EXTRA-CONSTITUTIONAL LIMITATIONS UPON LEGISLATIVE POWER

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THE appearance of Professor Haines' volume on *The Revival of Natural Law Concepts*¹ and the recent decision of the Supreme Court of Oklahoma in *Thomas v. Reid*,² present anew the issue whether state legislatures are limited in their powers by restrictions not found in the text of written constitutions. In the case of *Thomas v. Reid* the court held invalid a legislative act requiring a vote of sixty per cent of the qualified voters to authorize the sale of a municipally-owned public utility, saying that majority rule is one of the foundation stones of our government³ and that the legislature is powerless to take away the right of local government existing in the several municipalities at the time of the adoption of the state constitution.

Under our federal system of government it is obviously necessary to look beyond the constitutional texts in order to discover all restrictions upon state legislative power. In the field of concurrent powers, each new exercise of national power restricts the field within which the states may act. Not only must federal statutes be resorted to in order to discover the limits of state legislative power, but in certain cases such statutes permit the exercise of state legislative power in a manner otherwise forbidden by the federal constitution. Although Congress may not delegate its powers to the states,⁴ it may to some extent, by affirmative action, remove impediments otherwise imposed upon the state by the federal constitution.⁵

Aside from this there are no textual limitations upon state legislatures other than those in written constitutions. The

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¹ Charles Grove Haines, *The Revival of Natural Law Concepts* (1930)

⁴ HARV. STUDIES IN JURISPRUDENCE.

² 285 Pac. 92 (1930). See (1930) 44 HARV. L. REV. 133.

³ Similar expressions as to majority rule may be found in *Maynard v. Board*, 84 Mich. 228, 47 N. W. 756 (1890), and in other cases involving the validity of proportional representation. See William Anderson, *The Constitutionality of Proportional Representation* (Supp. 1923) NATIONAL MUNICIPAL REV.

⁴ *Knickerbocker Ice Company v. Stewart*, 253 U. S. 149, 40 Sup. Ct. 438 (1920).

⁵ *In re Rahrer*, 140 U. S. 545, 11 Sup. Ct. 865 (1891); *Bickle, The Silence of Congress* (1927) 41 HARV. L. REV. 200.

Supreme Court of Ohio once took the view that the power of the state legislature as to the state's internal affairs was limited by the Ordinance of 1787, but this view has been explicitly rejected by the United States Supreme Court.⁶ It is also well established that, after a state is admitted to the union, no federal limitations upon its power exist outside of the constitution of the United States and the powers properly exercisable thereunder;⁷ although, in admitting a territory to statehood, Congress may require the state to impose limitations upon itself by its own constitution, as was actually done in the cases of Arizona and New Mexico.⁸ The Louisiana constitution of 1913 declared that the prior constitution and all amendments thereto were superseded, but added that "the omission from this constitution of any article of the constitution of 1898 and the amendments thereto or of any other existing constitutional provision shall not amount to the repeal thereof, unless the same be inconsistent with this constitution." While this did not set up constitutional limitations outside the terms of the written constitutions, it did give the court a roving commission to determine what provisions in prior constitutions were still in force.

Perhaps *Bennett v. Jackson*⁹ presents the most important recent instance of an extra-constitutional limitation upon state legislative power. The constitution of Indiana contains no provision regarding the calling of a constitutional convention. The general view in this country, outside of Rhode Island, is that, in the absence of such a provision, the legislature has power to take steps for assembling a convention. The Indiana legislature submitted the question of calling a convention to a popular vote, which in 1914 resulted in an adverse decision. Nevertheless in 1917 the legislature passed an act calling a constitutional convention. The Indiana Supreme Court said:

"We are of the opinion that the will of the people as expressed in the election of 1914 is as binding on the general assembly as a positive provision of the Constitution could be, and hence the action of the legislature in calling a constitutional convention as provided for in chapter 2, page 5, of the acts of 1917, is null and void, being in conflict with section 1 of the Bill of Rights and taking from the people the right to say when they desire a change in their fundamental law."¹⁰

⁶ See *State v. Boone*, 84 Ohio St. 346, 95 N. E. 924 (1911) and *Donahey v. Edmonson*, 89 Ohio St. 93, 105 N. E. 269 (1913); *Cincinnati v. Louisville & Nashville R. R.*, 223 U. S. 390, 32 Sup. Ct. 267 (1912) and cases cited in *Economy Light & Power Co. v. United States*, 256 U. S. 113, 120, 47 Sup. Ct. 409, 412 (1921).

