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 laws." The second, third, and fourth Sections, now impressed with historical interest merely, speak of the apportionment of representatives, the ban against holding public office, whether elective or appointive, on those who had engaged in insurrection or rebellion, and the validity of public debts of the United States incurred in connection with the Civil War, but excluding any traceable to aiding such insurrection or rebellion. The fifth Section authorizes Congress "to enforce, by appropriate legislation, the provisions of this article."

²⁷ The first Section of the Fifteenth Amendment is worded thus: "The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude." Congress, in its second Section, is given the power to enforce this provision by appropriate legislation.

²⁸ The Nineteenth Amendment reads in full: "The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of sex." Congress shall have power to enforce this article by appropriate legislation.

Rights refers to the first eight of such amendments as well as the Fourteenth Amendment of the United States Constitution.²⁹

The scope of the civil liberties in the original text and in the first eight Amendments was well-nigh all-inclusive in terms, to follow Laski's formulation, of "rights as boundary marks which traced out areas of conduct the state [is] not normally entitled to invade."³⁰ There was necessity, as far as the United States was concerned, for all ten of them. From the standpoint of coverage, and, much more so, of the influence they were to exert in other lands and later times, only the First, the Fourth, the Fifth, the Seventh and the Eighth of these amendments call for further treatment.³¹ The First Amendment deserves to be quoted in full:

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.³²

Of equal importance for the rights of man is the due process amendment, the Fifth:

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty or property, without due process of law, nor shall private property be taken for public use, without just compensation.³³

This guarantee, as noted, extends to state action under the Fourteenth Amendment, which likewise assures equal protection. The safeguards thus thrown around an accused include the prohibition against unreasonable search and seizure under the Fourth Amendment³⁴ and the right to a speedy and public trial by an impartial jury with the assistance of counsel under the Sixth and Seventh Amendments.³⁵

²⁹ Learned Hand, *The Bill of Rights* 1 (1958).

³⁰ Laski, *The State in Theory and Practice* 35 (1935).

³¹ The Second Amendment states: "A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed." This is the Third Amendment: "No soldier shall, in time of peace be quartered in any house, without the consent of the Owner, nor in time of war, but in a manner to be prescribed by law."

³² The First Amendment of the United States Constitution.

³³ The Fifth Amendment of the United States Constitution.

³⁴ The Fourth Amendment reads: "The right of the people to be more secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

³⁵ The Sixth Amendment provides: "In all criminal prosecutions the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence." The Seventh Amendment is worded thus: "In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law."

Then there is the Eighth Amendment: "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishment inflicted."³⁶ The Ninth Amendment³⁷ which provides that the "enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people." It is thus rendered clear that what is found in a constitution is a recognition, not a grant, of rights — and, at that, not a comprehensive one either. Even in 1791 then, there was juridical support for the idea of their being inherently possessed by every human being.

It was not too long ago that the New York University School of Law published a volume entitled *The Great Rights*, edited by the late Professor Edmond Cahn, containing the James Madison Lectures from four distinguished American jurists, Justices Hugo L. Black, William J. Brennan, Jr., Earl Warren and William O. Douglas. The volume opens with Cahn's essay emphasizing the great debt owed Madison for the American Bill of Rights. Thus:

Something daring and novel was in the wind which caught the finest minds of the time and inflamed them. The military aspect of an all-pervasive American Revolution and the question to be decided was not whether Americans should regain the rights that Englishmen had considered customary but whether for the first time in human history any man anywhere could enjoy the full political dignity to which all men were born. Though English notions of liberty were obviously useful, they were inadequate. What America promised must be nothing less than a new kind of society — fresh, equal, just, open, free, and forever respectful of conscience.³⁸

To the question of how "to implement this vision and find constitutional machinery"³⁹ to lend it force and effectivity, he answered:

The breakthrough came because Madison believed profoundly that in America the people were sovereign and the officials their mere trustees, agents and servants. He put it neatly: 'In Europe,' he wrote, 'charters of liberty have been granted by power.' And in America? 'Charters of power granted by liberty.' In Magna Carta where King John, though acting under coercion of powerful nobles, nevertheless spoke as monarch. 'We will not' was deemed fitting (in Latin, of course, for the benefit of the common man). In the English Bill of Rights where William and Mary, though accepting the conditions that Parliament had exacted, still spoke as sovereign, 'ought not' was deemed bold enough for the protection of the rights of subject. But when the American people in 1789 prescribed the acts that their new Federal Government must either not do or do only in a particular manner, they were entitled to say 'shall not,' the language of command. Thus, the old flaccid promises and pious exhortations were at last toughened into imperative law.⁴⁰

What is embraced in the term "imperative law" is not limited to the literal language of the provisions as found, which in most cases are phrased in general terms allowing a great deal of discretion and flexibility in their application. Their history, of course, cannot be ignored. There is truth, moreover, in this observation of Justice Frankfurter: "Deeply imbedded traditional ways of carrying out state

³⁶ The Eighth Amendment.

³⁷ The Ninth Amendment. This is the Tenth Amendment: "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."

³⁸ Cahn, *The Great Rights* 3 (1963).

³⁹ *Ibid.*, 4.

⁴⁰ *Ibid.*, 5.

policy,... are often tougher and truer law than the dead words of the written text.”⁴¹ The main reliance though in ascertaining the meaning rightfully attached to the constitutional commands should be on American Supreme Court decisions. For the United States Constitution is not merely law but is the supreme law. It is the judiciary then, ultimately the Supreme Court which, in the language of Haines, “interpreted and applied its terms as they did the language of statutes so that matters of great political import were passed upon apparently with the same ease, simplicity, and procedure as the interpretation of a contract or the defining of the rights of persons under a will.”⁴² What is more, as Fairman noted: “It has seemed far more consistent with our polity that for the protection of individual rights the citizen look to the Courts rather than be dependent upon the fluctuating views of the legislature.”⁴³

From the standpoint of a careful and precise appraisal and study of such decisions and the opinion or opinions rendered, it is essential that a painstaking analysis be attempted. Even if the author would be so bold as to attempt such a task, the necessity for it is not too apparent. Rather, it is his opinion that viewed solely in terms of their impact on Asian Constitutions, it may suffice that reference be made to the approach taken and the language employed to show adherence and fealty to the concept of fundamental rights, without ignoring, of course, the judgment rendered. It may be that the ideals professed rather than the ideals realized may in the end prove to be more influential as far as foreign lands are concerned. It will also have the merit, so the author believes, of treading on grounds of a none-too-familiar terrain. More simply put, the peculiar and singular circumstances of each case may not be too apparent to a foreign observer. It must be borne in mind likewise that even if the identical phraseology of the provisions as found in the American Constitution is followed in the Asian nations to be referred to, there has to be an appreciation of the varying conditions and the flux of circumstances of each country involved. This is not to deny, however, that where no deviation of wording exists, there is at least a *prima facie* case for the persuasive character of the United States Supreme Court decisions in the interpretation of the provisions in question. It only remains to be added that considering the time when the Asiatic Constitutions were framed, just after the close of World War II, outside of the deference and respect elicited by the majestic utterances of a Marshall, a Holmes, a Brandeis, or a Cardozo, the influence of the American Supreme Court under the leadership of Chief Justices Hughes and Stone⁴⁴ covering the period from 1930 to 1946 is quite apparent. This is so as a number of the Asian Constitutions were adopted immediately after World War II. A word more about the

⁴¹ *Nashville C. & St. L. Railway v. Browning*, 310 US 362, 369 (1940).

⁴² Haines, *The Role of the Supreme Court in American Government and Politics*, 11 (1960).

⁴³ Fairman, *The Attack on the Segregation Cases*, 70 Harv. Law Rev., 85 (1956).

⁴⁴ The Constitutional opinions of both Chief Justices and, in the case of the latter, even those penned when he was an Associate Justice, received their due attention. From the late thirties and during this era, certain pronouncements on the civil liberties question by Justices Black, Douglas, Frankfurter, Jackson, Murphy and Rutledge also came to be highly regarded.

present Constitution of the Philippines, which became effective on January 17, 1973. It was framed by the Constitutional Convention, which opened its session on June 1, 1971 and was approved on November 30, 1972. It is not surprising then why traces of the Warren Court leading decisions⁴⁵ could be discerned in its Bill of Rights which, again not surprisingly, reiterated what was earlier contained in the Commonwealth Constitution of 1935. In that sense, the debt owed to the earlier Hughes and Stone eras must be acknowledged.

(1) *Brief Survey of American Supreme Court Rulings on Certain Fundamental Rights*

To refer to the fundamental rights anew that will be briefly discussed, they may be categorized into freedom of belief and expression, whether religious or secular, including freedom of assembly and of association in accordance with the First Amendment, the due process and equal protection guarantees, as ordained in the Fifth and Fourteenth Amendment, and in the case of the former, not only insofar as the procedural aspect is concerned but also insofar as it formerly constituted the main reliance for the protection of property interests, and lastly, the rights of an accused individual safeguarded by the Fourth, the Fifth, the Sixth, the Seventh and the Eighth Amendments. It is not to be lost sight of that in the interpretation of the due process requirement for state action as found in the Fourteenth Amendment, these specific rights are likewise deemed included as well as freedom of thought and expression, whether through the media or in oral discourse, including the cognate rights of assembly and association. To repeat, while the rulings announced should be kept in mind, the aspect to be emphasized would be the constitutional objectives sought to be attained, even if, from a more detailed study of the technical and intricate questions raised, it may be difficult to resist the conclusion that at times, performance did not match aspiration as affirmed in what McCloskey referred to as "promissory rhetoric."

(a) *The First Amendment Rights: Freedoms of religion, speech, press and assembly*

We start with the First Amendment rights. An opinion that has been acclaimed is that of Justice Jackson in *West Virginia State Board of Education v. Barnette*,⁴⁶ overruling *Minersville School District v. Gobitis*,⁴⁷ and thus nullifying the compulsory flag salute objected to by members of a religious sect, Jehovah's Witnesses, as contrary to their freedom of conscience. This portion is particularly relevant:

Much of the vagueness of the due process clause disappears when the specific prohibitions of the First become its standard. The rights of a State to regulate, for example, a public utility may well include, so far as the due process test is concerned, power to impose all of the restrictions which a legislature may have a 'rational basis' for adopting. But freedom of speech and of press, of assembly, and of worship may not be infringed on such slender grounds. They are susceptible of restrictions only to prevent grave and immediate danger to interests which the state may lawfully protect. It is important to note that while it is the Fourteenth Amendment which bears directly upon the State it is the more

⁴⁵ Outside of Chief Justice Warren, the views of Justices Black and Douglas, as could have been expected, as well as Justices Brennan and Forecast, were duly taken into account by the framers of the Philippine Constitution.

⁴⁶ 319 US 624 (1943).

⁴⁷ 310 US 586 (1940).

specific limiting principles of the First Amendment that finally govern this case.⁴⁸

An eloquent excerpt in a later portion of his opinion emphasized even more the significance of freedom of belief, whether in matters of conscience or in secular affairs. Thus: “If there is any fixed star in our constitutional constellation, it is that no official high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein.”⁴⁹ That is to follow the Holmes dictum that it is freedom for the thought that we hate no less than freedom for the thought that agrees with us.⁵⁰ That is likewise reminiscent of an earlier dissent from him in *Abrams v. United States*,⁵¹ even more oft-quoted and justifiably so:

But when men have realized that time has upset many fighting faiths, they may come to believe even more than they believe the very foundations of their own conduct that the ultimate good desired is better reached by free trade in ideas—that the best test of truth is the power of the thought to get itself accepted in the competition of the market, and that truth is the only ground upon which their wishes safely can be carried out. That at any rate is the theory of our Constitution. It is an experiment, as all life is an experiment; every year, if not every day, we have to wager our salvation upon some prophecy based upon imperfect knowledge. While that experiment is part of our system, I think that we should be eternally vigilant against attempts to check the expression of opinions that we loathe and believe to be fraught with death, unless they so imminently threaten immediate interference with the lawful and pressing purposes of the law that an immediate check is required to save the country.⁵²

The elegance associated with the juristic style of Justice Cardozo is apparent from this excerpt in his opinion in *Palko v. Connecticut*,⁵³ expressing a similar sentiment:

Of that freedom one may say that it is the matrix, the indispensable condition, of nearly every other form of freedom. With rare aberrations a pervasive recognition of that truth can be traced in our history, political and legal. So it has come about that the domain of liberty, withdrawn by the Fourteenth Amendment from encroachment by the states, has been enlarged by latter-day judgments to include liberty of the mind as well as liberty of action.⁵⁴

Two years after the *Barnette* decision in 1945 came *Thomas v. Collins*,⁵⁵ where the American Supreme Court held that a Texas statute requiring

⁴⁸ 319 US 624, 639 (1943).

⁴⁹ *Ibid.*, 642. Accuracy demands the acknowledgement that in his later opinions, Justice Jackson did not always tilt judicial balance in favor of liberty.

⁵⁰ *Cf. U.S. v. Schwimmer*, 279 US 644, 655 (1929). Justice Holmes dissented in this case from the ruling that a lady pacifist could not be eligible for naturalization as she could not in conscience promise to bear arms for the United States. In 1946, *Schwimmer* was overruled in *Girouard v. United States*, 328 US 61.

⁵¹ 250 US 616 (1919).

⁵² *Ibid.*, 630. In this case *Abrams* and a few other Russian emigrants threw down some leaflets urging the curtailment of war production from the roof of a loft in the garment district of New York. They were prosecuted and convicted under the Espionage Act, the majority of the Court being satisfied that there was intent by such curtailment of production “to cripple or hinder the United States in the prosecution of the war.”

⁵³ 302 US 319 (1937).

⁵⁴ *Ibid.*, 327.

⁵⁵ 323 US 516.

paid labor union organizers to register with its Secretary of State and secure an organizer's card before soliciting members within the state cannot be applied for being repugnant to free speech and assembly to a national labor leader who was invited to Texas to address a mass meeting and who, in a prepared speech, invited his hearers generally and one person specifically to join a union. Mention was then made by Justice Rutledge that the "indispensable [First Amendment] democratic freedoms" are preferred. "That priority," accordingly, "gives these liberties a sanctity and a sanction not permitting dubious intrusions. And it is the character of the right, not of the limitation, which determines what standard governs the choice."⁵⁶ Further: "It is therefore in our tradition to allow the widest room for discussion, the narrowest range for its restriction, particularly when this right is exercised in conjunction with peaceable assembly."⁵⁷

The high estate accorded freedom of belief, especially in the realm of conscience, and its expression in speech, press, or peaceable assembly is thus evident. McKay in a 1959 article could conclude: "The preferred position, whether known by that or some other name, is a fact of American constitutional law."⁵⁸ In support of such a view he referred, speaking of the period up to 1945, to pronouncements from Justice Holmes in *Abrams* to Justice Rutledge in *Thomas*. In addition, he could cite Justice Brandeis in *Whitney v. California*,⁵⁹ Justice Holmes anew in *United States v. Schwimmer*,⁶⁰ Justice Hughes in *Stromberg v. California*,⁶¹ Justice Roberts in *Herndon v. Lowry*,⁶² Justice Cardozo in *Palko v. Connecticut*,⁶³ Justice Hughes again in *Lovell v. City of Griffin*,⁶⁴ Justice Stone in *United States v. Carolene Prods. Co.*,⁶⁵ Justice Roberts once more in *Schneider v. State*,⁶⁶ Justice Black in *Bridges v. California*,⁶⁷ Justice Stone once again in *Jones v. Opelika*,⁶⁸ Justice Douglas in *Murdoch v. Pennsylvania*,⁶⁹ Justice Black in *Martin v. City of Struthers*,⁷⁰ Justice Jackson in *West Virginia Bd. of Educ. v. Barnette*,⁷¹ and Justice Rutledge in *Prince v. Massachusetts*.⁷² So matters stood at the close of World War II when the newly-independent Asian nations were drafting their constitutions. In this sphere of civil liberties, perhaps more so than in the equally significant manifestations of physical freedom, the doctrines enunciated by the American Supreme Court were in a sense beacon lights to illuminate the way. The fact that during this period there was likewise in well-nigh all countries, the victors no less than vanquished, the movement for the assurance

⁵⁶ *Ibid.*, 530.

⁵⁷ *Ibid.*

⁵⁸ McKay, The Preference for Freedom, 34 New York Univ. Law Rev. 1182, 1222 (1959).

⁵⁹ 274 US 357, 375 (1927).

⁶⁰ 279 US 644, 654-55 (1929).

⁶¹ 283 US 359, 369 (1931).

⁶² 301 US 242, 258 (1937).

⁶³ 302 US 319, 327 (1937).

⁶⁴ 303 US 444, 450 (1938).

⁶⁵ 304 US 144, 152 n.4 (1938).

⁶⁶ 308 US 147, 161 (1939).

⁶⁷ 314 US 252, 263 (1941).

⁶⁸ 316 US 584, 608 (1942).

⁶⁹ 319 US 105, 115 (1943).

⁷⁰ 319 US 141, 143 (1943).

⁷¹ 319 US 624, 639 (1943).

⁷² 321 US 158, 165-65 (1944).

of respect and dignity for every human being as such, culminating in the Universal Declaration of Human Rights of December 10, 1948, was a fortunate circumstance. It made it less difficult to follow in the wake of the American tradition. Whatever apprehension may be entertained as to the undue emphasis on libertarian claims weakening the bonds of authority was stilled by the explicit recognition in such pronouncements of the limits placed on freedom of thought and expression. So it was made clear in the Jackson opinion in *Barnette*. Similarly, in *Thomas v. Collins*,⁷³ after noting the preferred position of the First Amendment freedoms, Justice Rutledge left no doubt that they are not absolute. These are his words:

For these reasons any attempt to restrict those liberties must be justified by clear public interest, threatened not doubtfully or remotely, but by 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.⁷⁴

That is to adhere to the clear and present danger concept as the standard to impose allowable restraints, first enunciated by Justice Holmes in *Schenck v. United States*⁷⁵ in these words:

We admit that in many places and in ordinary times, the defendants, in saying all that was said in the circular, would have been within their constitutional rights. But the character of every act depends upon the circumstances in which it is done.... The most stringent protection of free speech would not protect a man in falsely shouting fire in a theater, and causing a panic. It does not even protect a man from an injunction against uttering words that may have all the effect of force.... The question in every case is whether the words used are used in such circumstances and are of such a nature as to create a clear and present danger that they will bring about the substantive evils that Congress has a right to prevent. It is a question of proximity and degree.⁷⁶

The area for permissible limitation as the standard as thus originally formulated is not kept within the narrowest bounds. The personal conviction of Justice Holmes was, it would seem, more accurately set forth in *Abrams*. A similar approach was followed by Justice Brandeis. As he so felicitously expressed it in his concurrence in *Whitney v. California*.⁷⁷

Those who won our independence by revolution were not cowards. They did not fear political change. They did not exalt order at the cost of liberty. To courageous, self-reliant men, with confidence in the power of free and fearless reasoning applied through the processes of popular government, no danger flowing from speech can be deemed clear and present, unless the incidence of the evil apprehended is so imminent that it may befall before there is opportunity for full discussion. If there be time to expose through discussion the falsehood and fallacies, to avert the evil by the processes of education, the remedy to be applied is more speech, not enforced silence. Only an emergency can justify repression.⁷⁸ Such must be the rule if authority is to be reconciled with freedom.

