

Constitutional Law—Due Process—The Right to Counsel in a Criminal Proceeding (Powell et al. v. State of Alabama, 53 S. Ct. 55 (1932))

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CONSTITUTIONAL LAW—DUE PROCESS—THE RIGHT TO COUNSEL IN A CRIMINAL PROCEEDING.—Defendants, non-residents of the state of Alabama, were charged with the crime of rape. The arraignment in the state court took place six days after the arrest and the trial followed after a lapse of a similar period of time. Defendants were without counsel. The Court designated generally the entire local bar. Nothing more was ordered with respect to providing counsel to prepare the defense for the accused. The defendants were convicted in the trial court and the conviction was upheld by the Supreme Court of Alabama with but one dissent therefrom.¹ On appeal to the Supreme Court of the United States, *held*, reversed. The denial of counsel with the customary incidents of consultation and opportunity to prepare for the trial was a denial of due process in violation of the Fourteenth Amendment.² *Powell et al. v. State of Alabama*, 53 Sup. Ct. 55 (1932).

The problem as to what constitutes "due process" under the Fourteenth Amendment has received timely and full consideration elsewhere.³ The modern concept of fundamental rights has its basis in the past as modified by changing conditions and views. Any attempt to calculate individual rights must of necessity fail. In the words of Mr. Justice Holmes, "General propositions do not decide concrete cases. The decision will depend on a judgment or intuition more subtle than any articulate major premise."⁴ It is one thing to declare that an individual is not entitled to an indictment by a grand jury as a prerequisite to prosecution by a state for murder because the Fourteenth Amendment contains no such express guarantee;⁵ it is quite another thing to deprive him of an opportunity to employ or have assigned counsel to defend and to be allotted sufficient time for the preparation of such defense. It is not true, as generally believed, that it is a denial of due process to take away some right once enjoyed as a protective measure. Thus a hearing to determine the rights of an individual may be entrusted to an executive officer or administrative board and there need not be any judicial proceeding for that purpose;⁶ the state may repeal a statute of limitation and thereby

¹ Chief Justice Anderson dissented.

² Two other points were raised on appeal: (1) They were not given a fair, impartial and deliberate trial; * * * (3) They were tried before juries from which qualified members of their own race were systematically excluded.

³ Thomas B. Hill, Jr., *The Federal Constitution and the Fourteenth Amendment* (1926) 1 ALA. L. J. 68; Nesbitt, *Due Process of Law and Opinion* (1926) 26 COL. L. REV. 23; Finkelstein, *From Munn v. Illinois to Tyson v. Banton—A Study in the Judicial Process* (1927) 27 COL. L. REV. 769; Hough, *Due Process of Law—Today* (1919) 32 HARV. L. REV. 218; Warren, *The New Liberty Under the Fourteenth Amendment* (1926) 39 HARV. L. REV. 431; Brown, *Due Process of Law, Police Power and the Supreme Court* (1927) 40 HARV. L. REV. 943; Laylin and Tuttle, *Due Process and Punishment* (1922) 20 MICH. L. REV. 614; Willis, *Due Process of Law Under the United States Constitution* (1926) 74 U. OF PA. L. REV. 331.

⁴ *Lochner v. New York*, 198 U. S. 45, 76, 25 Sup. Ct. 539, 547 (1905).

⁵ *Hurtado v. California*, 110 U. S. 516, 4 Sup. Ct. 111 (1884).

⁶ *U. S. v. Ju Toy*, 198 U. S. 253, 25 Sup. Ct. 299 (1905).

revive a debt that had already been barred;⁷ the state may change the number of jurors for a criminal case or abolish the jury system entirely.⁸ All these acts are not deemed a denial of due process. Apparently the absence of an express declaration in the Amendment itself granting a particular right⁹ is no longer to be regarded as the determining factor. The suggested basis is, if "the right involved is of such a character that it cannot be denied without violating those 'fundamental principles of liberty and justice which lie at the base of all our civil and political institutions,'" ¹⁰ the Court will be moved to declare that it is a denial of due process.

The points set forth on appeal might have justified a decision on other grounds.¹¹ Perhaps the Court feared the results of an extension of the doctrine stated in *Moore v. Dempsey*¹² or that the facts surrounding the trial of the instant case were insufficient to render it amenable to the rule enunciated therein. Sufficient it is for the present that the limitations and definitions of the due process clause aptly referred to in the phrase "convenient vagueness"¹³ is justification for the Court in assuming jurisdiction of a similar cause and in acting as a check on this phase of criminal procedure, resting, as it does almost exclusively, with each state.¹⁴

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⁷ *Campbell v. Holt*, 115 U. S. 620, 6 Sup. Ct. 209 (1885).

⁸ *Maxwell v. Dow*, 176 U. S. 581, 20 Sup. Ct. 488 (1898). For a further consideration of changes in the adjective law as affecting due process see Note (1931) 5 ST. JOHN'S L. REV. 226.

⁹ *Hurtado v. California*, *supra* note 5.

¹⁰ Instant case.

¹¹ *Supra* note 1.

¹² 261 U. S. 86, 43 Sup. Ct. 265 (1923).

¹³ Editorial by Felix Frankfurter appearing in the N. Y. Times, Nov. 13, 1932, pp. E 1, 2. Professor Frankfurter stated: "The words of the amendment are words of 'convenient vagueness,' definable only by the cumulative process of judicial inclusion and exclusion. In matters affecting property rights, and notably the regulation of economic enterprise, they have come to be the foundation of a large body of doctrine often interposing irksome barriers to restrictive legislation. Only last year they served Mr. Justice Sutherland in the famous Oklahoma ice case [*New State Ice Co. v. Liebmann*, 285 U. S. 262 (1932)] as a touchstone for the invalidity of a statute which authorized the State Corporation Commission to deny to any person the right to enter the business of manufacturing ice in a community where in its opinion the existing facilities made such entrance injurious to the public. Now, in the hands of the same Justice, they return to their more immediate purpose of protecting black men from oppressive and unequal treatment by whites."

¹⁴ Mr. Chief Justice Hughes, Mr. Justices Sutherland, Cardozo, Stone, Brandeis, Roberts and Van Devanter join in the prevailing opinion. It is interesting to note that Mr. Justice Sutherland, who dissented in *Moore v. Dempsey*, *supra* note 12, wrote the prevailing opinion in the instant case.