⁷ *Coyle v. Smith*, 221 U. S. 559, 31 Sup. Ct. 688 (1911).

⁸ *ODD, STATE GOVERNMENT* (2d ed. 1928) 22-24.

⁹ 186 Ind. 553, 110 N. E. 921 (1917).

¹⁰ *Ibid.* 540, 116 N. E. at 923.

The court here appears to base its decision on a specific provision of the state constitution, but the only parts of Section 1 of the Indiana Bill of Rights upon which the decision may be based are those which declare that "all power is inherent in the people" and that "the people have at all times the indefeasible right to alter and reform their government."

Constitutional provisions must be construed, and under our system of government, such construction is primarily a judicial function. The very nature of a constitution makes it impossible, even by the use of clear and explicit language, to meet all issues of construction in advance. Some provisions are naturally more explicit than others and require less judicial construction, or at least attain greater certainty through construction.¹¹ But the language employed in constitutions necessarily raises implications, and the courts have developed or stated a mass of implied powers in the federal system and of implied limitations in the state system.¹² In constitutional construction two questions, therefore, present themselves: (1) What constitutional text applies to the specific issue under consideration? (2) What is the meaning of the text? Technically, a limitation upon legislative power discovered by the court to be within the language of a written text cannot be considered as one found independently of and in addition to the text, even though we may disagree with the court as to whether the limitation is within the written language.

The orthodox doctrine of American constitutional law that a statute may be declared invalid only because of conflict with the text of written constitutions, was well stated by Justice Iredell in *Calder v. Bull*:

An even more recent effort to read an extra-constitutional limitation into a constitutional text is that involved in the argument that the Eighteenth Amendment could only have been ratified by conventions in the several states, although the constitution of the United States expressly provides for ratification by legislatures or conventions in the several states, "as one or the other mode of ratification may be proposed by the Congress". The lengthy opinion by Judge Clark in support of this view is unconvincing (*United States v. Sprague*, 44 Fed. (2d), 967), as is also the more lengthy brief of Appellees in the same case in the United States Supreme Court, though the Appellees urged their view on the basis of the constitutional text. The brief opinion of Mr. Justice Roberts in *United States v. Sprague*, 51 Sup. Ct. 220 (1931), adequately disposes of the matter.

¹¹ See Dodd, *The Problem of State Constitutional Construction* (1920) 20 COL. L. REV. 635.

¹² See Dodd, *Implied Powers and Implied Limitations* (1919) 29 YALE L. J. 137. For a problem that has become increasingly important in recent years see Corwin, *The Spending Power of Congress* (1923) 36 HARV. L. REV. 548.

"If any act of Congress, or of the legislature of a state, violates those constitutional provisions, it is unquestionably void. . . . If, on the other hand, the legislature of the Union, or the legislature of any member of the Union, shall pass a law, within the general scope of their constitutional power, the court cannot pronounce it to be void, merely because it is, in their judgment, contrary to the principles of natural justice. The ideas of natural justice are regulated by no fixed standard; the ablest and purest of men have differed upon the subject; and all that the court could properly say, in such an event, would be, that the legislature (possessed of an equal right of opinion) had passed an act which, in the opinion of the judges, was inconsistent with the abstract principles of natural justice."¹³

This statement has been frequently repeated or paraphrased by later decisions in both national and state courts.¹⁴

As a corollary to this principle it has often been said that in order to present to a court an issue of constitutionality "some particular clause of the constitution must be pointed out with which the act is inconsistent."¹⁵ The doctrine so stated is not fully established, and has actually been denied in some cases.¹⁶ Courts occasionally have even sought out constitutional objections and passed upon them in cases where the parties had presented no constitutional issue.¹⁷ For present purposes, however, it is sufficient to suggest that courts have not in any systematic way required those contesting statutes to allege specific objections based upon constitutional texts;¹⁸ and in invalidating

¹³ *Calder v. Bull*, 3 Dall. 386, 399 (U. S. 1793).

¹⁴ See *Dorman v. State*, 34 Ala. 216, 235 (1859); *State v. Wheeler*, 25 Conn. 290 (1856); *Bertholf v. O'Reilly*, 74 N. Y. 509, 516 (1878). See also *Denio, J.*, in *Westervelt v. Gregg*, 12 N. Y. 202, 212 (1854); *Slack v. Jacob*, 8 W. Va. 612, 634-639 (1875); *Wynehamer v. People*, 13 N. Y. 378, 393-395 (Comstock), 411-412 (A. S. Johnson), 447-458 (Hubbard), 477 (T. A. Johnson) (1856). *Russ v. Commonwealth*, 210 Pa. St. 544, 60 Atl. 169 (1905), presents a review of the Pennsylvania cases.