⁷³ 323 US 516 (1945).

⁷⁴ *Ibid.*, 530.

⁷⁵ 249 US 47 (1919).

⁷⁶ *Ibid.*, 52.

⁷⁷ 274 US 357 (1929).

⁷⁸ *Ibid.*, 377.

During the period brought to a close by the termination of World War II, even Justice Black, at a latter stage the champion of the absolutist interpretation of the First Amendment, following a literal reading thereof, was himself a militant partisan of the clear and present danger test. In *Bridges v. California*,⁷⁹ where its application resulted in the quashing of contempt citations arising from publications intemperately critical of the judiciary, he spoke for the Court in this wise: "What finally emerges from the 'clear and present danger' cases is a working principle that the substantive evil must be extremely serious and the degree of imminence extremely high before utterances can be punished."⁸⁰ It could be that his disillusionment at such a standard not being a sufficient obstacle to the conviction for advocacy of Communism in *Dennis v. United States*⁸¹ led to his belief that it had lost its cutting edge occasioned his change of heart. It suffices to state that in the Warren Court era, the balancing of interests formula⁸² to harmonize the competing interests of free speech and press against other desirable state ends appeared to have gained the day. In a recent essay, Strong could discern traces of similarity in both concepts, especially so if the prevailing balancing doctrine is impressed with a definitional rather than an *ad hoc* character.⁸³

A few more words on freedom of conscience. It was the ruling in *United States v. Ballard*,⁸⁴ a 1944 decision, that "the truth or verity of respondent's religious doctrine or beliefs" [ought not to] have been submitted to the jury,⁸⁵ The opinion of Justice Douglas explained why:

Whatever this particular indictment might require, the First Amendment precludes such a course, as the United States seems to concede. 'The law knows no heresy, and is committed to the support of no dogma, the establishment of no sect.' *Watson v. Jones*, 13 Wall. (US) 679, 728. . . . The First Amendment has a dual aspect. It not only 'forestalls compulsion by law of the acceptance of any creed or the practice of any form of worship' but also 'safeguards the free exercise of the chosen form of religion.' *Cantwell v. Connecticut*, 310 US 296, 303. . . . 'Thus the Amendment embraces two concepts, — freedom to believe and freedom to act. The first is absolute but, in the nature of things, the second cannot be.' *Id.* 310 US pp. 303, 304. . . . Freedom of thought, which includes freedom of religious belief, is basic in a society of free men. *West Virginia State Bd. of Educ. v. Barnette*, 319 US 624. . . . It embraces the right to maintain theories of life and of death and of the hereafter which are rank heresy to followers of the orthodox faiths. Heresy trials are foreign to our Constitution. Men may believe what they cannot prove. They may not be put to the proof of their religious doctrines or beliefs. Religious experiences which are as real as life to some may be incomprehensible to others. Yet the fact that they may be beyond the ken of mortals does not mean that they can be made suspect

⁷⁹ 314 US 252 (1941).

⁸⁰ *Ibid.*, 262. The last two sentences of this paragraph in his opinion indicate that even then he was in favor of what some critics refer to as a latitudinarian construction of freedom of thought. Thus: "For the First Amendment does not speak equivocally. It prohibits any law 'abridging the freedom of speech or of the press.' It must be taken as a command of the broadest scope that explicit language, read in the context of a liberty-loving society will allow."

⁸¹ 341 US 494 (1951).

⁸² *Cf. American Communications Association v. Douds*, 339 US 382 (1950); *Barenblatt v. United States*, 360 US 109 (1959); *Gibson v. Florida Investigating Committee*, 372 US 539 (1963).

⁸³ *Cf. Strong, Fifty Years of "Clear and Present Danger."* From *Schenck to Brandenburg — and Beyond*, 1969 Supreme Court Review 41-80 (1970).

⁸⁴ 322 US 78.

⁸⁵ *Ibid.*, 86.

before the law. Many take their gospel from the New Testament. But it would hardly be supposed that they could be tried before a jury charged with the duty of determining whether those teachings contained false representations. The miracles of the New Testament, the Divinity of Christ, life after death, the power of prayer are deep in the religious convictions of many. If one could be sent to jail because a jury in a hostile environment found those teachings false, little indeed would be left of religious freedom. The Fathers of the Constitution were not unaware of the varied and extreme views of religious sects, of the violence of disagreement among them, and of the lack of any one religious creed on which all men would agree. They fashioned a charter of government which envisaged the widest possible toleration of conflicting views. Man's relation to his God was made no concern of the state. He was granted to the right to worship as he pleased and to answer to no man for the verity of his religious views. The religious views espoused by respondents might seem incredible, if not preposterous, to most people. But if those doctrines are subject to trial before a jury charged with finding their truth or falsity, then the same can be done with the religious beliefs of any sect. When the triers of fact undertake that task, they enter a forbidden domain. The First Amendment does not select any one group or any one type of religion for preferred treatment. It puts them all in that position.⁸⁶

So to view the subject is moreover to affirm that freedom of conscience under the First Amendment includes a no establishment clause. What is meant by it was set forth in the opinion of Justice Black in *Everson v. Board of Education of Ewing Township*⁸⁷ decided in 1947. Thus:

The 'establishment of religion' clause of the First Amendment means at least this: Neither a state nor the Federal Government can set up a church. Neither can pass laws which aid one religion, aid all religions, or prefer one religion over another. Neither can force nor influence a person to go to or to remain away from church against his will or force him to profess a belief or disbelief in any religion. No person can be punished for entertaining or professing religious beliefs or disbeliefs, for church attendance or non-attendance. No tax in any amount, large or small, can be levied to support any religious activities or institutions, whatever they may be called, or whatever form they may adopt to teach or practice religion. Neither a state nor the Federal Government can, openly or secretly, participate in the affairs of any religious organizations or groups and vice versa. In the words of Jefferson, the clause against establishment of religion by law was intended to erect 'a wall of separation between Church and State.'⁸⁸

In this case a resolution of the Board of Education of Ewing Township in New Jersey authorizing reimbursement to parents of money spent by them for the bus transportation of their children even if in attendance at parochial schools was held not offensive to the establishment of religion clause. Such was the ruling in line with the doctrine that whatever incidental benefits may accrue to members of a religious sect, there is no constitutional infirmity if it could be shown that government aid was inspired by a secular purpose and that its primary effect is neither to advance nor inhibit religion.

(b) *The Fifth and Fourteenth Amendments Rights to Due Process And Equal Protection*

The Fifth Amendment, as noted, explicitly provides: "No person [shall] be deprived of life, liberty or property without due process

⁸⁶ *Ibid.*, 86-87.

⁸⁷ 330 US 1 (1947).

⁸⁸ *Ibid.*, 15-16.

of law.” The Fourteenth Amendment, which took effect in 1868, requires that state action, as previously mentioned, should meet the test of due process as well as equal protection. In a 1918 article, Judge Hough⁸⁹ concluded that fifty years after independence, due process had a procedural significance only. For authority, he quoted Story on the Constitution, published in 1833, where the following appeared: “This clause in effect affirms the right of trial according to the process and proceedings of the common law.”⁹⁰ When the due process clause in the Fifth Amendment was construed by the American Supreme Court for the first time in the case of *Murray v. Hoboken Land and Improvement Company*⁹¹ in 1855, the same impression was yielded: “The words, ‘due process of law,’ were undoubtedly intended to convey the same meaning as the words, ‘by the law of the land,’ in Magna Charta. Lord Coke, in his commentary on those words (2 *Inst.* 50) says they mean due process of law.”⁹² *Mugler v. Kansas*,⁹³ an 1887 decision, promulgated almost two decades after the Fourteenth Amendment, more than just hinted that it could have a substantive significance as well. It is a restraint on state power. In this case, where it was held that the prohibition law of Kansas was violative of such clause under the Fourteenth Amendment, it was ruled that the American Supreme Court has the competence to determine whether a given statute “is to be accepted as a legitimate exertion of the police power of the state” so that if it has “no real or substantive relation” to the objects of that power or “is a palpable invasion of rights reserved by the fundamental law, it is the duty of the courts to so adjudge and thereby give effect to the Constitution.”⁹⁴ That duty is felt it had to perform in *Chicago Milwaukee & St. Paul Rev. Company v. Minnesota*,⁹⁵ decided in 1890, where in reliance upon the due process clause, an 1887 act of Minnesota was declared unconstitutional insofar as the petitioner railway company could be compelled to adopt the rates fixed by the Railroad and warehouse Commission and thus denied the power to charge reasonable rates.⁹⁶ By then, it would appear that due process had been expanded to include non-procedural matters. An even more fateful development came in 1905 when in *Lochner v. New York*,⁹⁷ the concept of substantive due process was deemed to include liberty of contract. As followed in subsequent decisions, it became the rock on which legislation of a socio-economic character enacted for the welfare of labor foundered. In *Lochner*, the American Supreme Court, through Justice Peckham, nullified a New York statute providing for a ten-hour day and a sixty-hour week for bakery workers. First, the basic issue was set forth:

In every case that comes before this Court, therefore, where legislation of this character is concerned, and where the protection of the Federal Constitution is sought, the question necessarily arises: Is this a fair, reasonable, and appropriate exercise of the police power of the state, or is it an unreasonable, unnecessary, and arbitrary interference with the

⁸⁹ Due Process of Law-Today, 32 Harvard Law Rev. 218, 222.

⁹⁰ *Ibid.*, 222.

⁹¹ 18 Howard, 272.

⁹² *ibid.*, 276.

⁹³ 123 US 623.

⁹⁴ *Ibid.* 661. Cf. Brown, Due Process of Law, Police Power, and the Supreme Court, 40 Harvard Law Rev. 943 (1927).

⁹⁵ 134 US 418.

⁹⁶ *Ibid.*, 458.

⁹⁷ 198 US 46.

right of the individual to his personal liberty, or to enter into those contracts in relation to labor which may seem to him appropriate or necessary for the support of himself and his family? Of course the liberty of contract relating to labor includes both parties to it. The one has as much right to purchase as the other to sell labor.⁹⁸

From the manner of its presentation, the outcome was predictable. There was a touch of irony in a later excerpt therein indicating that Justice Peckham, perhaps not duly mindful of the realities of the business world, in all apparent sincerity, expressed the belief that he had labor's interest at heart. Thus:

It is a question of which of two powers or rights shall prevail—the power of the state to legislate or the right of the individual to liberty of person and freedom of contract. The mere assertion that the subject relates, though but in a remote degree, to the public health, does not necessarily render the enactment valid. The act must have a more direct relation, as a means to an end, and the end itself must be appropriate and legitimate, before an act can be held to be valid which interferes with the general right of an individual to be free in⁹⁹ his persons and in his power to contract in relation to his own labor.

Substantive due process could thus be identified with the imposition of whatever values the Court may hold.¹ It could be wielded as a weapon then by an unsympathetic judiciary to nullify police determinations of the political branches.

There was a vigorous dissent from Justice Holmes. He revealed his sensitivity to the harshness of a *laissez-faire* capitalism and the need for state action to ameliorate a grievous situation. Accordingly, he would defer to the legislative judgment on the matter. Thus:

This case is decided upon an economic theory which a large part of the country does not entertain. If it were a question whether I agreed with that theory, I should desire to study it further and long before making up my mind. But I do not conceive that to be my duty, because I strongly believe that my agreement or disagreement has nothing to do with the right of a majority to embody their opinions in law. It is settled by various decisions of this court that state constitutions and state laws may regulate life in many ways which we as legislators might think as injudicious, or if you like as tyrannical, as this, and which, equally with this, interfere with the liberty to contract.... [A] Constitution is not intended to embody a particular economic theory, whether of paternalism and the organic relation of the citizen to the state or of *laissez faire*. It is made for people of fundamentally differing views, and the accident of our finding certain opinions natural and familiar, or novel, and even shocking, ought not to conclude our judgment upon the question whether statutes² embodying them conflict with the Constitution of the United States.³

The Holmes dissent easily commended itself to legal and academic circles, at least to those of liberal persuasion, but it was the *Lochner* ruling with its stress on freedom of contract that supplied the juridical basis for nullifying labor legislation. For over three decades, it constituted a barrier, well-nigh insurmountable, for remedial measures of that character. It sufficed to invalidate in *Adair v. United States*³

⁹⁸ *Ibid.*, 56.

⁹⁹ *Ibid.*, 58.

¹ Cf. Kurland, *Politics, the Constitution and the Warren Court* 150 (1969).

² 198 US 46, 75-76.

³ 208 US 161 (1908).

the Erdman Act which made it a criminal offense for a railroad company to discharge or otherwise discriminate against a worker on the ground of his membership in a union, thus proscribing a "yellow dog contract." The same result attended *Coppage v. Kansas*,⁴ involving a suit of a similar character, except that it was a state rather than a federal measure, one likewise broader in scope as it would also penalize an employer who would make non-membership in a union a condition for hiring or for continuing work in an establishment. There was as in *Adair* a dissent by Holmes that again earned the approbation of the discerning. Thus:

In present conditions a workman not unnaturally may believe that only by belonging to a union can he secure a contract that shall be fair to him.... If that belief, whether right or wrong, may be held by a reasonable man, it seems to me that it may be enforced by law in order to establish the equality of position between the parties in which liberty of contract begins.⁵

The majority remained adamant. Its approach reached its apogee in *Adkins v. Children's Hospital*,⁶ decided in 1923. There, a federal statute, setting up a board to determine minimum wages for women was found suffering from constitutional infirmity under the test supplied by the liberty of contract doctrine. Holmes, unconvinced, again dissented. A relevant excerpt follows:

The earlier decisions upon the same words in the Fourteenth Amendment began within our memory and went no farther than an unpretentious assertion of the liberty to follow the ordinary callings. Later that innocuous generality was expanded into the dogma, Liberty of Contract. Contract is not specially mentioned in the text that we have to construe. It is merely an example of doing what you want to do, embodied in the word liberty. But pretty much all law consists in forbidding men to do some things they want to do, and contract is no more exempt from law than other act.

At long last, in 1937, at the height of the bitter conflict over the plan of President Roosevelt to organize, some said to pack, the American Supreme Court, Chief Justice Hughes, in *West Coast Hotel Company v. Parrish*,⁸ which expressly overruled *Adkins*, laid to rest the concept of freedom of contract as thus rigidly formulated and applied. He could have not been any clearer:

The principle which must control our decision is not in doubt. The constitutional provision invoked is the due process clause of the Fourteenth Amendment governing the States, as the due process clause invoked in the *Adkins* Case governed Congress. In each case the violation alleged by those attacking minimum wage regulation for women is deprivation of freedom of contract. What is this freedom? The Constitution does not speak of freedom of contract. It speaks of liberty and prohibits the deprivation of liberty without due process of law. In prohibiting that deprivation the Constitution does not recognize an absolute and uncontrollable liberty. Liberty in each of its phases has its history and connotation. But the liberty safeguarded is liberty in a social organization which requires the protection of law against the evils which menace the health, safety, morals and welfare of the people. Liberty under the Constitution is thus necessarily subject to the restraints of due process, and regulation which is reasonable in relation to its⁹ subject and is adopted in the interests of the community is due process.

⁴ 236 US 1 (1915).

⁵ Cf. *Ibid.*, 28.

⁶ 261 US 525.

⁷ *Ibid.*, 568-569.

⁸ 300 US 379 (1937).

⁹ *Ibid.*, 392.

Since then, it would appear to be a fair summary of American constitutional law that substantive due process as a standard with which the Supreme Court could impose its set of values and set at naught legislative and executive acts thus found wanting has served its day. The *laissez faire* era in economic matters was over. There was a time, according to the first Storrs lecture of Justice Cardozo, when it “was not only a counsel of caution which statesmen would do well to heed. It was a categorical imperative, which statesmen as well as judges must obey.”¹⁰ That time was no more as of the *West Coast Hotel v. Parrish* decision of 1937. It could be said that the social and economic forces at work in the United States to which the New Deal administration of President Roosevelt was most responsive did occasion, as of 1937, greater receptivity by the American Supreme Court to a philosophy less rigid in its obeisance to property rights. Earlier legislation deemed offensive to the *laissez-faire* concept had met a dismal fate. Their nullity during the first term could, more often than not, be expected.¹¹ Moreover, in the previously-cited case of *West Virginia State Board of Education v. Barnette*, Justice Jackson could explicitly affirm: “We must transplant these rights to a soil in which the *laissez-faire* concept or principle of non-interference has withered at least as to economic affairs, and social advancements are increasingly sought through closer integration of society and through expanded and strengthened governmental controls.”¹²

So matters stood around the close of the Hughes Court and the beginning of the Stone Court in 1941. It remained thus when World War II ended. So this author is led to conclude from his appraisal of the Supreme Court decisions as well as a sprinkling of legal literature on the subject. Substantive due process identified thus, to follow Bickel in his 1969 Oliver Wendell Holmes lecture, as “an unyielding assertion of judicial supremacy, to be exerted in defense of the rights of property and the freedom of individual enterprise” was thus interred¹³ It may, however, be going too far to assert that there is no firm juridical support for the view that as a standard for fixing the outermost limits of legislative competence, whether in federal or state affairs, substantive due process has lapsed into innocuous desuetude. Bickel could affirm that even for such Justices as Brandeis and Frankfurter, noted for their alertness to the judiciary trespassing on the domain of policy-making, the clause has a substantive aspect as applied to things fundamental, included among which are the right to speech, the right to education, the right to choice of profession, and the right to locomotion.¹⁴ Nor is the enumeration comprehensive. It survives as a test of reason to assure that the assailed governmental measure is not tainted with arbitrariness or caprice. That is to maintain inviolate, what in the apt language of Cardozo, are rights constituting “the very essence of a scheme of ordered liberty.”¹⁵ The question to be

¹⁰ Cardozo, *The Nature of Judicial Process* 77 (1921).

¹¹ As was stated in Jackson, *Struggle for Judicial Supremacy*: “But in just three years, beginning with the October 1933 term, the Court refused to recognize the power of Congress in twelve cases. Five of these twelve decisions occurred during a single year: that is, the October 1935 term; four of the five, by a sharply divided court.” At 41.

¹² 319 US 624 (1943).

¹³ Bickel, *The Supreme Court and the Idea of Progress* 15 (1970)

¹⁴ *Ibid.*, 26.