¹⁵ *Gray v. McLendon*, 134 Ga. 224, 67 S. E. 859 (1910). See *State v. Main*, 16 Wis. 398, 415 (1863).

¹⁶ See *Union Pacific R. R. v. Abilene*, 78 Kan. 820, 822-24, 98 Pac. 224, 225 (1908).

¹⁷ *Kraus v. Lehman*, 170 Ind. 408, 84 N. E. 769 (1908).

¹⁸ In cases brought to the United States Supreme Court from the highest state courts, the constitutional grounds are usually clear. Yet even here difficulties sometimes present themselves. See *Whitney v. California*, 274 U. S. 357, 47 Sup. Ct. 641 (1927) and *People v. Zimmerman*, 278 U. S. 63, 49 Sup. Ct. 61 (1928). And sometimes a review on broad due process grounds is sought on one basis and prosecuted on another. *Wuchter v. Pizzutti*, 276 U. S. 13, 48 Sup. Ct. 259 (1928).

The same case may, of course, involve a number of constitutional issues, based upon different parts of the same constitutional instrument. Sometimes a decision is based on inferences from the constitution as a whole. In *United States v. Gettysburg Electric Ry.*, 160 U. S. 668, 683, 16 Sup. Ct. 427, 430 (1896), the court said that power in the national government "need not be plainly and unmistakably deduced from any one of the particularly

statutes the courts have not always referred to the specific constitutional grounds upon which they have done so. This statement applies particularly to state courts. While the real ground of constitutional objection is usually clear, even though unstated, this is not true of many cases, especially before 1850. This situation adds to the difficulty of determining when decisions have been based upon constitutional texts and when theories outside the texts have been decisive. In many cases in which a court has endorsed natural rights as a proper basis for invalidating statutes, and has held a statute unconstitutional without the express mention of a written constitutional provision, it may yet be clear from a careful reading of the opinion, that such a text was in mind as a basis for the decision.

But the influence of natural rights in causing statutes to be declared unconstitutional should not be underestimated. Theories of natural law played a large part in the movement leading up to the American revolution,¹⁹ and early judicial discussions frequently quoted with approval the view of Sir Edward Coke in *Dr. Bonham's Case* that "when an act of Parliament is against common right and reason, or repugnant, or impossible to be performed, the common law will control it, and adjudge such act to be void."²⁰ In numerous statements from the revolutionary period down to the present time, both state and federal courts have spoken of the principles of natural right as if they were judicially enforceable against legislative acts.²¹ One of the best

specified powers. Any number of those powers may be grouped together, and an inference from them all may be drawn that the power claimed has been conferred." For similar expressions in state decisions, see *infra* note 80.

¹⁹ McLAUGHLIN, *THE COURTS, THE CONSTITUTION AND PARTIES* (1912) 75-85.

²⁰ 8 Rep. 118 a. See Plucknett, *Bonham's Case and Judicial Review* (1926) 40 HARV. L. REV. 30; Corwin, *The "Higher Law" Background of American Constitutional Law* (1928-1929) 42 HARV. L. REV. 149, 365; Wright, *American Interpretations of Natural Law* (1926) 20 AM. POL. SCI. REV. 524. The argument of Quincy in Paxton's case is largely based on this view, Quincy 474 (Mass. 1761). George Mason made use of it in *Robin v. Hardaway*, Jeff. 109 (Va. 1772), as did James M. Varnum in argument in *Trevitt v. Weeden* (1786).

²¹ See the cases collected in the excellent article by Haines in *The Law of Nature in State and Federal Judicial Decisions* (1916) 25 YALE L. J. 617, and in his recent volume, *THE REVIVAL OF NATURAL LAW CONCEPTS*. The cases in the United States Supreme Court have been carefully collected by Reeder, *Constitutional and Extra-Constitutional Restraints* (1913) 61 U. of PA. L. REV. 441. See also Richard C. Dale in (1901) 24 A. B. A. REP. 294; Baldwin, *The Courts as Conservators of Social Justice* (1909) 9 COL. L. REV. 567; Keeler, *Survival of the Theory of Natural Rights in Judicial Decisions* (1895) 5 YALE L. J. 14. Judge Oscar Hallam presents a clear discussion of extra-constitutional limitations in (1914) 48 AM. L. REV. 257-273. In the discussion of extra-constitutional limitations, judicial opinions have used numerous phrases, such as inherent rights or principles,

known of these statements is that of Justice Chase in *Calder v. Bull*, that, "An act of the legislature (for I cannot call it a law) contrary to the great first principles of the social compact cannot be considered a rightful exercise of legislative authority."²² But there appear to be few cases in which statutes have been declared unconstitutional upon a natural rights basis and that alone. A near approach to such a basis, if not in fact an instance of it, is *Mott v. Pennsylvania R. R.*,²³ where Chief Justice Lewis said that a statute conferring a perpetual exemption from taxation, was "such a plain, palpable, and open violation of the rights and liberties of the people, such a clear case of transcending the just limits of legislative power, that the judiciary is bound to pronounce such an act null and void;" and stated that no authority was needed, because the principles relied upon "are perfectly understood by every one who has the capacity to comprehend the nature of our free institutions." In the same case Justice Lowrie based his opinion on a similar argument; but Justice Knox reached the conclusion that the statute was unconstitutional on the ground that a perpetual exemption from taxation was not within the constitutional grant of "legislative power." Justice Knox's reasoning had a natural rights basis equally as much as that of the other judges, but differs merely in that it finds a convenient textual peg upon which to hang the conclusion as to unconstitutionality. This illustrates one of the greatest difficulties in determining the influence of natural law theories upon decisions against the validity of statutes. No great skill is required to find a provision of a constitutional text that may be employed in part at least as a basis for a decision reached largely as a result of theories of natural law. Nevertheless, statements of natural right (or of other extra-constitutional protection) are frequent; and though infrequently made the sole basis of decision, they are by no means mere dicta in all cases.

Pronouncements of doctrines of natural law may perhaps be called dicta when they are found in cases where statutes were upheld.²⁴ So in *Welch v. Wadsworth*, the Connecticut Supreme Court of Errors said:

natural justice, social compact, fundamental limitations, spirit of the constitution, limitations growing out of the essential nature of free governments. Nothing of value is gained from an attempt to analyze and distinguish these terms.

²² *Supra* note 13, at 388.

²³ 30 Pa. 9, 29 (1858). Perhaps *Bowman v. Middleton*, 1 Bay, 252 (S. C. 1792), should be classed as a case decided solely upon a natural rights basis.

²⁴ Of such a character are the often-quoted statements of Justice Chase in *Calder v. Bull*, *supra* note 13, at 388, and of Justice Story in *Wilkinson v. Leland*, 2 Pet. 627, 657-8 (U. S. 1829). See also statements of Justice Story in *Terrett v. Taylor*, 9 Cranch 43 (U. S. 1815).

"Nor can it be claimed that the act in question conflicts with any provision of the constitution of this state. There is nothing in any of the provisions of that constitution which can restrain the legislature from passing retrospective laws; and it is their practice every year to do so, and not infrequently acts which affect antecedent vested rights.

But the power of the legislature in this respect is not unlimited. They cannot entirely disregard the fundamental principles of the social compact. Those principles underlie all legislation, irrespective of constitutional restraints, and if the act in question is a clear violation of them, it is our duty to hold it abortive and void."²⁵

The Connecticut court found that the statute involved in the case did not conflict with the principles so stated; but they were applied to determine the issue of its validity, and would not fall within the usual definition of dicta. Similar in some respects is the Wisconsin case of *Nunnemacher v. State*,²⁶ where the court laid down the principle that "the right to demand that property pass by inheritance or will is an inherent right subject only to reasonable regulation by the legislature," but at the same time took the view that inheritance or succession taxes did not violate the inherent right found to exist.

Expressions of views in support of natural rights are frequently found in dissenting opinions. But since standards of natural right are largely personal, it may be that the majority in such cases also adhere to natural rights views, which are unexpressed and do not conflict with the decision.²⁷

Courts often base decisions of unconstitutionality expressly both upon doctrines of natural right and upon provisions of the written constitution when the latter alone would have been sufficient basis for the decision.²⁸ But decisions are frequently

²⁵ 30 Conn. 149, 155 (1861), based upon the more frequently cited case of *Goshen v. Stonington*, 4 Conn. 209 (1822).

²⁶ 129 Wis. 190, 202, 108 N. W. 627, 630 (1906). See also *Davis v. Ballard*, 1 J. J. Marsh 563 (Ky. 1829), and *Young v. McKenzie*, 3 Ga. 31 (1847).