¹⁵ *Polko v. Connecticut*, 302 US 319, 324 (1937).

answered, as he stated in an earlier case, is whether what was done was one "that an enlightened legislator might act upon without affront to justice."¹⁶ It is of interest to note that in the 1973 Supreme Court Review, Epstein in his commentary on *Roe v. Wade*¹⁷ and *Doe v. Bolton*,¹⁸ both 1973 decisions, could appropriately use this title for his legal essay: "Substantive Due Process by any other Name: the Abortion Cases."¹⁹ Tribe could rely on stronger language: "When the Court had its most dramatic opportunity to express its supposed aversion to substantive due process, it carried that doctrine to lengths few observers had expected, imposing limits on permissible abortion legislation so severe that no abortion law in the United States remained valid."²⁰

That brings us to the cognate rights of equal protection also found in the 1868 Fourteenth Amendment. No State may "deny to any person within its jurisdiction the equal protection of the laws." It imposes an ideal worthy of the most serious and dedicated pursuit. Moreover, the concept of equality possesses an appeal for Asian nations, the peoples of which have not been spared the odium of discriminatory action for centuries by those from the West. If lived up to, even in its qualified form, it brings nearer to realization the dream in the American Declaration of Independence of all men "being born free and equal, endowed with certain unalienable rights, among which are life, liberty and the pursuit of happiness and that to secure these rights governments are instituted among men deriving their just powers from the consent of the governed." It would not be entirely accurate to assert that the course of judicial decisions reflected undiluted fealty to its potentialities. As a matter of fact, until the New Deal Era and beginning from *Santa Clara County v. Southern Pacific Railroad Co.*,²¹ an 1886 decision, which assumed that private corporations were included within the term "person," this guarantee, like due process, was pressed into the service of free enterprise. It has been asserted, and not entirely without reason, that quite a few American Supreme Court opinions on this subject were inspired by the creed of *laissez faire* capitalism even if clothed in the habiliments of high-sounding verbal raiment, paying mere lip service to the objective the equal protection was designed to subserve.

If Gunther is to be believed, it was not until the last decade of the Warren Court, at the beginning of the 1960's, that it really came into its own, with strict scrutiny of selected types of legislation under the current concepts of "suspect classification" and "fundamental interest." There is now, according to him, "the new interventionist stance."²² He did take note, however, that one of the prized achievements of the Warren Court is *Brown v. Board of Education*,²³ decided in 1954. The case declared unconstitutional on equal protection grounds

¹⁶ *Burnet v. Wells*, 289 US 670 (1933).

¹⁷ 410 US 113 (1973).

¹⁸ 410 US 179 (1973).

¹⁹ Epstein, *The Supreme Court Review*, 1973, Kurland, ed., 159-185 (1974).

²⁰ Tribe, *The Supreme Court*, 1972 Term—Foreword, 87 Harv. Law Rev. 1, 2 (1973).

²¹ 118 US 394.

²² Gunther, *The Supreme Court* 1971 Term—Foreword, 86 Harv. Law Rev. 1, 8 (1972).

²³ 347 US 483.

the segregation of Negroes in public schools formerly deemed allowable under the “separate but equal” doctrine, announced in *Plessy v. Ferguson*,²⁴ There, it was held that there was a sufficient compliance with this requirement where the races were provided with substantially equal facilities even if they were not accommodated in the same schools. As was so well put by Chief Justice Warren:

We conclude that in the field of public education the doctrine of ‘separate but equal’ has no place. Separate educational facilities are inherently unequal. Therefore, we hold that the plaintiffs and others similarly situated for whom the actions have been brought are, by reason of the segregation complained of, deprived of the equal protection of the laws guaranteed by the Fourteenth Amendment.²⁵

Thus was *Plessy* dealt a death blow. It is not surprising why such a highly desirable result would be arrived at. For as early as 1880, in *Strauder v. State of West Virginia*,²⁶ the American Supreme Court, speaking of the equal protection clause, did state: “This is one of a series of constitutional provisions having a common purpose, namely: securing to a race recently emancipated, a race that through many generations had been held in slavery, all the civil rights that the superior race enjoy.”²⁷ What, from the standpoint of pure theory, may not be so easily explained was why it took so long. Reference was made to the theoretical aspect of such a grave problem, because if the matter be viewed in its historical and cultural setting, there would appear to be mitigating circumstances for such belated remedial efforts in the direction of equality for all citizens, irrespective of the color of their skin.

Of equal interest in connection with this situation of American citizens not being treated equally, reference may be made to the three Japanese-American cases, a product of what appeared to be the then war hysteria existing in the West Coast of the United States at the time when the Japanese military forces in the early stages of World War II appeared to be poised for invasion of this country. It was indeed a bleak winter with Manila and Corregidor having fallen and Australia being in danger. In *Hirabayashi v. United States*,²⁸ a 1943 decision, the conviction of an American citizen of Japanese descent for violation of a curfew order was sustained. The next year, in *Korematsu v. United States*,²⁹ an American citizen, likewise of Japanese ancestry, was found guilty under a Federal statute of violating a military order requiring exclusion from a coastal area. The Supreme Court did not reverse. In *Ex pane Endo*,³⁰ also decided in 1944, a habeas corpus application arising from the confinement of an American national but likewise with Japanese forebears was granted, thus putting an end to her detention from the War Relocation Center, her loyalty being

²⁴ Cf. *Plessy v. Ferguson*, 163 US 537 (1896).

²⁵ 347 US 483, 495. The trend towards a greater concern for racial equality could be traced to the earlier cases of *Missouri ex rel Gaines v. Canada* 305 US 337 (1938); *Morgan v. Virginia*, 328 US 373 (1946); *Sipuel v. Board of Regents*, 332 US 631 (1948); *Sweatt v. Painter*, 339 US 609 (1950); *McLaurin v. Oklahoma*, 339 US 637 (1950).

²⁶ 100 US 303 (1880).

²⁷ *Ibid.*, 306.

²⁸ 320 US 81.

²⁹ 323 US 214.

³⁰ 323 US 283.

duly established; even then, however, it was assumed that her temporary confinement for the purpose of such inquiry could not be deemed constitutionally objectionable. There was vigorous dissent on the part of eminent civil libertarians in America as could have been expected. One of the most telling came from Dean Rostow:

Our wartime treatment of Japanese aliens and citizens of Japanese descent on the West Coast was hasty, unnecessary, and mistaken. The course of action which we undertook was in no way required or justified by the circumstances of the war. It was calculated to produce both individual injustice and deep-seated social maladjustments of a cumulative and sinister kind.³¹

It is reassuring that by 1948, three years after the close of World War II, with a greater concern shown for fundamental rights and not only among the victorious powers, the United States Supreme Court, in *Oyama v. California*³² definitely held that there can be no discrimination between citizens on the basis of racial descent in accordance with the constitutional guarantee of equal protection.

The shift in judicial attitude was most commendable. When due note is taken of the American Supreme Court in an earlier period not averse to differences in treatment between American citizens, it is easily understandable why aliens could be classified as a separate group and accorded less privileges. Justice Holmes, who penned the opinion in the leading case of *Patsone v. Pennsylvania*,³³ found no constitutional objection to a Pennsylvania statute making it unlawful for any unnaturalized foreign-born resident to kill any wild bird or animal except in defense of person or property. He explained why:

The discrimination undoubtedly presents a more difficult question. But we start with the general consideration that a state may classify with reference to the evil to be prevented, and that if the class discriminated against is or reasonably might be considered to define those from whom the evil mainly is to be feared, it properly may be picked out. A lack of abstract symmetry does not matter. The question is a practical one, dependent upon experience.³⁴

This realistic approach is equally discernible in this excerpt from the opinion of Justice Frankfurter in *Eigner v. Texas*,³⁵ a 1940 decision:

The Fourteenth Amendment enjoins 'the equal protection of the laws,' and laws are not abstract propositions. They do not relate to abstract units, A, B and C, but are expressions of policy arising out of specific

³¹ Rostow, *The Sovereign Prerogative: The Supreme Court and the Quest for Law*, 193, 194 (1962). The excerpt is from his essay, *The Japanese-American Cases—A Disaster*, published in 1945 in 54 *Yale Law Journal* 489. He did take note of the step taken by the United States to atone for the wrong done. In an addendum to his article on the Japanese-American cases, the following appears: "On May 20, 1959, the Attorney General of the United States, the Honorable William P. Rogers, convened a ceremony at the Department of Justice to take note of the successful end of the program of restoring citizenship to all but a few of the 5,700 persons of Japanese descent who renounced their citizenship during World War II." At 263. He was asked to represent those who had written about the constitutional problems of evacuation and the opening paragraph of his remarks follows: "This is a day of price for American law. We are met to celebrate the correction of an injustice. The law has no higher duty than to acknowledge its own errors. It is one of the vital ways in which law draws strength from the conscience of the community, and helps by its example to further the moral development of our people." At 264.

³² 332 US 633.

³³ 232 US 137 (1914).

³⁴ *Ibid.*, 133.

³⁵ 310 US 141.

difficulties, addressed to the attainment of specific ends by the use of specific remedies. The Constitution does not require things which are different in fact or opinion to be treated in law as though they were the same. And so we conclude that to write into law the differences between agriculture and other economic pursuits was within the power of the Texas legislature.³⁶

Previously, in Ohio *ex rel. Clarke v. Deckebach*³⁷ a 1927 decision, the Court even went further:

The present regulation presupposes that aliens in Cincinnati are not as well qualified as citizens to engage in [the business of public pool and billiard rooms]. It is not necessary that we be satisfied that this premise is well founded in experience.... It is enough for present purposes that the ordinance, in the light of facts admitted or generally assumed, does not preclude the possibility of a rational basis for the legislative judgment and that we have no such knowledge of local conditions as would enable us to say that it is clearly wrong.³⁸

There is, of course, no question as to the legislative power to classify, for as noted in *Barber v. Connolly*,³⁹ a constitutional guarantee goes no further than to require "that there should be no arbitrary deprivation of life or liberty or arbitrary spoliation of property but that equal protection and security should be given to all under like circumstances in the enjoyment of their personal and civil rights"⁴⁰ That was in 1885. The very next year, in *Yick Wo v. Hopkins*,⁴¹ the concept of equal protection was further vitalized with the enunciation of this doctrine:

Though the law itself be fair on its face and impartial in appearance, yet, if it is applied and administered by public authority with an evil eye and an unequal hand, so as practically to make unjust and illegal discriminations between persons in similar circumstances, material to their rights, the denial of equal justice is still within the prohibition of the Constitution.⁴²

It could very well be that the tolerance shown by the American Supreme Court of all sorts of classification did militate against the effectiveness of the equal protection clause in the attainment of its avowed goal. There were fears expressed that there was lacking that full appreciation for the potentialities of this constitutional guarantee. The cause of property fared well at the expense, it would seem, of other fundamental rights. At times, the judicial attitude appeared to be decidedly unsympathetic. *Buck v. Bell*⁴³ may be cited as an instance. The decision found no merit in the due process objection that a sterilization measure aimed at mental defectives is unconstitutional. It likewise dismissed summarily the argument based on a denial of equal protection. The opinion of Justice Holmes was quite revealing as to the impatience with which a plea of such a character, at least in this case, was brushed aside. Thus:

But, it is said, however it might be if this reasoning were applied generally, it fails when it is confined to the small number who are in

³⁶ *Ibid.*, 147.

³⁷ 274 US 392.

³⁸ *Ibid.*, 397.

³⁹ 113 US 27 (1885).

⁴⁰ *Ibid.*, 31.

⁴¹ 118 US 356.

⁴² *Ibid.*, 373.

⁴³ 274 US 200 (1927).

the institutions named and is not applied to the multitudes outside. It is the usual last resort of constitutional arguments to point out shortcomings of this sort. But the answer is that the law does all that is needed when it does all that it can, indicates a policy, applies it to all within the lines, and seeks to bring within the lines all similarly situated so far and so fast as its means allow. Of course so far as the operations enable those who otherwise must be kept confined to be returned to the world, and thus open the asylum to others, the equality aimed at will be more nearly reached.⁴⁴

Evidently, that was an extreme case, and the jurist was noted for washing arguments in cynical acid. At any rate, by the time of the Stone Court, it could be said that equal protection did command greater respect. This is shown by *Skinner v. Oklahoma*,⁴⁵ a 1942 decision. There, the validity of the Habitual Criminal Sterilization Act was challenged. To come within that category, it is required that a person be convicted two or more times for crimes "amounting to felonies" involving "moral turpitude" either in its court or that of any other state and is thereafter convicted anew of such felony in Oklahoma and sentenced to a term of imprisonment in its penal institution. After notice and an opportunity to be heard, with the right to a jury trial provided, he could, if found to fall within the terms of the act, be rendered "sexually sterile" if there be a showing that it would not be detrimental to his health. Crimes, however, arising out of the violation of prohibitory laws, revenue acts, embezzlement or political offenses, do not fall within the Act. Why such a statute ran afoul of the equal protection clause was explained by Justice Douglas in his opinion. Thus:

We are dealing here with legislation which involves one of the basic civil rights of man. Marriage and procreation are fundamental to the very existence and survival of the race. The power to sterilize, if exercised, may have subtle, far-reaching and devastating effects. In evil or reckless hands it can cause races or types which are inimical to the dominant group to wither and disappear. There is no redemption for the individual whom the law touches. Any experiment which the State conducts is to his irreparable injury. He is forever deprived of a basic liberty. We mention these matters not to reexamine the scope of the police power of the States. We advert to them merely in emphasis of our view that strict scrutiny of the classification which a State makes in a sterilization law is essential, lest unwittingly or otherwise, invidious discriminations are made against groups or types of individuals in violation of the constitutional guaranty of just and equal laws.... When the law lays an unequal hand on those who have committed intrinsically the same quality of offense and sterilizes one and not the other, it has made as invidious a discrimination as if it had selected a particular race or nationality for oppressive treatment.... Sterilization of those who have thrice committed grand larceny with immunity for those who are embezzlers is a clear, pointed, unmistakable discrimination. Oklahoma makes no attempt to say that he who commits larceny by trespass or trick or fraud has biologically inheritable traits which he who commits embezzlement lacks. Oklahoma's line between larceny by fraud and embezzlement is determined, as we have noted, 'with reference to the time when the fraudulent intent to convert the property to the taker's own use' arises We have not the slightest basis for inferring that that line has any significance in eugenics nor that the inheritability of criminal traits follows the neat legal distinctions which the law has marked between those two offenses. In terms of fines and imprisonment the crimes of larceny and embezzlement rate the same under the Oklahoma code. Only when it comes to sterilization are the pains and penalties of the law different. The equal protection clause would indeed be a formula of empty words if such conspicuously artificial lines could be drawn.⁴⁶

⁴⁴ *Ibid.*, 208.

⁴⁵ 316 US 535.

⁴⁶ *Ibid.*, 541-542.

That same year, in 1942, in *Hill v. Texas*,⁴⁷ Chief Justice Stone stressed in language both vigorous and clear the significance to be attached to this constitutional guarantee: "Equal protection of the laws is something more than an abstract right. It is a command which the state must respect, the benefits of which every person may demand. Not the least merit of our constitutional system is that its safeguards extend to all — least deserving as well as the most virtuous."⁴⁸ To recall Gunther, the full flowering of this right occurred during the Warren Court. So with Bickel, who in the Oliver Wendell Holmes Lecture of 1969 cited Kurland to this effect: "The Justices of the Warren Court thus ventured to identify a goal. It was necessarily a grant one — if we had to give it a single name, that name, as Professor Kurland has suggested, would be the Egalitarian Society."⁴⁹

(c) *Procedural Due Process Under the Fifth and Fourteenth Amendments and the Other Rights of an Accused Under the Fourth, Sixth, Seventh and Eighth Amendments*

The last group in these fundamental liberties covers procedural due process that must be satisfied to warrant any deprivation of life, liberty, or property by the Federal government under the Fifth Amendment,⁵⁰ or by a State under the Fourteenth Amendment; the ban on unreasonable search and seizure under the Fourth Amendment; the right to speedy and public trial by an impartial jury with the accused being informed of the nature and cause of the accusation against him with compulsory process for obtaining witnesses in his favor and with the assistance of counsel for his defense under the Sixth Amendment; the right to a trial by jury under the Sixth and Seventh Amendments and the prohibition against excessive bail, excessive fine, and cruel and unusual punishment under the Eighth Amendment. Procedural due process, it must be remembered, applies to both civil and criminal cases; it is identified, as noted, with "the law of the land" which, to follow Webster, is one "which hears before it condemns, which proceeds upon inquiry, and renders judgment only after trial."⁵¹ The mere recital of the above rights, constituting the bulk of the first ten Amendments, yields the reflection that, as worded, the English legal heritage of the American people was quite marked. They could be viewed, however, not merely as privileges and immunities of Englishmen who emigrated to the United States and their descendants but of man as such. They could be, considering the then prevailing climate of opinion in the late eighteenth century, identified with the natural rights of anyone, whatever be the country of his allegiance. The historian Becker viewed it thus, imputing this concept to Locke's Civil Governments. As he stated: "Locke did not need to convince the colonists because they were already convinced; and they were already convinced because they had long been living under governments which did in a rough and ready way conform to the kind of government for which Locke had furnished a reasoned foundation."⁵² For him, "the

⁴⁷ 316 US 400.

⁴⁸ *Ibid.*, 406.

⁴⁹ Bickel, *The Supreme Court and the Idea of Progress*, 13 (1969).

⁵⁰ The due process clause in the Fifth Amendment as previously noted includes other specific rights, *supra*.

⁵¹ *Cf. The Trustees of Dartmouth College v. Woodward*, 4 Wheat. 518, 581 (1819).

⁵² Becker, *Declaration of Independence*, 72-73 (1922).

immunities which they in fact enjoyed they thought of as 'rights' which they ought constitutionally to possess."⁵³ Chafee would make a qualification, his surmise being "that some intellectual Americans between 1765 and 1791 thought a good deal about the rights of man, but that almost all Americans were thinking then and for a long time before about the rights of Englishmen."⁵⁴ Justice Story, the first eminent commentator on the American Constitution, writing of the historical background of the first ten Amendments, said:

In England, the bills of rights were not demanded merely of the crown, as withdrawing a power from the royal prerogative; they were equally important, as withdrawing power from parliament. A large proportion of the most valuable of the provisions in Magna Charta, and the bill of rights in 1688, consists of a solemn recognition of limitations upon the power of parliament; that is, a declaration that parliament *ought* not to abolish, or restrict those rights.⁵⁵

With reference to the constitutional ban on unreasonable search and seizure, which for Cooley is near in importance "to exemption from any arbitrary control of the person," Cooley referred to "that maxim of the common law which secures to the citizen immunity in his home against the prying eyes of the government, and protection in person, property, and papers against even the process of the law, except in a few specified calls."⁵⁶ It is "English history" that for him supplies the answer as to "the original occasion for its adoption."⁵⁷ With the evolution of the common law concepts as applied in the United States, the accused is afforded the opportunity for a fair and impartial proceeding, whenever an accusation is laid at his door.