²⁷ See dissent of Mayfield, J., in *McLendon v. State*, 179 Ala. 54, 63, 65, 69, 60 So. 392, 394, 395 (1912).

²⁸ A natural rights basis in part may be asserted of the case of *Durkee v. Janesville*, 28 Wis. 464, 467 (1871), where Chief Justice Dixon said for the Wisconsin court: "I care very little whether it is placed on those fundamental principles of law and justice which, in our form of government it has been held no legislative body can override, even though not prohibited by the written constitution, or upon the provisions of the constitution itself, some of which clearly forbid the enactment of such laws." Similar statements may be found in *Janesville v. Carpenter*, 77 Wis. 288, 46 N. W. 128 (1890) *State ex rel, Howe v. Des Moines*, 103 Iowa 76, 88, 72 N. W. 639, 643 (1897); *Norwich Gas Light Company v. Norwich City Gas Light Company*, 25 Conn. 19 (1856). See also *People v. Supervisors of Westchester*, 4 Barb. 64 (N. Y. 1848).

based upon two or more grounds, when one alone would perhaps have been sufficient; and although the presence of one ground may weaken the force of the other as authority, it is certainly not permissible to select the one which we think the more proper, and to treat the other as dictum. In a number of cases statements of natural rights views are made but the decision of unconstitutionality is expressly based upon the text of the constitution. Theories of natural right, while influential in some of these cases, may perhaps be regarded as a part of the argument upon which a certain interpretation of the constitution is based rather than as independent grounds for the decision itself. Thus a narrowing of the term "legislative power" through judicial decision has often had as its basis the notion that the grant of "legislative power" does not permit legislative interference with what the court may regard as a natural right.²⁹

Especially in the earlier cases concerning the so-called vested rights is it difficult to determine the extent of the influence exerted by extra-constitutional considerations. Professor Corwin has well said that the doctrine of vested rights is the basic one in the constitutional development of the United States before the Civil War.³⁰ To the protection of vested rights were applied various constitutional provisions: the federal constitutional provision against the impairment of the obligation of contracts; an enlarged interpretation of provisions regarding eminent domain; provisions in certain constitutions requiring "reasonable" laws or forbidding retrospective laws; due process of law and the law of the land (destined to become the most important provisions); and, most important of all before the Civil War, the principle of separation of powers, with its narrowing construction of the phrase "legislative power." These provisions, employed to pro-

²⁹ *Matter of Dorsey*, 7 Porter 293, 376-378 (Ala. 1838) (Ormond, J.); *Regents of the University of Maryland v. Williams*, 9 G. & J. 365 (Md. 1838); *Bank of State v. Cooper*, 2 Yerg. 599, 602-603 (Tenn. 1831); *Henry v. The Dubuque & Pacific R. R.*, 10 Ia. 540, 543-46 (1860); *Cole v. La Grange*, 113 U. S. 1, 5 Sup. Ct. 416 (1885). Other cases in which natural rights views are used to aid constitutional construction are *Ervine's Appeal*, 16 Pa. St. 256 (1851); *Madison and Indianapolis R. R. v. Whiteneck*, 8 Ind. 217 (1856); *Matter of Albany Street*, 11 Wend. 149 (N. Y. 1834); *Holden v. James*, 11 Mass. 396 (1814); *Sweet v. Hulbert*, 51 Barb. 312 (N. Y. 1868).

Chief Justice Marshall said in *Fletcher v. Peck*, 6 Cr. 87, 136 (U. S. 1810) that: "To the legislature all legislative power is granted; but the question, whether the act of transferring the property of an individual to the public, be in the nature of the legislative power, is well worthy of serious reflection". And in this case, at p. 143, Justice Johnson based his opinion in part on "the reason and nature of things; a principle which will impose laws even on the Diety".

³⁰ Corwin, *The Basic Doctrine of American Constitutional Law* (1914) 12 MICH. L. REV. 247. See also Corwin, *The Doctrine of Due Process of Law Before the Civil War* (1911) 24 HARV. L. REV. 366, 460.

tect vested rights, were steadily broadened in construction through the application of theories of natural rights. "Justices Wilson, Paterson, Story and Johnson, Chancellors Kent and Walworth, Chief Justice Grimke, Parsons, Parker, Hosmer, Ruffin and Buchanan all appealed to natural rights and the social compact as limiting legislative powers. They and other judges based decisions on this ground. The same doctrine was urged by the greatest lawyers of the period without reproach."³¹ These arguments were usually tied to some provision of the constitution; and this was easy, since broad provisions were available which might without difficulty be interpreted to support the judicial protection of vested right.