So it should be if constitutionalism is to prevail. Crimes should not go unpunished, it goes without saying. The conviction of an accused must, however, be based on commission of acts by him anti-social in character and as such duly penalized by law. It is equally important that the procedure followed does not offend canons of decency and justice. As was rightly observed by Cooley: "Perhaps the most important of the protections to personal liberty consists in the mode of trial which is secured to every person accused of crime."⁵⁸ Rights intended to assure this result do not pose obstacles to the equally pressing need for the minimum requirement of communal order. There are limits to a man's freedom of action. He lives in society. A regime of liberty, to be true to its name, requires, however, that the immunity of one's person be the rule, not the exception. That is the view of Cushman who could affirm: "There is no more accurate index of a nation's regard for civil liberty than is to be found in the laws and procedure by which it deals with persons accused of crime."⁵⁹ Dumbauld would remind us that the importance of such restrictions on the power of government is to be found "not in the particular specific types of action prohibited, but in the general principle that keeps alive in the public mind the doctrine that governmental

⁵³ *Ibid.*, 81.

⁵⁴ Chafee, *Documents on Fundamental Human Rights* 13 (1963).

⁵⁵ II Story, *Commentaries on the Constitution of the United States*, 3rd ed., 657-658 (1858).

⁵⁶ II Cooley, *A Treatise on the Constitutional Limitations*, 8th ed., 610-611 (1927).

⁵⁷ *Ibid.*, 612.

⁵⁸ *Ibid.*, 637.

power is not unlimited.”⁶⁰ So with Fraenkel, who was quite categorical in asserting that without such safeguards thrown around an accused, “no one is truly free.”⁶¹

The new Asian nations, embarked on the project of framing their fundamental laws, were most receptive to the hospitable scope accorded constitutional rights. Moreover, after World War II, there was quite a strong sentiment for stressing human rights. That is quite understandable in view of the horrors and atrocities to which it gave rise, especially those laid at the door of the Axis powers. It was felt then, and rightly so, that in the new world in the making, there should be more assurance of the respect and dignity to which every human being as such is entitled. The world was witness to how far the criminal process could be availed of to stifle the slightest opposition to the group in control of the government. Difference of opinion could be characterized as obstructionism. Dissent could be stigmatized as disloyalty. How easy it was to frame charges against anyone so unfortunate as to incur official displeasure. The Universal Declaration of Human Rights of December 10, 1948 was a fitting response to such a clamor. It included provisions, which if observed, would avoid the tyrannical use of criminal law.⁶² The broad and general character of such norms certainly gains concreteness if interpreted in the light of American authoritative doctrines. When it is considered that the grave social and economic problems of the new Asian states call for the extension of governmental power into matters traditionally viewed outside state competence and that there is urgency in the formulation and application of remedial measures, it becomes readily apparent why the teaching of American experience in this field possesses value. It will serve, if followed, as a brake to the tendency, perhaps at times unavoidable, for officialdom to check abuse of authority and to adhere to the ideals of liberty.

That was the lesson to be gleaned from the doctrines in this branch of constitutional law enunciated during the Hughes and Stone era. It was evident that the American Supreme Court, according to Pritchett, had “to a considerable degree exhibited the same kind of concern for protection of the procedural rights of defendants in criminal cases that it [had] shown for the protection of civil liberties.”⁶³

⁵⁹ Cushman, *Civil Liberties in the United States* 135 (1956).

⁶⁰ Dumbauld, *The Bill of Rights* 140 (1957).

⁶¹ Fraenkel, *Our Civil Liberties* 6 (1944).

⁶² Thus Article 9 states: “No one shall be subjected to arbitrary arrest, detention or exile.” Article 10 provides: “Everyone is entitled in full equality to a fair and public hearing by an independent and impartial tribunal, in the determination of his rights and obligations and of any criminal charge against him.” Article 11 reads: “1. Everyone charged with a penal offence has the right to be presumed innocent until proved guilty according to law in a public trial at which he has had all the guarantees necessary for his defence. 2. No one shall be held guilty of any penal offence on account of any act or omission which did not constitute a penal offence, under national or international law, at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time the penal offence was committed.” Article 12 is worded thus: “No one shall be subjected to arbitrary interference with his privacy, family, home or correspondence, nor to attacks upon his honour and reputation. Everyone has the right to the protection of the law against such interference or attacks.”

⁶³ Pritchett, *The Roosevelt Court*, 137 (1948).

He was referring to opinions in cases involving the First Amendment rights. It would be unfair to compare that period with the great advances under the later Warren Court, but it does seem to this author that the most notable achievement in this cluster of constitutional rights lies in the marked progress attained in assuring that confessions to be admissible must not be the product of coercion, whether physical, emotional, or psychological. Thus was the right against self-incrimination vitalized as an aspect of procedural due process to which state action must conform. In *Brown v. Mississippi*⁶⁴ the evidence disclosed that defendants had been whipped until they agreed to sign confessions drafted by the prosecuting officers and were threatened with renewal of the torture if they later retracted. The defense of the State of Mississippi was that immunity from self-incrimination as guaranteed by the Constitution in federal prosecutions was not a due process requirement for the states. The Court had no use for such a defense. As Chief Justice Hughes, who spoke for the Court, pointed out: "The rack and torture chamber may not be substituted for the witness stand."⁶⁵ A trial of that character, as he later stressed, "is a mere pretense where the state authorities have contrived a conviction resting solely upon confessions obtained by violence."⁶⁶ After referring therefore to the doctrine that state action, whether through one agency or another, must "be consistent with the fundamental principles of liberty and justice" lying at the base of all American civil and political institutions, citing *Hebert v. Louisiana*,⁶⁷ the opinion concluded: "It would be difficult to conceive of methods more revolting to the sense of justice than those taken to procure the confessions of these petitioners, and the use of the confessions thus obtained as the basis for conviction and sentence was a clear denial of due process."⁶⁸ It was the use of violence that was thus proscribed in *Brown*. *Chambers v. Florida*⁶⁹ carried the matter a step further. It is rare in the judicial annals of American Supreme Court decisions that the heights of lofty and elevated prose that characterized the opinion of Justice Black were ever attained. Such language was prompted by the facts therein showing that four young Americans belonging to the black race were accused of the murder of a white man, kept in custody and questioned one by one with no opportunity between grillings to obtain rest or sleep for five days and nights until they confessed. The convictions could not stand. The memorable words of Justice Black follow:

To permit human lives to be forfeited upon confessions thus obtained would make of the constitutional requirement of due process of law a meaningless symbol. We are not impressed by the argument that law enforcement methods such as those under review are necessary to uphold our laws. The Constitution proscribes such lawless means irrespective of the end. And this argument flouts the basic principle that all people must stand on an equality before the bar of justice in every American court. Today, as in ages past, we are not without tragic proof that the exalted power of some governments to punish manufactured crime dictatorially is the handmaid of tyranny. Under our constitutional system, courts stand against any winds that blow as havens of refuge for those who might otherwise suffer because they are helpless, weak, outnumbered, or because they are non-confirming victims of prejudice and public

⁶⁴ 297 US 278 (1936).

⁶⁵ *Ibid.*, 286-287.

⁶⁶ *Ibid.*, 287.

⁶⁷ 272 US 312 (1926).

⁶⁸ 297 US 278, 287.

⁶⁹ 309 US 227.

excitement. 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. No higher duty, no more solemn responsibility, rests upon this Court, than that of translating into living law and maintaining this constitutional shield deliberately planned and inscribed for the benefit of every human being subject to our Constitution — of whatever race, creed, or persuasion.⁷⁰

Due process thus enabled federal supervision of state criminal procedure. It was, however, during the period of the Warren Court that its far-reaching scope became evident. It is now deemed to include the right to be free from unreasonable searches and seizures and to have excluded from criminal trials any evidence illegally seized,⁷¹ the right to counsel;⁷² the right against self-incrimination;⁷³ the right to confront opposing witnesses;⁷⁴ the right to a speedy trial;⁷⁵ the right to compulsory process for obtaining witnesses;⁷⁶ the right to a jury trial;⁷⁷ and the right against double jeopardy.⁷⁸ Graham could accurately state:

Basically, what the Court did was to refine the meaning of the due process requirement of the Constitution, which until then required only that states observe: 'fundamental fairness' in criminal matters. The Warren Court changed the due process requirement to demand absolute compliance by state and local police with the key provisions of the Bill of Rights. For a process that was accomplished in less than a decade, this could properly be called a 'due process revolution.'⁷⁹

It would seem, therefore, that the void in the American legal firmament caused by the eclipse of substantive due process was filled by procedural due process. Why it has come to be so owes much to Justice Black. His contribution to such a state of affairs was substantial. He had resolutely pursued a course of deferring to legislative judgment on economic matters. That, for him, was not the Court's business. Just as resolutely he was adamant in his belief that it was the intention of those responsible for the Fourteenth Amendment to include in the due process clause the specific guarantees found in the 1791 Bill of Rights. That was his reading of its historical background, announced with his customary vigor and lucidity in his famed *Adamson* dissent.⁸⁰ As was categorically stated by him:

My study of the historical events that culminated in the Fourteenth Amendment, and the expressions of those who sponsored and favored, as well as those who opposed its submission and passage, persuades me that one of the chief objects that the provisions of the Amendment's first section, separately, and as a whole, were intended to accomplish was to make the Bill of Rights applicable to the states.⁸¹

⁷⁰ *Ibid.*, 240-241.

⁷¹ See *Mapp v. Ohio*, 367 US 643 (1961).

⁷² *Gideon v. Wainwright*, 372 US 335 (1963).

⁷³ *Malloy v. Hogan*, 378 US 1 (1964).

⁷⁴ *Pointer v. Texas*, 380 US 400 (1965).

⁷⁵ *Klopfer v. North Carolina*, 386 US 213 (1967). The right to a public trial as part of due process was announced in a much earlier case, *In re Oliver*, 333 US 257 (1948).

⁷⁶ *Washington v. Texas*, 388 US 14 (1967).

⁷⁷ *Duncan v. Louisiana*, 391 US 145 (1968).

⁷⁸ *Benton v. Maryland*, 395 US 711 (1969).

⁷⁹ Graham, *The Self-inflicted Wound* 6 (1970).

⁸⁰ *Andamson v. California*, 332 US 46 (1947).

⁸¹ *Ibid.*, 71-72.

On the other hand, the majority opinion by Justice Reed stated precisely the opposite:

Nothing has been called to our attention that either the framers of the Fourteenth Amendment or the states that adopted intended its due process clause to draw within its scope the earlier amendments to the Constitution. Palko held that such provisions of the Bill of Rights as were 'implicit in the concept of ordered liberty,'... became secure from state interference by the clause. But it held nothing more.⁸²

There was thus adherence to the prevailing concept in the *Higbes* and *Stone* are expressed in *Palko v. Connecticut*⁸³ by the equally articulate Justice Cardozo: "In these and other situations immunities that are valid as against the federal government by force of specific pledges of particular amendments have been found to be implicit in the concept of ordered liberty, and thus, through the Fourteenth Amendment, became valid as against the states."⁸⁴ While there has been no formal adoption of the incorporation theory of Justice Black, it would seem that the result, if not identical, is very much akin to it.

3. *Fundamental Rights in Asian Constitutions: The American Influence*

The next line of inquiry to be briefly pursued is the extent of the influence of American constitutional law on the fundamental laws of the new Asian states. They were framed, as previously noted, just after the close of World War II. Also, as mentioned, the Constitution of the Republic of the Philippines as of the date of her independence in 1946 was the one proposed and thereafter ratified as far back as 1935, intended for the Commonwealth of the Philippines, which was a transition status from an unincorporated territory of the United States to that of an independent state. Such influence, it may safely be assumed, varies from considerable to slight.

1) *Influence of American Constitution in the Philippines quite marked*

The 1935 Constitution was patterned after that of the United States. There was a bill of rights. The separation of powers doctrine was adhered to, with a President vested with the executive power, a National Assembly vested with legislative power, and the Supreme Court as well as such inferior courts as may be created by law vested with judicial power. In an article written by the President of the Convention, the late Claro M. Recto, fourteen years after its adoption, he expressed the fears that it might be looked upon, especially for those apt to judge by cursory appraisal, "as a mere imitation of the American Charter."⁸⁵ As a matter of fact, one of the arguments put forth by the advocates of change as far back as 1946 was that it was a remnant of colonialism. A more sober appraisal from the pen of the then Justice, later Chief Justice, Roberto Concepcion, was that except for mandatory matters included in an ordinance, which ended as of the date of independence in 1946, the rest of the provisions did express the genuine will of the Filipino people as conceived by the framers.⁸⁶ That was the way they wanted it. It is easy to under-

⁸² *Ibid.*, 54.

⁸³ 302 US 319 (1937).

⁸⁴ *Ibid.*, 324-325.

⁸⁵ Recto, *Our Constitution*, 1 Philippine Bench and Bar 5 (1949).

⁸⁶ Cf. Concepcion, *Thirty Years of the Philippine Constitution* 72 (1965).

stand why. Recto, as Presiding Officer of the Convention, observed how firm was the conviction held by so many leading delegates, products of the American system of education, that a constitutional democracy of the American type was the one most suited to Philippine conditions. Moreover, there was a practical reason. Care was taken by the Convention to avoid any radical departure from the constitutional system enforced in the United States inasmuch as the Philippine Independence Act of 1934 contained a provision that the American President had to certify that the constitution drafted would provide for a republican form of government and contain a bill of rights. Without such certification, the Commonwealth of the Philippines could not be established. "Since the long-sought independence was premised after a ten-year transition period of such status, it was imperative, in the thinking of the Filipino leaders then, that there be no obstacle to its coming into existence as soon as possible, which may not be the case if the proposed constitution were to be indicted for unorthodoxy.

There is, moreover, this consideration present in the mind of the delegates. Government, if viewed as a science, involves problems and difficulties formidable in character. If the technique of leadership by which it is carried out is looked upon as an art, it is quite baffling and complex. There is need then for caution and prudence, not the duty but the necessity, to paraphrase Holmes, to keep continuity with the past, to adhere to what has been insofar as it proved beneficial or to the extent that it has formed part of the people's accustomed ways. It is not to be doubted that from the inception of the American tutelage, at the beginning of the century, Philippine public law was based on American concepts. As early as 1910, in *United States v. Bull*,⁸⁷ its Supreme Court then composed of a majority of Americans affirmed: "Within the limits of its authority the Government of the Philippines is a complete governmental organism with executive, legislative, and judicial departments exercising the functions commonly assigned to such departments. The separation of powers is as complete as in most governments."⁸⁸ This was at a time when the upper house of the then legislative body was composed of the Philippine Commission, headed by the Governor-General with the cabinet members included and an elective lower house composed entirely of Filipinos. That was the way it was provided for in the first organic act, the Philippine Bill of 1902.⁸⁹ More to the point, as far as fundamental rights are concerned. Such legislation adopted the first ten Amendments in the United States Constitution as well as the Thirteenth and Fourteenth Amendments. In the absence of a federal structure in the Philippines, there was no need to grapple with the complexity of the state action rubric in the judicial effort to vitalize both the due process and equal protection guarantees. The opening paragraph of the Bill of Rights, Section 5 of such Act, reads: "That no law shall be enacted in said Islands which shall deprive any person of life, liberty, or property, without due process of law, or deny to any person therein the equal protection of the laws."⁹⁰ The next organic

⁸⁷ 18 Philippine Reports 7. Hereafter, Philippine Reports will be referred to as Phil.

⁸⁸ *Ibid.*, 27.

⁸⁹ Section 7 of the Philippine Bill of 1902.

⁹⁰ Section 5.

law was the Philippine Autonomy Act of 1916, more popularly known as the Jones Law after its author. Its preamble expressly announced the purpose of the people of the United States to withdraw their sovereignty over the Philippine Islands and to recognize their independence with the establishment of a stable government. Even prior to its effectivity, there was a much-increased participation by Filipinos in the government, thanks to a far-seeing policy of an American Governor, Francis Burton Harrison by name. This legislation further increased the scope of local autonomy. Again, as far as rights were concerned, due process and equal protection were the first specified, as in the Philippine Bill of 1902.⁹¹ There was also a reiteration of all the other guarantees.

By the time then the Constitutional Convention met in 1934, the Supreme Court of the Philippines had for over three decades been quite busy at work construing the fundamental rights provisions of such organic acts. As a matter of fact, even before the Philippine Bill of 1902 was enacted, the Philippine Supreme Court had to pass upon the contention that to apply to a petitioner in a habeas corpus proceeding the then Code of Civil Procedure provision allowing arrest in civil cases was to violate the non-impairment clause.⁹² It is worth noting that in 1907, the first time the Supreme Court exercised the power of judicial review by annulling a statutory provision in *Casanovas v. Hord*,⁹³ it was this same right that was successfully invoked. Thereafter, there were a number of judicial decisions construing the organic act provisions on the freedom of belief, of expression, and of assembly. One of the most notable was promulgated in 1918. It is *United States v. Bustos*.⁹⁴ It set aside a conviction for libel, the complaint being based on affidavits, charging a justice of the peace with malfeasance in office and seeking his removal. Justice Malcolm, by far the ablest constitutionalist on the bench, viewed the matter from the standpoint of the rights to freedom of speech and of the press. He mentioned that the Malolos Constitution, drafted by the Filipinos in 1898, after concluding its successful revolution against Spain, "zealously guarded freedom of speech and press and assembly and petition."⁹⁵ Then came this memorable passage:

The interest of society and the maintenance of good government demand a full discussion of public affairs. Complete liberty to comment on the conduct of public men is a scalpel in the case of free speech. The sharp incision of its probe relieves the abscesses of officialdom. Men in public life may suffer under a hostile and an unjust accusation; the wound can be assuaged with the balm of a clear conscience. A public officer must not be too thin-skinned with reference to comment upon his official acts.⁹⁶

It is a source of pride that the Philippine Supreme Court was thus ahead by more than three decades of its American counterpart, the leading *New York Times*⁹⁷ case on the question of the limitation

⁹¹ Section 3. There is, however, this last sentence: "Private property shall not be taken for public use without just compensation."

⁹² *In re Prautch*, 1 Phil. 132 (1902).

⁹³ 8 Phil. 125.

⁹⁴ 37 Phil. 731 (1918). The caption arises from the fact that in the first two decades of the American rule in the Philippines, the prosecution was in the name of the United States.

⁹⁵ *Ibid.*, 739.

⁹⁶ *Ibid.*, 740-741.

⁹⁷ 376 US 254 (1964).

arising from “the constitutional protections for speech and press,” on “a State’s power to award damages in a libel action brought by a public official against critics of his official conduct.”⁹⁸

That was the situation when the Constitutional Convention met in 1934. The feeling of the vast majority of the Filipinos was that the American experiment in constitutional democracy in the Philippines was successful. There was, of course, dissatisfaction in some quarters. Poverty was even then a serious problem. The feeling on the part of some peasant leaders was that capitalism was inherently exploitative. For them freedom of speech and of conscience as well as the safeguards to which an accused is entitled did not suffice. To many, however, these constitutional rights were meaningful. They did assure, if not ignored, that man’s innate dignity would be respected. That way of life had its appeal. The important thing was for the promise in the organic acts to be fulfilled. There was no thought, even if the Philippine Independence Act did not require it, to do away with a bill of rights. By that time, the Filipino people were familiar with such guarantees. Their retention as worded would be most natural. Some intellectuals with a European background and a number of the surviving leaders of the Revolution, first against Spain and thereafter against the United States, which took place because of this country’s failure to recognize our independence, were desirous of incorporating some changes. They had in mind certain provisions of the Malolos Constitution. In their opinion, that was more in keeping with Filipino tradition. That was to reflect greater responsiveness to local needs and conditions. While they were unable to persuade the Convention to go as far as they would wish, they met with some measure of success. By and large though, the Bill of Rights of the 1935 Constitution adhered to what had been. Such a result, in view of what had been said, had almost the imprint of inevitability.