But in a number of the cases holding statutes invalid no reference is made to constitutional texts; the assertion that vested rights are interfered with appears to be regarded as sufficient. How may this be explained, especially if we bear in mind that provisions of constitutional texts were in other instances applied to similar cases? Had the courts thought it necessary or desirable to do so, they would have found no difficulty in bottoming their views upon broadly interpreted provisions of the written constitutions. The fact that this was not done is in some cases, probably due to failure of courts expressly to mention written provisions of the constitution which they had in mind. But the practice, when taken in connection with a rather wide-spread judicial acceptance of notions of natural rights, suggests that the courts may have regarded it as proper to protect certain rights, without the need of bringing them within the specific terms of written constitutions.³²

And the constitutions themselves gave support to this view. From the beginning of written state constitutions in 1776, many provisions in the texts of these constitutions have expressly stated theories of natural right. The Virginia bill of rights of 1776 declared that:

"All men are by nature equally free and independent, and have certain inherent rights . . . namely, the enjoyment of life and liberty, with the means of acquiring and possessing property, and pursuing and obtaining happiness and safety."

Somewhat longer declarations of a similar character appear in the Massachusetts constitution of 1780, and the New Hampshire

³¹ Corwin, *op. cit. supra* note 30, at 253.

³² See *Wilderman v. Baltimore*, 8 Md. 551 (1855); *Conant v. Van Schaick*, 24 Barb. 87 (N. Y. 1857); *Hunter v. Hatch*, 45 Ill. 178 (1867); *Trim v. McPherson*, 7 Cold. (Tenn. 1869) 15; *Albertson v. Landon*, 42 Conn. 209 (1875); *L. & T. Turnpike Co. v. Boss*, 19 Ky. L. Rep. 1954, 44 S. W. 981 (1898). The Louisiana constitution of 1845 expressly forbade the divesting of vested rights. Art. 109.

constitution of 1784; and such provisions stand today in more than two-thirds of the American state constitutions.³³ Provisions of this type began to appear in state constitutions before the establishment of judicial control over legislation, and may have been regarded at first as declarations of governmental policy rather than as enforceable limitations upon governmental action. But with the development of judicial control, and with the extension through it of the content of constitutional limitations, these general declarations have occasionally served as the basis for judicial action adverse to the validity of statutes, or have been considered binding limitations for the testing of such validity. The statement of Justice Winslow in *Nunnemacher v. State* has often been referred to by those discussing natural rights in American constitutional law:

"That there are inherent rights existing in the people prior to the making of any of our constitutions is a fact recognized and declared by the Declaration of Independence, and by substantially every state constitution. Our own constitution says in its very first article: 'All men are born equally free and independent and have certain inherent rights; among these are life, liberty and the pursuit of happiness; to secure these rights governments are instituted among men, deriving their just powers from the consent of the governed. Notice the language, "to secure these (inherent) rights governments are instituted"; not to manufacture new rights or to confer them on its citizens, but to conserve and secure to its citizens the exercise of pre-existing rights. It is true that the inherent rights here referred to are not defined but are included under the very general terms of 'life, liberty and the pursuit of happiness.' " ³⁴

The inherent or natural rights here referred to are not extra-constitutional, but are found within the text of the constitution. If the provision regarding inherent rights is to be construed as a limitation, rather than as a mere declaration, Justice Winslow's statement has much basis in state constitutional texts.³⁵ A

³³ NEW YORK INDEX DIGEST OF STATE CONSTITUTIONS (1915) 971.

³⁴ *Supra* note 26, at 200, 108 N. W. at 629. See also the statement of Justice Doe (dissenting) in *Orr v. Quimby*, 54 N. H. 590, 616 (1874), and the use of this statement in *State v. Ramseyer*, 73 N. H. 31, 58 Atl. 958 (1904).