There was this contributing factor. The draft was prepared by a committee headed by Delegate, later Justice, Jose P. Laurel, the leading Filipino authority on the subject of constitutional law and a Doctor of Civil Laws graduate of the Yale Law School. It was he who sponsored the draft. He pressed for its approval with all the persuasive powers at his command, arising from the breadth of his scholarship and his gift of oratory. Thus his major address started with these words:

The history of the world is the history of man and his arduous struggle for liberty. And the history of the Philippines is the history of the Filipinos and their gigantic struggle for emancipation. It is the history of those brave and noble souls who, in the ages that are past, have labored, fought and bled that the government of the lash — that symbol of slavery and despotism — might endure no more. It is the history of those great self-sacrificing men who lived and suffered in an age of cruelty, pain and desolation, so that every man might stand, under the protection of great rights and privileges, the equal of every other man.⁹⁹

Then came this portion where there was explicit reference to the American experience:

The student of American constitutional history will recall that when the

⁹⁸ *Ibid.*, 256.

⁹⁹ III *Proceedings of the Philippine Constitutional Convention*, S. Laurel, ed., 648 (1966).

United States Constitution was submitted to the thirteen original states for ratification, it did not contain a full enumeration of ancient rights and that it was ratified only upon the promise that such an enumeration would later on be made. The promise was fulfilled by the first Congress in the form of ten amendments to the Constitution. The Bill of Rights in the Federal Constitution was, therefore, the product of popular demand, consciously and conscientiously made, as against the judgment of the Constitutional Convention of 1787. So high is the regard of the American people for individual rights that the Congress, in enacting the Independence Law, imposed as one of the conditions the insertion in our constitution of a Bill of Rights.¹

More to the point, he stressed:

The Bill of Rights in Section 3 of the Jones Law, reproduced from similar provisions in American Constitutions, both Federal and State, is well-nigh precise and comprehensive. The Committee on Bill of Rights has had a relatively facile work, in this connection, namely that of adoption and adaptation. Modifications and changes in phraseology have been avoided, whenever possible. The principles have been left in a language expressive of their historical background, nature, extent and limitations as construed and interpreted by the great statesmen and jurists who have vitalized them in the course of time.²

The closing paragraph of that sponsorship speech likewise deserves mention. Delegate Laurel gave warning not to

be allured by new and untried dogmas and theories in the formation of our Bill of Rights, and again I suggest that we adopt a conservative attitude in this connection. There is in reality nothing new in this proposed Bill of Rights. It is but a restatement of what is found in the Jones Law, and the Bill of Rights contained in this law is in turn but a reproduction of similar provisions in American Constitutions, both Federal and State. The existing Bill of Rights embodied in the Jones Law is believed comprehensive enough and has worked out satisfactorily. It has become part and parcel of our jurisprudence and carries with it the interpretations given by the great Jurists and Statesmen who have vitalized its provisions. Again, it were better that we keep close to the shores; let others venture on the deep.³

At the same time, he was cognizant with the recent trend in government for greater control of the economy to promote public welfare and the consequent need to view those traditional rights as posing no obstacle to such state efforts. Thus:

Upon the other hand, notwithstanding the fact that the Bill of Rights of the United States Constitution may be said to be founded on an absolute theory, it has withstood the test of time, and for more than one and one-half century, has not suffered an amendment. Congress, from time to time, has passed legislation on labor and capital and other matters affecting social conditions in America but the American Bill of Rights has been able to adapt itself to changing conditions and environments. This shows the flexibility of the Bill. In the very draft itself of the Constitution that we are considering, we find provisions pertaining to social justice and of socialistic tendencies. For instance, we find limitation upon private ownership of agricultural land (Sec. 15, Art. XIII); we nationalize or socialize railroads, telegraphs and other means of communications, as they have done in the United States (Sec. 10, *Ibid.*); we nationalize our natural resources (Sec. 13, *et seq.*); we make it the duty of the State to safeguard social progress of the inhabitants, etc. (Sec. 9, *Ibid.*); we require the State, in the interest of social justice to afford the necessary protection to labor, especially to women and minors, and to regulate the relations between labor and capital, and landlord and tenant, both in agriculture and industry (Sec. 7, *Ibid.*).

¹ *Ibid.*

² *Ibid.*, 649.

³ *Ibid.*, 674.

More than that, to gain economic and social fortitude we provide in this draft for delegation of legislative authority to the President in connection with the fixing of tariff rates, tonnage and wharfage dues (Par. 13, Sec. 5, Art. VII) and the promulgation of rules and regulations to carry out a declared national policy in cases of emergency (Par. 15, *Ibid.*). And yet, our proposed Bill of Rights, I dare say, may be made to adapt itself to these perchance 'revolutionary' provisions, through proper interpretation and application of the reserve 'police power' of the State. The task in this respect will be thrown mainly on the judiciary and to some extent on the political departments of the government. We shall need to summon not only the learning but the vision and patriotism of our judges, so that in the process of exposition and construction of the fundamental law, they may emulate the 'judicial statesmanship' of the great John Marshall of the Supreme Court of the United States. Let our judges be, as it were, the vestal keepers of the purity and sanctity of our Constitution and the protection and vindication of popular rights will, I trust, be safe and secure in their reverential guardianship.⁴

There were three more days of debate. Delegate Laurel met and parried all sorts of questions. Invariably his explanations and answers to queries expressing doubts or seeking modifications were accorded acceptance. After the assurance that there was to be no inflexibility in the interpretation of the guarantees in line with what had been pronounced in the past by American courts and with the recognition that Philippine experience certainly should weigh considerably in such process, the Convention readily gave its nod of approval to the draft. Thus did the bill of rights in the Constitution of the Philippines follow the phraseology found in the American Constitution. The First Amendment was embodied in two provisions. First, there was freedom of conscience: "No law shall be made respecting an establishment of religion, or prohibiting the free exercise thereof, and the free exercise and enjoyment of religious profession and worship, without discrimination or preference, shall forever be allowed. No religious test shall be required for the exercise of civil or political rights."⁵ Immediately after came the freedom of expression guarantee including the right to peaceable assembly: "No law shall be passed abridging the freedom of speech, or of the press or the right of the people peaceably to assemble and petition the government for redress of grievances."⁶ Moreover, freedom of association was explicitly mentioned: "The right to form associations or societies for purposes not contrary to law shall not be abridged."⁷ The Malolos Constitution is the source of this provision. There is no explicit affirmation of such right in the United States Constitution. In 1958, however, the American Supreme Court flatly declared: "It is beyond debate that freedom to engage in association for the advancement of beliefs and ideas is an inseparable aspect of the 'liberty' [embraced in] freedom of speech."⁸ Justice Douglas, in an article published five years later, stressed its significance "that it is primarily the First Amendment of her Constitution, which safeguards freedom of speech and of the press, of assembly and of petition 'that provides [association] with the protection they need if they are to remain viable and continue to contribute to our Free Society."⁹

⁴ *Ibid.*, 674-675.

⁵ Article III, Section 1, par. (7), *Ibid.*

⁶ Article III, Section 1, par. (8), *Ibid.*

⁷ Article III, Section 1, par. (6), *Ibid.*

⁸ *NAACP v. Alabama ex rel Patterson*, 357 US 449, 460 (1958).

⁹ Douglas, *The Right of Association*, 63 Col. Law Rev. 1363 (1963).

All the more credit is therefore due the Filipino framers of the Malolos Constitution. It is quite obvious then that in the Philippines, as in the United States, intellectual liberty is on a high plane.

The other rights found in the Fourth to the Eighth Amendments of the American Constitution as well as those in the original text were likewise embodied in the 1935 Constitution. That is to safeguard liberty in the physical sense, covering freedom of the person, his home, papers and possessions, with particular mention of his right to abode and respect for the privacy of his correspondence, except when search or seizure is reasonable;¹⁰ his freedom from involuntary servitude;¹¹ his non-imprisonment for debt;¹² his rights if accused of crime;¹³ the prohibition against the enactment of an *ex post facto* law and a bill of attainder;¹⁴ and the expeditious remedy afforded him by the writ of habeas corpus.¹⁵ The first group of the above rights is a recognition that the liberty of the person is meaningless if there be unwarranted intrusion in the privacy of his home, with the recognition of the state authority to conduct reasonable searches and seizures under safeguards that would protect such freedom.¹⁶ Such a right is bolstered by the guarantees of the liberty of abode and the immunity of communication and correspondence.¹⁷ Our Bill of Rights, then, in addition to incorporating the Fourth Amendment of the United States Constitution prohibiting unreasonable searches and seizures, again turned for guidance to the Malolos Constitution, with its express recognition that a man can choose his place of abode and that he can be assured that his correspondence is safe from the prying eyes of public officials, except where required by public safety and order.¹⁸ The search and seizure provision in the 1935 Constitution is well-nigh identical with the Fourth Amendment of the United States Constitution:

The right of the people to be secure in their persons, houses, papers, and effects against unreasonable searches and seizures shall not be violated, and no warrants shall issue but upon probable cause, to be determined by the judge after examination under oath or affirmation of the complainant and the witnesses he may produce, and particularly describing the place to be searched, and the persons or things to be seized.¹⁹

There was this significant modification. It was required that the probable cause is "to be determined by the judge after examination under oath or affirmation of the complainant and the witnesses" that may be produced. The privacy of communication is provided for in

¹⁰ Art. III, Section 1, pars. (3-5), Constitution of the Philippines.

¹¹ Art. III, Section 1, par. (13) of the 1935 Constitution reads: "No involuntary servitude in any form shall exist except as a punishment for crime whereof the party shall have been duly convicted."

¹² Art. III, Section 1, par. (12) of such Constitution states: "No person shall be imprisoned for debt or nonpayment of a poll tax."

¹³ Art. III, Section 1 pars. (15-20), *Ibid.*

¹⁴ Art. III, Section 1 par. (11), *Ibid.*

¹⁵ Art. III, Section 1 par. (14), *Ibid.*

¹⁶ Art. III, Section 1 par. (3), *Ibid.*

¹⁷ Art. III, Section 1 pars. (4-5), *Ibid.*

¹⁸ *Cf.* According to Article 11 of the Malolos Constitution: "No Filipino shall be compelled to change his domicile or residence except by virtue of final judgment." Art. 12 thereof reads thus: "In no case can correspondence confined to the post-office be detained or opened by government authorities, nor can those made by telegraph or telephone be detained. But, by virtue of a decree by a competent judge, any correspondence can be detained and that carried through the mails may also be opened in the presence of the accused."

¹⁹ Article III, Section 1, par. (3) of the Constitution of the Philippines.

this wise: "The privacy of communication and correspondence shall be inviolable except upon lawful order of the court or when public safety and order require otherwise."²⁰ As to the freedom to choose one's place of domicile, the 1935 Constitution states: "The liberty of abode and of changing the same within the limits prescribed by law shall not be impaired."²¹

The other rights of an accused were grouped together towards the end of the Article on the Philippine Bill of Rights in that Constitution. There was express mention anew of the due process guarantee: "No person shall be held to answer for a criminal offense without due process of law."²² The right to bail was next: "All persons shall before conviction be bailable by sufficient sureties, except those charged with capital offenses when evidence of guilt is strong. Excessive bail shall not be required."²³ The presumption of innocence and the rights of the defendant at the trial came thereafter: "In all criminal prosecutions the accused shall be presumed to be innocent until the contrary is proved, and shall enjoy the right to be heard by himself and counsel, to be informed of the nature and cause of the accusation against him, to have a speedy and public trial, to meet the witnesses face to face, and to have compulsory process to secure the attendance of witnesses in his behalf."²⁴ There was one paragraph devoted solely to the right against self-incrimination: "No person shall be compelled to be a witness against himself."²⁵ The limits as to the penalties that may be imposed whether in the concept of fines or any other form of penal liability were then set forth: "Excessive fines shall not be imposed, nor cruel and unusual punishment inflicted."²⁶ The twice in jeopardy clause was last provided for: "No person shall be twice put in jeopardy of punishment for the same offense. If an act is punished by a law and an ordinance, conviction or acquittal under either shall constitute a bar to another prosecution for the same act."²⁷ Again it was explained at the Convention that such rights are intended not to shield the guilty but to protect the innocent. An individual subject to prosecution is thus freed from the apprehension that once indicted, conviction must automatically follow. Crime must be penalized; wrongdoing has to be repressed. It should not be thought that a person innocent but belonging to a minority group or otherwise without influence should be mistakenly sent to prison. Even where a misdeed has been committed, the individual is not to be denied the opportunity of submitting whatever defense he could legitimately avail of. Nor are such rights intended solely for the welfare of the individual accused. What is not to be lost sight of is that they find a place in the fundamental law out of a belief, deeply cherished, that the state itself finds it to its own advantage and benefit that it be so. There is a great and vital public interest in such rights being duly recognized and respected. If there is such obeisance to their com-

²⁰ Art. III, Section 1, par. (5), *Ibid.*

²¹ Art. III, Section 1, par. (4), *Ibid.*

²² Art. III, Section 1, par. (15), *Ibid.*

²³ Art. III, Section 1, par. (16), *Ibid.*

²⁴ Art. III, Section 1, par. (17), *Ibid.*

²⁵ Art. III, Section 1, par. (18), *Ibid.*

²⁶ Art. III, Section 1, par. (19), *Ibid.*

²⁷ Art. III, Section 1 par. (20), *Ibid.*

mands, as there ought to be, then a public need, not merely formal but substantial, is attended to. Only thus can the state as the dispenser of justice truly live up to such vital role.

Rights of a related character deal with the ban on retroactive legislation and the limitation on the power of the state to suspend the privilege of habeas corpus. As to the former, the 1935 Constitution of the Philippines is quite categorical: "No ex post facto law or bill of attainder shall be enacted."²⁸ The source is the American Constitution.²⁹ In one of the earliest Philippine decisions, *Mekin v. Wolfe*,³⁰ rendered in 1903, the ex post facto clause was held applicable only to criminal proceedings. As to habeas corpus, the 1935 Constitution contained this provision: "The privilege of the writ of habeas corpus shall not be suspended except in case of invasion, insurrection, or rebellion, when the public safety requires it, in any of which events the same may be suspended wherever during such period the necessity for such suspension shall exist."³¹ There was thus a modification of the phraseology appearing in the United States Constitution: "The Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the Public Safety may require it."³² The Philippine version, however, would avoid any question as to whether it was the executive or the legislative department vested with such competence. Also, it did provide restrictions as to time and place. It is to be noted that it is only the privilege and not the writ that may be suspended. That accounts for the fact that while the Philippines is under martial law at present, applications for the writ are given due course, and it is up to the party detaining to allege that petitioner or the person in whose behalf it is made is included among the individuals as to whom the suspension is operative.³³

All that remains to be said to complete this brief appraisal of the Philippine Bill of Rights in its 1935 Constitution is to state that property is likewise safeguarded by due process and equal protection.³⁴ As was the case with the two previous organic acts, they were mentioned first. The next paragraph in the enumeration of the rights provided for the indemnity that must be paid in case of the exercise of the power of eminent domain: "Private property shall not be taken for public use without just compensation."³⁵ Delegate Laurel took pains to emphasize that the Malolos Constitution did likewise call for provisions of this character. Again for the sake of historical continuity, with Philippine Supreme Court decisions delineating their bounds, it seemed more advisable to adhere to the traditional formulation.³⁶ Nor was the non-impairment clause omitted: "No law impairing the obligation of contracts shall be passed."³⁷ There was no

²⁸ Art. III, Section 1, par. (11), *Ibid.*

²⁹ Cf. Art. I, Section 9, par. (3) of the United States Constitution,

³⁰ 2 Phil. 74.

³¹ Art. III, Section 1, par. (14) of the 1935 Constitution.

³² Art. I, Section 9, par. (2) of the United States Constitution.

³³ Cf. *Aquino, Jr. v. Ponce Enrile*, 56 SCRA 183 (1974).

³⁴ Art. III, Section 1, par. (1) of the 1935 Constitution provides: "No person shall be deprived of life, liberty, or property without due process of law, nor shall any person be denied the equal protection of the laws."

³⁵ Art. III, Section 1, par. (2), *Ibid.*

³⁶ III Proceedings of the Philippine Constitutional Convention, 349-350 (1966).

³⁷ Art. III, Section 1, par. (10) of the 1935 Constitution.

thought either of departing from the language of the Philippine Bill of 1902 and of the Philippine Autonomy Act, which incorporated what is found in the text of the American Constitution as a limitation on the power of a State.³⁸ Reference must be made to the misgivings expressed by some delegates to the 1934 Constitutional Convention as to the adverse consequences to state efforts to apply remedial measures to solve the problem of widespread poverty if too much regard was paid to property rights. *Laissez faire* as an economic maxim posing a hindrance to police power regulatory statutes was becoming increasingly anathema to many Filipino leaders of thought and opinion. The fears were sought to be stilled by the words of Delegate Laurel in the closing paragraph of his sponsorship address as to the enlarged scope of state authority in the field of economic legislation. It was fortunate likewise that the Philippines was not too responsive to the creed of unfettered capitalism, as was the case with the United States. As early as 1919, in the leading case of *Rubi v. Provincial Board of Mindoro*,³⁹ Justice Malcolm already had occasion to affirm:

The doctrines of *laissez-faire* and of unrestricted freedom of the individual, as axioms of economic and political theory, are of the past. The modern period has shown a widespread belief in the amplest possible demonstration of governmental activity. The Courts unfortunately have sometimes seemed to trail after the other branches of the Government in this progressive march.⁴⁰

It was understandable, therefore, why the reluctance of some delegates, not surprisingly graduates of American law schools, to incorporate the due process clause was overcome. The Convention could detect likewise hopeful signs on the horizon as to the American Supreme Court relying less on the constitutional protection to property to nullify legislation of an economic character. In a 1934 decision, *Home Building and Loan Assn. v. Blaisdell*,⁴¹ the non-impairment clause was restrictively construed. Later that same year, in *Nebbia v. New York*,⁴² the due process obstacle to price regulation under the technical and fine-spun concept of business affected with a public interest was swept away by this explicit pronouncement from the United States Supreme Court: "The phrase 'affected with a public interest' can, in the nature of things, mean no more than an industry, for adequate reason is subject to control for the public good."⁴³ The Philippine Constitutional Convention could not have been reasonably expected to anticipate the developments next year when the American Supreme Court seemed bent more than ever to stand pat on its role as a valiant defender of property.⁴⁴

To make assurance doubly sure that state efforts to aid the economically underprivileged would not be tainted by constitutional infirmity, the Convention included in the Constitution social and economic rights. In this regard, the American influence, as might have

³⁸ Art. I, Section 10, par. (1) of the United States Constitution.