³⁵ Constitutional guaranties of inherent or inalienable rights aided in defeating statutes in *State v. Redmon*, 134 Wis. 89, 101, 114 N. W. 137, 138 (1907); *Chenoweth v. State Board*, 57 Colo. 74, 84, 141 Pac. 132, 136 (1914); *Sherman v. Buick*, 32 Cal. 241, 249-50 (1867); and *Beebe v. State*, 6 Ind. 501, 510 (1855). *People v. Gallagher*, 4 Mich. 244 (1856), should be read with *Beebe v. State* and with *Herman v. State*, 8 Ind. 545 (1855). In the *Gallagher* case it was expressly urged that a prohibition law was "repugnant to fundamental ideas and principles necessarily implied in a free republican constitution," a view which was adopted by a dissenting judge. See also *Ex parte Martin*, 13 Ark. 198 (1853), and *State v. Ashbrook*, 154 Mo. 375, 394, 55 S. W. 627, 632 (1899).

statement somewhat similar to that of the *Nunnemacher* case may be found in *Ex parte Quarg*, where a statute against scalping of theatre tickets was held unconstitutional, partly on the basis of the constitutional guaranty securing to every person the right of "acquiring, possessing and protecting property." Speaking for the California Court, Justice Shaw said, "These rights are in fact inherent in every natural person and do not depend on constitutional grant or guaranty."³⁶

The development of natural rights doctrines has also been furthered by certain constitutional clauses which are particularly susceptible of wide interpretation in support of judicial action. In Massachusetts broad results were in two cases aided by a constitutional provision that the individual has a right to be protected "according to standing laws."³⁷ Similar aid has been obtained from the grant of legislative power in Massachusetts (1780) and New Hampshire (1784) to make "wholesome and reasonable laws," and in Maine (1819) to make "reasonable" laws.³⁸ With respect to the New Hampshire clause, the view of Chief Justice Perley in *East Kingston v. Towle* is worth quoting:

"The power delegated by the constitution 'to make and ordain all manner of reasonable and wholesome orders, laws,' etc. confers no authority to make an order or law in plain violation of the fundamental principles of natural justice, though the act may not be prohibited by any express limitation in the constitution."³⁹

And in *Winters v. Myers*,⁴⁰ a statute giving public lands to private individuals was invalidated by a decision based primarily upon a provision in the Kansas bill of rights that,

"All political power is inherent in the people, and all free governments are founded on their authority, and are instituted for their equal protection and benefit."

It is in the interpretation of broad and indefinite provisions such as these that notions of natural right have been particularly influential. If these provisions were to have a practical application they could have it only with a body or content given to

³⁶ 149 Cal. 79, 80, 84 Pac. 766 (1906). See also *Britton v. Board of Commissioners*, 129 Cal. 337, 344, 61 Pac. 1115, 1117 (1900), where a declaration of unconstitutionality is based in part on a natural right to organize political parties.

³⁷ MASS. CONST. OF 1780, pt. I, art. X. *Holden v. James*, 11 Mass. 396 (1814); *Commonwealth v. Anthes*, 5 Gray, 185 (Mass. 1855).

³⁸ *Kennebec Proprietors v. Laboree*, 2 Me. 275 (1823); *East Kingston v. Towle*, 48 N. H. 57 (1868).

³⁹ *Supra* note 38, at 59.

⁴⁰ 92 Kan. 414, 421, 140 Pac. 1033, 1036 (1914).

them by judicial action; in this process of construction there would naturally and necessarily be reflected the judicial point of view at the time.

The desire of the courts to protect what they may regard as natural rights has also raised extra-constitutional issues in statutory construction. Especially has this been true of judicial action seeking to avoid the retrospective operation of statutes. In *Ham v. M'Claws*,⁴¹ the South Carolina court had before it a statute of 1788 against the importation of slaves; this statute replaced a precisely opposite statute of the preceding year. Mrs. M'Claws, coming with slaves from Honduras, arrived only a few days after the Act of 1788 had come into effect. Her journey to South Carolina had begun while the earlier law was in force, and when she could have had no knowledge of the Act of 1788. Although the statute itself made no exceptions, its forfeiture and penalties were found inapplicable to Mrs. M'Claws. The court said:

"We are, therefore, bound to give such a construction to this enacting clause of the Act of 1788, as will be consistent with justice and the dictates of natural reason, though contrary to the strict letter of the law."⁴²

Strong views against retrospective constructions were expressed in two early Virginia cases.⁴³ The classical statement of this attitude is presented by Kent's opinion in *Dash v. Van Kleeck*,⁴⁴ which confined a statute to prospective operation although its terms appeared to be retrospective, and though the facts of the case seem to suggest that justice would have been better accomplished by the latter construction. But in the cases just referred to a prospective operation could be given to the statutes with some plausibility and without defeating their whole purpose. In *Norman v. Heist*,⁴⁵ however, a private act was deprived of all practical application by an exclusively prospective interpretation. Chief Justice Shaw, when a Massachusetts statute sought to make juries judges of law, succeeded, in part upon theories of natural right, in holding the statute constitutional by construing it in such a manner that it would accomplish nothing.⁴⁶

⁴¹ 1 Bay 93 (S. C. 1789).