³⁹ 39 Phil. 660.

⁴⁰ *ibid.*, 717-718.

⁴¹ 290 US 398.

⁴² 291 US 502.

⁴³ *Ibid.*, 536.

⁴⁴ Cf. Jackson, *The Struggle for Judicial Supremacy*, 86-123 (1941).

been expected, was minimal. While the United States can boast of a glorious tradition in the field of traditional political and civil rights expressive of the humanistic values that rightly elicited predominant judicial concern, social and economic rights hardly formed part of the judicial agenda. Yet they are necessary to make democracy a living reality, especially so in a developing country like the Philippines. So the Convention believed, and acted on such conviction. The 1935 Constitution then represented a departure from, and to that extent could be said to be an improvement of, its American counterpart. That the Convention was moved to act thus was in large part due to the vigorous advocacy of the then Delegate Manuel Roxas, the first President of the Republic of the Philippines. For him the Constitution that was to be drafted should have

a definite and well defined philosophy, not only political but social and economic. A constitution that in 1776 or in 1789 was sufficient in the United States, considering the problems they had at that time, may not now be sufficient with the growing and ever-widening complexities of social and economic problems and relations. If the United States of America were to call a constitutional convention today to draft a constitution for the United States, does any one doubt that in the provisions of that constitution there will be found definite declarations of policy as to economic tendencies; that there will be matters which are necessary in accordance with the experience of the American people during these years when vast organizations of capital and trade have succeeded to a certain degree to control the life and destiny of the American people? If in this constitution the gentleman will find declarations of economic policy, they are there because they are necessary to safeguard the interests and welfare of the Filipino people because we believe that the days have come when in self-defense, a nation may provide in its constitution those safeguards, the patrimony, the freedom to grow, the freedom to develop national aspirations and national interests, not to be hampered by the artificial boundaries which a constitutional provision automatically imposes.⁴⁵

One of the most vital national interests, an aspect of the country's aspirations, is the promotion of a social order truly concerned with the satisfaction of primary needs of the common man. Accordingly, in the Declaration of Principles, an Article that was itself an innovation, it was expressly provided: "The promotion of social justice to insure the well-being and economic security of all the people should be the concern of the State."⁴⁶ This provision is supplemented by the requirement: "The State shall afford protection to labor, especially to working women and minors, and shall regulate the relation between landowner and tenant, and between labor and capital in industry and in agriculture. The State may provide for compulsory arbitration."⁴⁷ The power of eminent domain was expanded to carry out the policy of transferring the ownership of lands to tenants: "The Congress may authorize, upon payment of just compensation, the expropriation of lands to be subdivided into small lots and conveyed at cost to individuals."⁴⁸ There was too another manifestation of the enlarged sphere of governmental power: "The State may, in the interest of national welfare and defense, establish and operate industries and means of transportation and communications, and, upon payment of just compensation, transfer to public ownership utilities and other

⁴⁵ III *Proceedings of the Philippine Constitutional Convention*, S. Laurel, ed., 177-178.

⁴⁶ Art. II, Section 5 of the Constitution of the Philippines.

⁴⁷ Art. XIV, Section 6, *Ibid.*

⁴⁸ Art. XIII, Section 4, *Ibid.*

private enterprises to be operated by the Government.”⁴⁹ Natural resources, it was made clear, belong to the Filipino people as a juridical entity:

All agricultural, timber and mineral lands of the public domain, waters, minerals, coal, petroleum, and other mineral oils, all forces of potential energy, and other natural resources of the Philippines belong to the State, and their disposition, exploitation, development, or utilization shall be limited to citizens of the Philippines, or to corporations or associations at least sixty per centum of the capital of which is owned by such citizens, subject to any existing right, grant, lease, or concession at the time of the inauguration of the Government established under this Constitution.⁵⁰

Public utilities were also reserved for Filipinos:

No franchise, certificate, or any other form of authorization for the operation of a public utility shall be granted except to citizens of the Philippines or to corporations or other entities organized under the laws of the Philippines, sixty per centum of the capital of which is owned by citizens of the Philippines, nor shall such franchise, certificate, or authorization be exclusive in character or for a longer period than fifty years. No franchise or right shall be granted to any individual, firm, or corporation, except under the condition that it shall be subject to amendment, alteration, or repeal by the Congress when the public interest so requires.⁵¹

So much for the fundamental rights provision of the 1935 Constitution, which is no longer in force. The present Constitution of the Philippines was drafted by the 1971 Constitutional Convention. It came into force and effect on January 17, 1973. What is immediately discernible is that the amendments introduced in the Bill of Rights⁵² are in essence minimal. Where formerly there were twenty-one paragraphs in the sole section, now there are twenty-three. There are thus two new rights added, one being an express recognition of the right of the people to have access to official records and to documents and papers pertaining to official acts, transactions, or decisions, subject to such limitations as may be provided by law.⁵³ The other rights that is now included in such article assures the speedy disposition of cases before all judicial, quasi-judicial or administrative bodies.⁵⁴ The promptness required in the disposition of cases may be looked upon as implied in the due process clause. The search and seizure clause has been modified. It now reads:

The right of the people to be secure in their persons, houses, papers, and effects against unreasonable searches and seizures of whatever nature and for any purpose shall not be violated, and no search warrant or warrant of arrest shall issue except upon probable cause to be determined by the judge, or such other responsible officer as may be authorized

⁴⁹ Art. XIII, Section 6, *Ibid.*

⁵⁰ Art. XIII, Section 1, *Ibid.*

⁵¹ Art. XIV, Section 8, *Ibid.*

⁵² Art. in of the 1935 Constitution and now Art. IV of the Revised Constitution.

⁵³ According to Section 6 of Art. IV: “The right of the people to information on matters of public concern shall be recognized. Access to official records, and to documents and papers pertaining to official acts, transactions, or decisions, shall be afforded the citizen subject to such limitations as may be provided by law.”

⁵⁴ According to Section 16 of Art. IV: “All persons shall have the right to a speedy disposition of their cases before all judicial, quasi-judicial, or administrative bodies.”

by law, after examination under oath or affirmation of the complainant and the witnesses he may produce, and particularly describing the place to be searched, and the persons or things to be seized.⁵⁵

Thus any possible ambiguity as to this guarantee being applicable to a warrant of arrest has been dissipated. The former language gave rise to doubts as a literal reading could confine its scope only to search warrants. Now there is the express requirement that for such arrest to be constitutionally permissible there must be a "probable cause to be determined by the judge, or such other responsible officer as may be authorized by law...." The last mentioned phrase is also an alteration. Where formerly, it is only a judge who can do so, now legislation may be enacted vesting such competence on "such other responsible officer." This innovation may be fraught with undesirable consequences. If it were a judge, the element of impartiality is easier to attain. He is not under pressure, unlike a fiscal or some other executive official, to have the party before him apprehended so that the prosecution could be started. In the 1935 Constitution, it was made clear that communication and correspondence "shall be inviolable except upon lawful order of the court or when public safety and order require otherwise."⁵⁶ A second paragraph has been added in the present Constitution. It is therein explicitly provided: "Any evidence obtained in violation of this or the preceding section shall be inadmissible for any purpose in any proceeding."⁵⁷ This is a feature of the new Constitution that is most welcome. It gives a constitutional sanction to the ruling in *Stonehill v. Diokno*.⁵⁸ The opinion in this leading Philippine decision cited this excerpt from *Mapp v. Ohio*:⁵⁹

The ignorable shortcut to conviction left open to the State tends to destroy the entire system of constitutional restraints on which the liberties of the people rest. Having once recognized that the right to privacy embodied in the Fourth Amendment is enforceable against the States, and that the right to be secure against rude invasions of privacy by state officers is, therefore, constitutional in origin, we can no longer permit that right to remain an empty promise. Because it is enforceable in the same manner and to like effect as other basic rights secured by its Due Process Clause, we can no longer permit it to be revocable at the whim of any police officer who, in the name of law enforcement itself, chooses to suspend its enjoyment. Our decision, founded on reason and truth, gives to the individual no more than that which the Constitution guarantees him, to the police officer no less than that to which honest law enforcement is entitled, and, to the courts, that judicial integrity so necessary in the true administration of justice.⁶⁰

The present Constitution is likewise notable for the added vitality accorded the guarantee against self-incrimination. It now reads:

No person shall be compelled to be a witness against himself. Any person under investigation for the commission of an offense shall have the right to remain silent and to counsel, and to be informed of such right. No force, violence, threat, intimidation, or any other means which vitiates the free will shall be used against him. Any confession obtained in violation of this section shall be inadmissible in evidence.⁶¹

⁵⁵ Art. IV, Section 3 of the Constitution of the Philippines.

⁵⁶ Art. III, Section I, par. (5) of the 1935 Constitution.

⁵⁷ Art. IV, Section 4, par. (2) of the Revised Constitution.

⁵⁸ L-19550, June 19, 1967, 20 SCRA 383.

⁵⁹ 367 US 643 (1961).

⁶⁰ *Ibid.*, 660.

⁶¹ Art. IV, Section 20 of the Constitution of the Philippines. Only the first sentence was found in the former Bill of Rights, Art. III, Section 1, par. (18).

The epochal American Supreme Court decision in *Miranda v. Arizona*,⁶² the opinion being rendered by Chief Justice Warren, supplied the basis for this mandate in the present Philippine Constitution. If fully implemented, the opportunity for abusive practices committed against individuals interrogated under police custody would be minimized. Without such a safeguard, there were fears that their right against self-incrimination could be rendered futile. There was also the insertion of this last sentence of that section dealing with the rights of an accused at the trial: "However, after arraignment, trial may proceed notwithstanding the absence of the accused provided that he has been duly notified and his failure to appear is unjustified."⁶³ Likewise, it now suffices that the punishment be either cruel or unusual, where formerly it should be both.⁶⁴

As for social and economic rights, the changes in the present Constitution are quite extensive. The social justice provision in the 1935 Constitution was limited to an expression of a general principle: "The promotion of social justice to insure the well-being and economic security of all the people should be the concern of the State."⁶⁵ There is a restatement of such a mandate in the present Charter less productive of doubts as to how far it can affect property rights. Thus: "The State shall promote social justice to ensure the dignity, welfare, and security of all the people. Towards this end, the State shall regulate the acquisition, ownership, use, enjoyment, and disposition of private property, and equitably diffuse property ownership and profits."⁶⁶ The duty cast on government as to its implementation is made explicit: "The State shall establish, maintain, and ensure adequate social services in the field of education, health, housing, employment, welfare, and social security to guarantee the enjoyment by the people of a decent standard of living."⁶⁷ The age-old evil of tenancy was likewise sought to be met frontally: "The State shall formulate and implement an agrarian reform program aimed at emancipating the tenant from the bondage of the soil and achieving the goals enunciated in this Constitution."⁶⁸ The constitutional policy on social justice in the 1935 Constitution was supplemented by the requirement that the State "shall afford protection to labor, especially to working women and minors."⁶⁹ The new fundamental law is much more definite. Thus:

The State shall afford protection to labor, promote full employment and equality in employment, ensure equal work opportunities regardless of sex, race, or creed, and regulate the relations between workers and employers. The State shall assure the rights of workers to self-organization, collective bargaining, security of tenure, and just and humane conditions of work. The State may provide for compulsory arbitration.⁷⁰

⁶² 348 US 436 (1966).

⁶³ Art. IV, Section 19 of the Constitution of the Philippines.

⁶⁴ According to Art. IV, Section 21, *Ibid.*: "Excessive fines shall not be imposed, nor cruel or unusual punishment inflicted."

⁶⁵ Art. II, Section 5 of the 1935 Constitution.

⁶⁶ Art. II, Section 6 of the Constitution of the Philippines.

⁶⁷ Art. II, Section 7, *Ibid.*

⁶⁸ Art. XIV, Section 12, *Ibid.*

⁶⁹ Art. XIV, Section 6 of the 1935 Constitution of the Philippines reads as follows: "The State shall afford protection to labor, especially to working women and minors, and shall regulate the relations between landowner and tenant, between labor and capital in industry and in agriculture. The State may provide for compulsory arbitration."

⁷⁰ Art. II, Section 9 of the Constitution of the Philippines.

(2) *Influence of American Constitution in Some Other Asian Countries*

As far as the other Asian countries mentioned earlier are concerned, it may be said that the influence of the United States Constitution in their fundamental laws was not as considerable as in the case of the Philippines, for which, as noted there is a historical explanation. Of those nations, the constitutions of Japan and Korea contain quite a number of provisions of American origin. The fundamental laws of Burma, India, Malaysia, and Pakistan to a lesser degree bear traces of American concepts. The Constitution of Indonesia appears to have the least connection. An examination of such Constitutions readily makes apparent that of the cognate rights of due process and equal protection which contributed much to the growth of American constitutional law, there is no mention whatsoever of the former. Such an omission may be due to the fears entertained that as was the case for a rather long stretch of time in the United States, due process could be availed of to press the right to property to unreasonable extremes. That would indeed be regrettable for in these countries, except perhaps Malaysia, social and economic rights are a prominent feature. The Constitution of Burma speaks of cultural and educational rights⁷¹ as well as economic rights.⁷² India's Constitution in its Directive Principles of State Policy⁷³ ordains: "The State shall strive to promote the welfare of the people by securing and protecting as effectively as it may a social order in which justice, social, economic and political, shall inform all the institutions of the national life."⁷⁴ The next section is quite specific:

The State shall, in particular, direct its policy towards securing: (a) that the citizens, men and women equally, have the right to an adequate means of livelihood; (b) that the ownership and control of the material resources of the community are so distributed as best to subserve the common good; (c) that the operation of the economic system does not result in the concentration of wealth and means of production to the common detriment; (d) that there is equal pay for equal work for both men and women; (e) that the health and strength of workers, men and women, and the tender age of children are not abused and that the citizens are not forced by economic necessity to enter avocations unsuited to their age or strength; (f) that childhood and youth are protected against exploitation and against moral and material abandonment.⁷⁵

The Constitution of Indonesia provides for social welfare: "Economy shall be organized cooperatively. Branches of production which are important to the State and which affect the life of most people, shall be controlled by the State. Land and water and the natural riches therein shall be controlled by the State and shall be exploited for the greatest welfare of the people."⁷⁶ The right to education is found in the Constitution of Korea:

(1) All citizens shall have the right to receive an equal education corresponding to their abilities. (2) All citizens who have children under their protection shall be responsible for at least their elementary education and other education as required by law. (3) Such compulsory education shall be free. (4) Independence and political impartiality of education

⁷¹ Section 22, Constitution of Burma.

⁷² Section 23, *Ibid.*

⁷³ Part IV, Constitution of India.

⁷⁴ Section 38, Part IV, *Ibid.*

⁷⁵ Section 39, Part IV, *Ibid.*

⁷⁶ Chapter XIV, Article 33, Sections 1 to 3, Constitution of Indonesia.

shall be guaranteed. (5) Fundamental matters pertaining to the educational system and its operation shall be determined by law.⁷⁷

The right as well as the duty to work comes next:

(1) All citizens shall have the right to work. The State shall endeavor to promote the employment of workers through social and economic means. (2) All citizens shall have the duty to work. The contents and conditions of the duty to work shall be determined by law in conformity with democratic principles. (3) Standards of working conditions shall be determined by law. (4) Special protection shall be accorded to working women and children.⁷⁸

Then provision is made for the right to association and collective bargaining:

(1) The right to association, collective bargaining and collective action of workers shall be guaranteed within the scope defined by law. (2) The right to association, collective bargaining, and collective action shall not be accorded to workers who are public officials, except for those authorized by the provisions of law. (3) The right to collective action may be either restricted or may not be recognized in accordance with the provisions of law for public officials and workers engaged in State, local, autonomous governments, state-run enterprises, public utility businesses, and enterprises which have serious influence on the national economy.⁷⁹

What is more, there is recognition of the goal of decent human existence and social security: (1) All citizens shall be entitled to a decent human life. (2) The State shall endeavor to promote social security. (3) Citizens who are incapable of making a living shall be protected by the State in accordance with the provisions of law.⁸⁰ The Constitution of Japan, after mentioning the right and obligation to work, requires that standards for wages, hours, rest and other working conditions shall be fixed by law.⁸¹ Children "shall not be exploited."⁸² The next article guarantees the "right of workers to organize and to bargain and act collectively."⁸³

So much then for the substantive due process which, as formerly interpreted by American Courts, could be attended with mischievous consequences for the welfare of those at the bottom of the economic pyramid. Procedural due process, however, even if not referred to by such term, is not ignored. The Constitution of Burma is quite clear: "No citizen shall be deprived of his personal liberty, nor his dwelling entered, nor his property confiscated, save in accordance with law."⁸⁴ The same may be said of the Constitution of India: "No person shall be deprived of his life or personal liberty except according to procedure established by law."⁸⁵ The Constitution of Japan is well-nigh identical: "No person shall be deprived of life or liberty, nor shall any other criminal penalty be imposed, except according to procedure established by law."⁸⁶ The Constitution of Korea is worked in

⁷⁷ Chapter II, Article 27 of the Constitution of Korea.

⁷⁸ Chapter II, Article 28, *Ibid.*

⁷⁹ Chapter II, Article 29, *Ibid.*

⁸⁰ Chapter II, Article 30, *Ibid.*

⁸¹ Chapter III, Article 27, Constitution of Japan.

⁸² *Ibid.*

⁸³ Chapter III, Article 28, *Ibid.*

⁸⁴ Section 16, Constitution of Burma.

⁸⁵ Part III, Section 21, Constitution of India.

⁸⁶ Chapter III, Article 31, Constitution of Japan.

a similar fashion: "All citizens shall enjoy personal liberty. No person shall be arrested, detained, seized, searched, interrogated, punished, subjected to involuntary labor, or branded as security risk except as provided by law."⁸⁷ The Constitution of Malaysia is quite categorical: "No person shall be deprived of his life or personal liberty save in accordance with law."⁸⁸ The same thought in language that is not distinguishable appears in the Constitution of Pakistan: "No person shall be deprived of Me or liberty save in accordance with law."⁸⁹

Equality is a highly-prized ideal by the Asian peoples. The Constitution of Burma is explicit on the matter: "All citizens irrespective of birth, religion, sex or race are equal before the law; that is to say, there shall not be any arbitrary discrimination between one citizen or class of citizens and another."⁹⁰ Then: "There shall be equality of opportunity for all citizens in matters of public employment and in the exercise or carrying on of any occupation, trade, business or profession."⁹¹ After which comes a provision that is a step in the direction of sexual equality: "Women shall be entitled to the same pay as that received by men in respect of similar work."⁹² The Constitution of India has an expanded equal protection clause: "The State shall not deny to any person equality before the law, or the equal protection of the laws within the territory of India."⁹³ The guarantee is made more specific under the next article:

The State shall not discriminate against any citizen on grounds only of religion, race, caste, sex, place of birth or any of them. No citizen shall, on grounds only of religion, race, caste, sex, place of birth or any of them, be subject to any disability, liability, restriction or condition with regard to: (a) access to shops, public restaurants, hotels and places of public entertainment; or (b) the use of wells, tanks, bathing ghats, roads and places of public resort maintained wholly or partly out of State funds or dedicated to the use of the general public. Nothing in this article shall prevent the State from making any special provision for women and children. Nothing in this article or in clause (2) of Article 29 shall prevent the State from making any special provision for the advancement of any socially and educationally backward classes of citizens or for the Scheduled Castes and the Scheduled Tribes.⁹⁴

There is also equality prescribed for public service:

There shall be equality of opportunity for all citizens in matters relating to employment or appointment to any office under the State. No citizen shall, on grounds only of religion, race, caste, sex, descent, place of birth, residence or any of them, be ineligible for, or discriminated against in respect of, any employment or office under the State. Nothing in this article shall prevent Parliament from making any law prescribing, in regard to a class or classes of employment or appointment to an office under the Government of, or any local or other authority within, a State or Union territory, any requirement as to residence within that State or Union territory prior to such employment or appointment. Nothing in this article shall prevent the State from making any provision for the reservation of appointments or posts in favour of any backward class of citizens which, in the opinion of the State, is not adequately represented in the services under the State. Nothing in this article shall affect the operation of any law which provides that the incumbent of an office in

⁸⁷ Chapter II, Article 10, par. (1), Constitution of Korea.

⁸⁸ Part II, Article 5, par. (1), Constitution of Malaysia.

⁸⁹ Part II, Chapter I, Section 1 of the Constitution of Pakistan.

⁹⁰ Section 13, Constitution of Burma.

⁹¹ Section 14, *Ibid.*

⁹² Section 15, *Ibid.*

⁹³ Part III, Section 14, Constitution of India.

⁹⁴ Part III, Section 15 *Ibid.*

connection with the affairs of any religious or denominational institution or any member of the governing body thereof shall be a person professing a particular religion or belonging to a particular denomination."⁹⁵

The concept of equality is set forth in the Constitution of Japan in these terms:

All of the people are equal under the law and there shall be no discrimination in political, economic or social relations because of race, creed, sex, social status or family origin. Peers and peerage shall not be recognized. No privilege shall accompany any award of honor, decoration or any distinction, nor shall any such award be valid beyond the lifetime of the individual who now holds or hereafter may receive it."⁹⁶

The Constitution of Korea provides for the matter thus:

(1) All citizens shall be equal before the law, and there shall be no discrimination in political, economic, social, or cultural life on account of sex, religion or social status. (2) No privileged castes shall be recognized, nor ever be established in any form. (3) The awarding of decorations or distinctions of honor in any form shall be effective only for recipients, and no privileged status shall be created thereby."⁹⁷

The Constitution of Malaysia has an equal protection clause similar to that of India:

All persons are equal before the law and are entitled to the equal protection of the law."⁹⁸

The three next paragraphs of this article expand the guarantee thus:

(2) Except as expressly authorized by this Constitution, there shall be no discrimination against citizens on the ground only of religion, race, descent or place of birth in any law or in the appointment to any office or employment under a public authority or in the administration of any law relating to the acquisition, holding or disposition of property or the establishing or carrying on of any trade, business, profession, vocation or employment. (3) There shall be no discrimination in favour of any person on the ground that he is a subject of the Ruler of any State. (4) No public authority shall discriminate against any person on the ground that he is resident or carrying on business in any part of the Federation outside the jurisdiction of the authority."⁹⁹

The Constitution of Pakistan, as in those of India and Malaysia, has a similar version of the equal protection clause: "All citizens are equal before law and are entitled to equal protection of law."¹ It likewise prescribes non-discrimination in respect of access to public places:

In respect of access to places of public entertainment or resort, not intended for religious purposes only, there shall be no discrimination against any citizen on the ground only of race, religion, caste, sex or place of birth, but nothing herein shall be deemed to prevent the making of any special provision for women."²

3. *The American Institution of Judicial Review: Its Scope and Development*

It is through the awesome and delicate power of judicial review, to follow the oft-quoted observation of Chief Justice Hughes, made at

⁹⁵ Part III, Section 16, *Ibid.*

⁹⁶ Chapter III, Article 14, Constitution of Japan.

⁹⁷ Chapter II, Article 9, Constitution of Korea.

⁹⁸ Part II, Article 8, par. (1), Constitution of Malaysia.

⁹⁹ Part II, Article 8, pars. (2), (3), (4), *Ibid.*

¹ Part II, Chapter 1, Article 15, Constitution of Pakistan.

² Article 16, Part II, *Ibid.*

a time before he became the Chief Magistrate, that while the United States is under a Constitution, "it is what the judges say it is."³ For in discharging the task of inquiring into whether a challenged executive or legislative action is in conformity with, or repugnant to, its Constitution, the meaning attached to its provisions becomes authoritative when it is the American Supreme Court that speaks. Such a pronouncement, Justice Jackson, in a work published when he was Attorney General, did characterize as "the most understandable and comprehensive summary of American constitutional law."⁴ He pointed out that there was no explicit constitutional grant of this power, having been "left to lurk in an inference."⁵ At any rate, he continued, "Political evolution has supplied the omission, and the course of history has established that power in the Supreme Court."⁶ It had its genesis in the landmark decision of Chief Justice Marshall in *Marbury v. Madison*,⁷ the case where the doctrine of judicial review was first enunciated and applied by the Supreme Court of the United States. In declining to issue mandamus to the then Secretary of State Madison on the ground that the Supreme Court did not have such original jurisdiction under the Constitution of the United States and that the authority conferred by a Congressional act found no support in it, Marshall spoke of "the province and duty of the judicial department to say what the law is." In applying the rule to particular cases, it "must of necessity expound and interpret that rule." If two laws conflict with each other, "the courts must decide on the operation of each." He continued:

So if a law be in opposition to the Constitution; if both the law and the Constitution apply to a particular case, so that the court must either decide that case conformably to the law, disregarding the Constitution; or conformably to the Constitution, disregarding the law; the court must determine which of these conflicting rules governs the case. This is of the very essence of judicial duty.

He concluded: "If then, the courts are to regard the Constitution, and the Constitution is superior to any ordinary act of the Legislature, the Constitution, and not such ordinary Act, must govern the case to which they both apply."⁸ Corwin characterized this epochal opinion as bearing "the earmarks of a deliberate partisan coup."⁹ It must be viewed in the light of the raging strife during that period between the Federalists of which Marshall was one of the leaders before he became Chief Justice and from which he was never to be dissociated in belief if not in acts and the then Republicans under Jefferson and Madison.¹⁰ For some, it meant that the Chief Justice seized the occasion to lecture to the then Secretary of State Madison as to the performance of his duties and thus, by denying the power to issue a writ of mandamus, to avoid placing the Supreme Court in the embarrassing position of having its order disregarded by the Executive. At the same time, he was likewise enabled to assert the far greater power of declaring an

³ Cf. Lockhart, Kamisar, Choper, *Constitutional Law*, 3rd ed., citing a speech of Chief Justice Hughes delivered May 3, 1907, 8 (1970).

⁴ Jackson, *The Struggle for Judicial Supremacy* 3 (1941).

⁵ *Ibid.*, 4.

⁶ *Ibid.*, 5.

⁷ I Cranch, 137.

⁸ *Ibid.*, 176, 177.

⁹ Corwin, "*Marbury v. Madison and the Doctrine of Judicial Review*" reprinted in I Selected Essays on Constitutional Law 128, 133 (1939).

¹⁰ See in this connection the picturesque if highly partisan account of Beveridge in Volume 3 of his *The Life of John Marshall*, 103-156 (1919). Cf. I Warren, *The Supreme Court in the United States History*, 231-261 (1922).

act of Congress void. In view of the reliance on fundamental postulates of constitutionalism and the nature and essence of judicial duty, rather than on a specific grant of authority, the assertion of such competence had been denounced as devoid of any foundation and as an instance of judicial usurpation.¹¹ There were other critics, less bitter in their appraisal, who contented themselves with the remark that there was an element of ambiguity on the matter. As was stated by Curtis: "The problem was given no answer by the Constitution. A hole was left where the Court might drive in the peg of judicial supremacy, if it could. And that is what John Marshall did."¹²

The famed American jurist Learned Hand was not that casual about the matter. In his Oliver Wendell Holmes Lectures of 1958, later on published as the *Bill of Rights*, he stated:

One cannot find among the powers granted to courts any authority to pass upon the validity of the decisions of another 'Department' as to the scope of that 'Department's' powers. Indeed, it is to be understood that the three 'Departments' were separate and coequal, each being, as it were, a Leibnizian monad, looking up to the Heaven of the Electorate, but without any mutual dependence. What could be better evidence of complete dependence than to subject the validity of the decision of one 'Department' as to its authority on a given occasion to review and reversal by another whose own action was conditioned upon the answer to the same issue? Such a doctrine makes supreme the 'Department' that has the last word.¹³

Then came this qualification:

On the other hand it was probable, if indeed it was not certain, that without some arbiter whose decision should be final the whole system would have collapsed, for it was extremely unlikely that the Executive or the Legislature, having once decided, would yield to the contrary holding of another 'Department,' even of the courts. The courts were undoubtedly the best 'Department' in which to vest such a power, since by the independence of their tenure they were least likely to be influenced by diverting pressure. It was not a lawless act to import into the Constitution such a grant of power. On the contrary, in construing written documents it has always been thought proper to engraft upon the text such provisions as are necessary to prevent the failure of the undertaking. That is no doubt a dangerous liberty, not lightly to be resorted to; but it was justified in this instance, for the need was compelling. On the other hand, it was absolutely essential to confine the power to the need that evoked it; that is, it was and always has been necessary to distinguish between the frontiers of another 'Department's' authority and the propriety of its choices within those frontiers.¹⁴

Wechsler, in his equally debated Oliver Wendell Holmes lecture, could not agree to such a view. Thus:

Though I have learned from past experience that disagreement with Judge Hand is usually nothing but the sheerest folly, I must make clear why I believe the power of the courts is grounded in the language of the Constitution and is not a mere interpolation. To do this you must let me quote the supremacy clause, which is mercifully short: 'This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.'¹⁵

¹¹ Cf. B. Boudin, *Government by Judiciary* 224 (1932).

¹² Curtis, *Lions Under the Throne* 12 (1947).

¹³ Learned Hand, *The Bill of Rights* 4 (1958).

¹⁴ *Ibid.*, 29-30.

¹⁵ Wechsler, *Principles, Politics, and Fundamental Law* 5 (1960).

The course of history, or “political evolution” in the words of Justice Jackson, has at any rate, erased any doubt as to the existence of the power of judicial review. Nor did it take long. Justice Story, in his *Commentaries on the Constitution of the United States*, published in 1833, could speak of “the duty or course of justice to declare any unconstitutional law passed by Congress or by State Legislature void.”¹⁶ Even as of that time, he could affirm that “the right of all courts, state as well as national, to declare unconstitutional laws void, seems settled beyond the reach of judicial controversy.”¹⁷ The power of judicial review was not however made use of to nullify American congressional legislation again until 1857 in the *Dred Scott*¹⁸ decision, where the Supreme Court held that the act known as the Missouri Compromise was void as Congress was without power to legislate on the issue of slavery. This attempt on the part of the Supreme Court to settle the slavery question proved singularly ineffective. It was in the crucible of the Civil War that the issue was decided. Cooley, in his *Constitutional Limitations*, the first edition of which came out in 1868, left no doubt that “under some circumstances, it may become the duty of the courts to declare that what the legislature has assumed to enact is void, either from want of constitutional power to enact it, or because the constitutional forms or conditions have not been observed.”¹⁹ Watson, in his treatise on the Constitution of the United States, could by 1910 categorically affirm: “The Constitution does not confer authority upon the courts to declare an act of Congress to be in conflict with that instrument, yet from the beginning of the Government the courts have exercised such power, and will continue to do so.”²⁰ Willoughby, in his three-volume work on the Constitutional Law of the United States, at the outset emphatically stressed:

The principle that statutory law, in order to be recognized as valid by the courts, must, in all cases, be in conformity with constitutional requirements, is a product of American law, and though now found in the jurisprudential systems of some other countries, has nowhere received the development and extended application that it has received in the United States.²¹

It would appear, therefore, that the power exists not because the judiciary can initiate the governmental action to be taken but after the performance of whatever functions undertaken by the political branches it could be an arbiter of its validity, as tested by its conformity to the Constitution. The Supreme Court, to paraphrase the then Professor Frankfurter, while not an architect of policy, as it is incapable of fashioning its own solutions for social problems, still is a vital part of the governmental machinery. Through its function of judicial review, it is

the ultimate organ — short of direct popular action — for adjusting the relationship of the individual to the separate states, of the individual to the United States, of the forty-eight states to another, of the states to the union, and of the three departments of government to one another.²²

¹⁶ II Story, *Commentaries on the Constitution of the United States*, 3rd ed., 645 (1858).

¹⁷ *Ibid.*

¹⁸ *Dred Scott v. Sandford* (1857) 19 How. 393.

¹⁹ I Cooley, *A Treatise on the Constitutional Limitations*, 8th ed., 332 (1927).

²⁰ II Watson, *Constitution of the United States* 1168 (1910).

²¹ Willoughby, *The Constitution of the United States*, 2nd ed., 1 (1929).

²² Cf. Frankfurter, *Law and Politics* 21 (1939).

It could be characterized then, to follow Kalven, as

not simply a court; it is an important part of the American political process. Because the key phrases of the Constitution have such grand ambiguities, the Court has wide discretion in passing on matters with a constitutional dimension, and because such matters are likely to concern and affect the larger issues of American life, the Court, in passing on them, exercises great political power.²³

Lerner went so far as to affirm that the Court is “a definite participant in the formation of public policy.”²⁴

In view of the broad reach of the function of judicial review that could lead at times to bitter conflict with the political branches, the acts of which may be nullified, Justice Frankfurter would counsel prudence in its exercise, lest the Supreme Court transcend the limit of its authority and transgress on the domain reserved for the other departments. This is the concept that is now identified as the judicial restraint approach. He is one of the American jurists identified with the philosophy of self-restraint, the others, in the opinion of Cox, being Holmes, Brandeis, and Learned Hand.²⁵ Its rationale, according to him, embraces three propositions:

First, the courts should avoid constitutional issues whenever possible. Such issues should be decided only when raised in ordinary litigation by one who could show that his own constitutional rights were violated and who could not prevail without a constitutional decision. Second, the courts should not invalidate laws unless they were inconsistent with some specific constitutional prohibition. Third, wherever there was room for rational difference of opinion upon a question of fact or upon the relative importance of different facts or conflicting interests — one might say, ‘upon the relative merits of different social policies’ — the doctrines of federalism and separation of powers would require the Court to uphold the legislation.²⁶

Justice Holmes in *Missouri, Kansas and Texas Ry. v. May*,²⁷ a 1904 decision, with his customary felicitous mode of expression, put the matter neatly: “Great constitutional provisions must be administered with caution. Some play must be allowed for the joints of the machine, and it must be remembered that legislatures are ultimate guardians of the liberties and welfare of the people in quite as great a degree as the courts.”²⁸ Justice Brandeis, as was his wont, was quite specific. His concurrence in *Ashwander v. Tennessee Valley Authority* pointed the way to a more modest judicial role. He spoke of the American Supreme Court having developed “for its own governance in the cases confusedly within its jurisdiction, a series of rules under which it has avoided passing upon a large part of all constitutional questions pressed upon it for decision.”²⁹ It does not pass upon the constitutionality of legislation in a friendly, nonadversary proceeding, as the function is legitimate only in the last resort, and as a necessity in the determination of real, earnest, and vital controversy between individuals.

²³ Kalven, Jr., Foreword: Even When a Nation is at War, 85 Harvard Law Rev. 3 (1971).

²⁴ Lerner, *The Supreme Court and American Capitalism*, in II *Selected Essays on Constitutional Law*, 154, 180 (1938).

²⁵ Cf. Cox, *The Warren Court* 4 (1968).

²⁶ *Ibid.*, 3-4.

²⁷ 194 US 267.

²⁸ *Ibid.*, 269.

²⁹ 297 US 288 (1936).

It will not anticipate a question of constitutional law in advance of the necessity of deciding it; nor will it formulate a rule of constitutional law broader than is required by the precise facts to which it is to be applied. It will not consider a constitutional question even if properly presented by the record, if it can be disposed of in some other way. It will not pass upon the validity of a statute on the complaint of one who is not injured by its operation or of one who has availed of its benefits. Lastly, if possible, it will construe the statute in such manner that the constitutional question is avoided.³⁰ Justice Brandeis conformably to his philosophy was likewise alert to the full significance of the presumption of validity. Even if the Court could reach the constitutional question, still the outcome should be in favor of the validity of the measure unless the burden of proof be shouldered by the party assailing it by facts that justify such a conclusion. This principle was announced by him in *O'Gorman & Young v. Hartford Fire Insurance Co.*³¹ in these words:

The statute here questioned deals with a subject clearly within the scope of the police power. We are asked to declare it void on the ground that the specific method of regulation prescribed is unreasonable and hence deprives the plaintiff of due process of law. As underlying questions of fact may condition the constitutionality of legislation of this character, the presumption of constitutionality must prevail in the absence of some factual foundation of record for overthrowing the statute.³²

Learned Hand in the Holmes lecture referred to would view the matter in this manner:

However, since this power is not a logical deduction from the structure of the Constitution but only a practical condition upon its successful operation, it need not be exercised whenever a court sees, or thinks that it sees, an invasion of the Constitution. It is always a preliminary question how importunately the occasion demands an answer. It may be better to leave the issue to be worked out without authoritative solution; or perhaps the only solution available is one that the court has no adequate means to enforce.³³

It may be worthwhile to consider briefly the criticism that judicial review is antithetical to the majoritarian concept, considering that the justices are appointive and practically hold life tenures. This expression of disapproval has not escaped Dean Rostow of Yale, who began one of his most celebrated legal essays, *The Democratic Character of Judicial Review*, thus: "A theme of uneasiness, and even of guilt, colors the literature about judicial review. Many of those who have talked, lectured, and written about the Constitution have been troubled by a sense that judicial review is undemocratic."³⁴ He went on to state: "Judicial review, they have urged, is an undemocratic shoot on an otherwise respectable tree. It should be cut off, or at least kept pruned and inconspicuous."³⁵ His view was precisely the opposite. Thus: "The power of constitutional review, to be exercised by some part of the government, is implicit in the conception of a written constitution delegating limited powers. A written constitution would promote discord rather than order in society if there were no accepted authority to construe it, at the least in cases of conflicting

³⁰ *Ibid.*, 346.

³¹ 282 US 251 (1931).

³² *Ibid.*, 257-258.

³³ Learned Hand, *The Bill of Rights* 15 (1958).

³⁴ Rostow, *op. cit.*, 147.

³⁵ *Ibid.*

action by different branches of government or of constitutionally unauthorized governmental action against individuals. The limitation and separation of powers, if they are to survive, require a procedure for independent mediation and construction to reconcile the inevitable dispute over the boundaries of constitutional power which arise in the process of government.”³⁶ More than that, he took pains to emphasize:

Whether another method of enforcing the Constitution could have been devised, the short answer is that no such method has developed. The argument over the constitutionality of judicial review has long since been settled by history. The power and duty of the Supreme Court to declare statutes or executive action unconstitutional in appropriate cases is part of the living Constitution. ‘The course of constitutional history,’ Mr. Justice Frankfurter recently remarked, ‘has cast responsibilities upon the Supreme Court which it would be “stultification” for it to evade.’³⁷

There would seem to be then more than ample justification for what has come to be called “judicial activism” as distinguished from the self-restraint approach. Justice Black in his 1968 Carpentier lectures at Columbia Law School stated that

this term has been used as one of criticism and reproach aimed at federal judges, particularly justices of the United States Supreme Court, who, in deciding cases before them, are charged with either (1) being willing or even anxious to determine constitutional questions that could have been avoided or (2) determining constitutional and other legal questions not on the basis of what the law is but on what the deciding judges believe it should be.³⁸

He was willing to consider himself an activist according to the first concept:

I cannot myself subscribe to the view that judges should always and invariably avoid a determination of constitutional questions if it is in any way possible to dispose of a particular case on a nonconstitutional ground. There are few cases, if any, where judges cannot conjure up and articulate arguments that are at least plausible to get rid of cases on nonconstitutional grounds. Such a resort to merely plausible reasons to avoid deciding constitutional questions has never seemed to me to be an ennobling example of judicial piety, morals or ethics. The necessity for complete candor in deciding cases cannot, in my opinion, be outweighed by any supposed dogmatic imperative to avoid constitutional questions. There come times when the public welfare calls loudly for putting an end to constitutional doubts about laws that may vitally affect the daily lives and practices of millions of people. Such doubts about highly valuable constitutional or statutory rights may cause delays in their enjoyment tantamount to their complete destruction. And persons subjected to burdensome duties by new untested statutes frequently may be caused to suffer irreparable losses by dilatory judicial practices that prevent constitutional tests of those new laws in the courts.³⁹

He asserted, however, that he was not of that group in the other sense. Thus:

The courts are given power to interpret the Constitution and laws which means to explain and expound, not to alter, amend, or remake. Judges take an oath to support the Constitution as it is, not as they think it should be. I cannot subscribe to the doctrine that consistent with that oath a judge can arrogate to himself a power to ‘adapt the Constitution to new times.’ The soft phrases use to claim that power for judges have

³⁶ *Ibid.*, 149-150.

³⁷ *Ibid.*, 151. The decision of Justice Frankfurter referred to is that of *Rochin v. People of California*, 342 US 165 (1952).

³⁸ Black, *A Constitutional Faith* 14 (1968).

³⁹ *Ibid.*, 15-16.

siren-like appeal. For one who has a legitimate power to interpret there is at first a certain persuasive note in the constant repetition to him that in explaining a constitution meant for the ages he should not stick to its old eighteenth-century words but substitute others to make the Constitution best serve the current generation. And there is a certain appeal in the argument that the dead should not control the living. But adherence to the Constitution as written does not mean we are controlled by the dead. It means we are controlled by the Constitution, truly a living document.⁴⁰

Nonetheless, by the vigor and persuasiveness with which he had pressed his own understanding of the Constitution, it has been noted, and not inaccurately either, that he did contribute his share of impressing on the Warren Court the attribute of activism, if by that is meant, to follow McCloskey, "the Supreme Court's propensity to intervene in the governing process."⁴¹ How far that tendency did manifest itself during that period was set forth by this author. Thus:

The Warren Court has taken upon itself a major share of the responsibility for transforming a pattern of racial segregation deeply rooted in the social customs and laws of the nation. It has undertaken to stamp out or greatly alter the censorship arrangements that have prevailed in many of our states and cities. It has undertaken to eliminate, or reduce to a Court-defined limit, religious observances in government-supported activities. It has undertaken to supervise more closely than ever before our machinery of criminal law enforcement, including the pre-trial behavior of police. It has undertaken to modify in a fundamental way and to oversee the electoral apportionment systems of the several states and of Congress itself. It has asserted and enforced a measure of judicial control over certain national powers once largely immune from constitutional query—the postal power, the authority to issue passports, and the authority to define citizenship. It has sought, cautiously, but unmistakably, to mitigate the asperities of governmental policies aimed at 'subversives.' What should be emphasized is that these tasks are largely new either in kind or degree: they have assumed in addition to the already considerable responsibilities in civil rights and in other fields which the pre-1953 Court already bore. That earlier Court was indeed already trying to alter state criminal procedures and state patterns of racial discrimination, but it was moving toward those objectives more gradually. The modern judicial policies seek to push the United States along the paths of virtue a good deal faster, and the dimension of the judicial job has correspondingly increased. Other self-imposed functions—most notably the supervision of apportionment—are entirely novel. Even Marshall, with all his ambition and daring, might well be daunted by the prospect of governing a self-willed, dynamic nation in as many important ways as the Warren Court has sought to govern America.⁴²

4. *Judicial Review in the Philippines*

In a leading case, the first of its kind after the effectivity of the 1935 Constitution, *Angara v. Electoral Commission*,⁴³ the Philippines Supreme Court stated that the power of judicial review "is granted, if not expressly, by clear implication from section 2 of Article VIII of our Constitution."⁴⁴ This Article did assume its existence and how it was to be exercised. Thus it stated that the Supreme Court was not to be deprived of its jurisdiction "to review, reverse, modify, or affirm on appeal, certiorari, or writ of error, final judgments and decrees in... (1) All cases in which the constitutionality or validity

⁴⁰ *Ibid.*, 20-21.

⁴¹ McCloskey, *The Modern Supreme Court* 339 (1972).

⁴² *Ibid.*, 343.

⁴³ 63 Phil. 139 (1936).

⁴⁴ *Ibid.*, 158. The opinion was penned by Justice Jose P. Laurel, the Delegate who was the Chairman of the Committee on the Bill of Rights in the 1934 Convention.

of any treaty, law, ordinance, or executive order or regulation is in question.”⁴⁵ Then in a subsequent section, the number of votes required was provided for: “All cases involving the constitutionality of a treaty or law shall be heard and decided by the Supreme Court in bane, and no treaty or law may be declared unconstitutional without the concurrence of two-thirds of all the members of the Court.”⁴⁶ In the present Constitution, with a Supreme Court of fifteen members, four more than was formerly the case, the provision on the mode of exercise is set forth thus: “All cases involving the constitutionality of a treaty, executive agreement, or law shall be heard and decided by the Supreme Court *en banc*, and no treaty, executive agreement, or law may be declared unconstitutional without the concurrence of at least ten Members.”⁴⁷ A brief historical background is not amiss. At the time when the United States acquired the Philippines from Spain at the end of the century, one of the principles of constitutional law binding on the territorial government established by her in the Philippines was this same concept of judicial review. It was natural for American lawyers, who were admitted to practice in the Philippines, to challenge the validity of statutes or executive orders, whenever the interests of their clients so demanded. The Filipino justices and judges who with their American brethren administered justice were soon made aware that the power to pass on the constitutionality of such statutes and executive orders was part of their judicial function. The Filipino lawyers vied with the American members of the bar in raising the question of constitutionality whenever appropriate. The American practice therefore of appealing to courts through the form of lawsuits, decisions reached by either the executive or legislative branches of the government became a part of the accepted doctrines in the Philippines early in the period of American sovereignty.

While it was not until March 22, 1907, that the Supreme Court of the Philippines set aside an act of the legislative branch in the case of *Casannovas v. Hord*,⁴⁸ as early as February 14, 1902, the Supreme Court in the case, *In re Prautch*,⁴⁹ dismissed as untenable the objection that there was an impairment of contractual obligation. A year later, on May 16, 1903, the Supreme Court of the Philippines in case of *United States v. Dorr*,⁵⁰ firmly rejected the assertion the judgment of the lower court did not grant jury trial as provided by the American Constitution. Likewise in a disbarment proceedings in 1904, *In re Montagne*,⁵¹ the plea by respondent attorney that he was denied due process of law met with no sympathetic response from the Supreme Court. Various other cases could be cited to show the readiness with which counsel would seize upon an alleged infringement of constitutional right and call upon the Court to exercise the power of judicial review.

Then came the period under the 1935 Constitution. It may safely be asserted that the role of the Supreme Court could be characterized as one of judicial activism. Such an approach could be traced to the

45 Art. VIII, Section 2 of the 1935 Constitution of the Philippines.

46 Art. VIII, Section 10, *Ibid*.

47 Art. X, Section 2, par. (2) of the Revised Constitution of the Philippines.

48 8 Phil. 125.

49 1 Phil. 132.

50 2 Phil. 269.

51 4 Phil. 1.

valedictory address before the 1934 Constitutional Convention of Claro M. Recto. He spoke of the trust reposed in the judiciary in these words: "It is one of the paradoxes of democracy that the people at times place more confidence in instrumentalities of the State other than those directly chosen by them for the exercise of their sovereignty."⁵² The assumption therefore was that whenever a constitutional question was posed, the Court should act. It was expected that it would discharge such a task, without regard to political considerations and with no thought except that of discharging its trust. Witness these words of the same Justice Laurel in an early landmark case, *People v. Vera*,⁵³ decided in 1937:

If it is ever necessary for us to make any vehement affirmance during this formative period of our political history, it is that We are independent of the Executive no less than of the Legislative department of our government — independent in the performance of our functions, undeterred by any consideration, free from politics, indifferent to popularity, and unafraid of criticism in the accomplishment of our sworn duty as we see it and as we understand it.⁵⁴

The hope of course was that such assertion of independence and impartiality was not mere rhetoric. There could not be the least doubt that what elicited the approval of the Filipino people was a belief in a judiciary ever alert to inquire into alleged breaches of the fundamental law to avoid its infringement. To do so is merely to do what is expected of it. Thereby no invasion of spheres appropriately belonging to the political branches occurred. It had to act only when there was a suit with proper parties before it, wherein rights appropriate for judicial enforcement were sought to be vindicated. Nor would it approach constitutional questions with dogmatism or apodictic certainty. There was likewise the expectation that there would be the search for jural consistency and rational coherence. Once allowance is made that for all its care and circumspection a Supreme Court is manned by human beings fettered by fallibility, but nonetheless earnestly and sincerely striving to do right, the public acceptance of its vigorous pursuit of the task of assuring that the Constitution be obeyed was easy to understand.

There is an impressive number of cases to indicate that in the Philippines there had been neither judicial timidity nor reluctance in the exercise of the power of judicial review. In the period before the Japanese Occupation in 1942, the Supreme Court was called upon to rule on a dispute between two constitutional agencies, the National Assembly and the then Electoral Commission,⁵⁵ on the reorganization of the judiciary,⁵⁶ and on the extent of the supervisory power over local governments.⁵⁷ After liberation, controversies more momentous in their implications for the welfare of the country were taken to the Supreme Court for resolution. It again had its hands full of cases decisive in their impact on the political and economic future of the Philippines. The presence of the American Army in the Philippines introduced added complications. Instances of its none-too-tender re-

⁵² VII *Proceedings of the Philippine Constitutional Convention*, S. Laurel, ed., Appendix L, 800.

⁵³ 65 Phil. 56 (1937).

⁵⁴ *Ibid.*, 96.

⁵⁵ *Angara v. Electoral Commission*, 63 Phil. 139 (1936).

⁵⁶ *Zanduetta v. De la Costa*, 66 Phil. 615 (1938).

⁵⁷ *Planas v. Gil*, 67 Phil. 62 (1939) and *Villena v. Secretary of the Interior*, 67 Phil. 451 (1939).

gard for the liberties of individuals were called, in appropriate cases, to the attention of the Supreme Court.⁵⁸ The legality of proceedings against those Filipinos who worked with the Japanese with such intensity and enthusiasm as to qualify their collaboration as treasonable was dumped on its lap.⁵⁹ Thereafter came cases of equal significance. Among them may be mentioned those involving the suspension of three Senators allegedly owing their election to terroristic activities of certain radical groups;⁶⁰ the sufficiency of the votes on the parity rights amendment to constitute a valid proposal, with three Senators and eight Representatives still under suspension and thus unable to participate;⁶¹ the near-crisis brought about by well-nigh one-half of the senators refusing to attend sessions after the incumbent Senate President was ousted by declaring the office vacant at a time when according to them there was no quorum;⁶² the exercise by at least two Presidents⁶³ of the power to legislate under the Emergency Powers Act even after the return of normalcy with Congress actually in operation;⁶⁴ the independence of the Commission on Elections from the Executive⁶⁵ and the scope of its authority to assure free and honest elections;⁶⁶ the validity of the suspension of the privilege of the writ of habeas, under President Quirino⁶⁷ and then President Marcos;⁶⁸ the availability of the right to bail during the period of such suspension;⁶⁹ the effect of there being a lone Senator from the opposition thus tilting the balance in favor of the majority party in the Electoral Tribunal;⁷⁰ the limits that should be placed on Presidential authority over local governments;⁷¹ the legality of midnight appointments, whether during the closing days of the Garcia⁷² or the Macapagal⁷³ administration; the restrictions placed on political parties as well as civic groups to nominate candidates for the 1971 Constitutional Convention⁷⁴ as well as the limits on the freedom of expression of candidates to such body;⁷⁵ and the piece-meal submission of proposals to amend the 1935 Constitution for ratification.⁷⁶

How far the Supreme Court of the Philippines in the exercise of the function of judicial review could participate in the power process of the government was indicated by four cases arising from the present

⁵⁸ *Raquiza v. Bradford*, 75 Phil. 50 (1945); *Tubb v. Griess*, 78 Phil. 249 (1947).

⁵⁹ *Laurel v. Misa*, 77 Phil. 856 (1947).

⁶⁰ *Vera v. Avelino*, 11 Phil. 192 (1946).

⁶¹ *Mabanag v. Lopez Vito*, 78 Phil. 1 (1947).

⁶² *Avelino v. Cuenco*, 83 Phil. 17 (1949).

⁶³ President Roxas and President Quirino.

⁶⁴ *Araneta v. Dinglasan*, 84 Phil. 368 (1949) and *Rodriguez v. Gella*, 92 Phil. 603 (1953).

⁶⁵ *Nacionalista Party v. Angelo Bautista*, 85 Phil. 101 (1949).

⁶⁶ *Nacionalista Party v. Commission on Elections*, 85 Phil. 149 (1949).

⁶⁷ *Montenegro v. Castaneda*, 91 Phil. 882 (1952).

⁶⁸ *Lansang v. Garcia*, L-33964, December 11, 1971, 42 SCRA 448 (1971).

⁶⁹ *Nava v. Gatmaitan*, 90 Phil. 172 (1951).

⁷⁰ *Tanada v. Cuenco*, 103 Phil. 1051 (1957).

⁷¹ *Hebron v. Reyes*, 104 Phil. 175 (1958).

⁷² *Aytona v. Castillo*, L-19313, January 19, 1962, 4 SCRA 1 (1962).

⁷³ *Guevara v. Inocentes*, L-25577, March 15, 1966, 16 SCRA 379 (1966).

⁷⁴ *Imbong v. Ferrer*, L-32432, September 11, 1970, 35 SCRA 28 (1970).

⁷⁵ *Badoy v. Comelec*, L-32546, October 17, 1970, 35 SCRA 285 (1970).

⁷⁶ *Tolentino v. Comelec*, L-34150, October 16, 1971, 41 SCRA 702 (1971).

state of emergency. The first, *Lansang v. Garcia*,⁷⁷ overruled earlier Philippine decisions,⁷⁸ by ruling that the suspension of the privilege of habeas corpus is a judicial, not a political question. It likewise held that the test of whether or not such power was unconstitutionally exercised is arbitrariness. There being no showing, the 1971 suspension of the privilege by President Marcos was sustained. The next three decisions all were promulgated under a regime of martial law declared under the 1935 Constitution. *Aquino v. Ponce Enrile*⁷⁹ was a habeas corpus petition seeking his release, one of the many filed by a number of those detained after martial law for possible complicity in the insurrection, the main ground being the nullity of such proclamation.⁸⁰ The challenge was unsuccessful. The Court did not see it that way. Chief Justice Makalintal and seven other members of the Court spoke out their minds on the crucial issue of martial law.⁸¹ The Presidential action challenged in the two other petitions,⁸² the first assailed the power of the President to call a referendum on crucial issues, and the second, questioned the jurisdiction of a military commission to try petitioner. Again, no constitutional infirmity was found. The unanimity that characterized the decision arrived at in the first case expressed in the opinion of Justice Makasiar,⁸³ was no bar to seven Justices submitting their considered views on the various constitutional aspects of the litigation.⁸⁴ In the latter suit,⁸⁵ it was a divided Court, with two outright dissents,⁸⁶ two concurring and dissenting opinions,⁸⁷ and one concurrence⁸⁸ to the main opinion of Justice Antonio.

ENRIQUE M. FERNANDO *

⁷⁷ 42 SCRA 448.

⁷⁸ *Barcelona v. Baker*, 5 Phil. 87 (1905) and *Montenegro v. Castaneda*, 91 Phil. 882 (1952).

⁷⁹ 59 SCRA 183 (1974).

⁸⁰ As will hereafter be discussed, petitioner Aquino was the only political figure of consequence, being one of the leaders of the Liberal Party who was still under detention when the case was decided. It must be mentioned that charges had been preferred against him, but there was still a pending action, *Aquino Jr. v. Military Commission*, to determine whether he could be tried by respondent body.

⁸¹ The reference was to the eight other petitions docketed: *L-35538, Rocas v. Ponce Enrile*; *L-35539, Diokno v. Ponce Enrile*; *L-35540, Soliven v. Ponce Enrile*; *L-35547, Voltaire Garcia v. Fidel Ramos*; *L-35556, Yuyitung v. Ponce Enrile*; *L-35567, Doronila v. Ponce Enrile*; *L-35571, Guiiao v. Ponce Enrile*; *L-35573, Rondon v. Ponce Enrile*. Respondent in eight such suits is the Secretary of National Defense. In the other, the party against whom the action was brought, General Ramos, is the Chief of the Constabulary.

⁸² *Aquino v. Commission on Elections*, 62 SCRA 275 and *Aquino v. Military Commission*, 63 SCRA 546.

⁸³ *Aquino, Jr. v. Commission on Elections*, 62 SCRA 275 (1975).

⁸⁴ Justices Castro, Teehankee, Barredo, Antonio, Fernandez and Munoz Palma, along with the writer, spelled out their thinking on the subject.

⁸⁵ *Aquino, Jr. v. Military Commission No. 2*, 63 SCRA 546 (1975).

⁸⁶ Justices Teehankee and Munoz Palma dissented.

⁸⁷ Justice Castro and the writer qualified their acceptance of the judgment of the Court.

⁸⁸ It came from Justice Barredo.

* Associate Justice, Supreme Court of the Philippines.