⁴² *Ibid.* 98.

⁴³ *Turner v. Turner's Executrix*, 4 Call. 234 (Va. 1792); *Elliott's Executor v. Lyell*, 3 Call. 268 (Va. 1802).

⁴⁴ 7 Johns. 477 (N. Y. 1811). For similar views see *Fisher v. Cockerill*, 5 T. B. Mon. 129 (Ky. 1827), and *Davis v. Minor*, 1 How. 183 (Miss. 1835).

⁴⁵ 5 W. & S. 171 (Pa. 1843). The Delaware constitution of 1776 and the New Hampshire constitution of 1784 expressly forbade retrospective laws; and similar provisions have appeared occasionally in later constitutions. For further cases see Bryant Smith, *Retrospective Laws and Vested Rights* (1927) 5 TEX. L. REV. 231.

⁴⁶ *Commonwealth v. Anthes*, 5 Gray 185 (Mass. 1855).

In the famous case of *Gardner v. Trustees of Newburgh*,⁴⁷ Chancellor Kent based his decision in part at least upon arguments of natural right. This case illustrates the difficulty in reaching agreement as to the bearing of doctrines of natural rights upon the decision of the court. Professor Haines in his recent volume says that Kent "held that in the absence of a constitutional provision for the purpose compensation was due the owner for property taken or damaged, and that the power of eminent domain could be exercised for public purposes only."⁴⁸ This implies the judicial enforcement of a limitation not within the text of the constitution. On the other hand, Professor Thayer said:

"This case and that of *Sinnickson v. Johnson*,⁴⁹ are sometimes referred to as if they judicially held that in a State where the Constitution is silent, the courts can disregard a legislative Act which plainly and indisputably takes private property for public purposes, without providing for compensation. Neither case so holds. In *Gardner v. Newburgh*, the statute was not set aside; but its true construction was declared, and the defendants were enjoined from violating it. This construction was reached on the ground, first, that other parts of the statute indicated the intention to be what is now laid down; and, second, that the contrary view would impute to the legislature what would be 'unjust and contrary to the first principles of government.' This method, in constitutional questions, that of construction, is one on which courts may travel far; and they do and should."⁵⁰

In a number of cases the principle of the separation of powers has served as a justification for narrowing the meaning of "legislative power" and broadening the protection accorded to property. In the early cases preventing the delegation of legislative power, especially, appeals have been made to fundamental principles of government not themselves expressed in the texts of the constitutions. The first example of this appears to be the Tennessee case of *Marr v. Enloe*,⁵¹ in which was involved the validity of a statute conferring a taxing power upon the county court, composed of persons not popularly elected. The statute was held unconstitutional, upon grounds stated by Judge Catron as follows:

"The constitution declares 'the legislative authority of this state shall be vested in the General Assembly which shall consist of a Senate and House of Representatives, both dependent on the people'. Art. I, sec. 1. Is taxing the people an act of legisla-

⁴⁷ 2 Johns. Ch. 162 (N. Y. 1816).

⁴⁸ HAINES, *THE REVIVAL OF NATURAL LAW CONCEPTS* (1930) 131.

⁴⁹ 2 Harrison 129 (N. J. 1839).

⁵⁰ 1 THAYER, *CASES ON CONSTITUTIONAL LAW* (1895) 983, n.

⁵¹ 1 Yerg. 452 (Tenn. 1830).

tion? That the taxing power belongs to the legislature—and that exclusively—and is, if not the most important, at least of equal magnitude with any power entrusted by the constitution to the General Assembly, is a truism never doubted or denied in Tennessee. Can this constitutional right, by an act of Assembly, be vested in a few individuals in each county, *who are not dependent on the people*, to tax without limit and even spend at pleasure, without responsibility and without control? . . . The right to tax themselves through their representatives, in General Assembly, is a constitutional right in the people. Representation and taxation are of necessity in our government inseparable, as they must be in every free country. Whenever the people are oppressed and bowed down with ruinous taxes, imposed without their consent, their fancied freedom is an idle delusion, and poverty and misery will as certainly overtake them in Tennessee, as under the sway of an Asiatic Prince or Spanish King, whose will is law, and whose exertions are limited only by his desires. Our Fathers fought, conquered, and separated from Great Britain to poor purpose, to preserve the principle '*that taxation without representation was tyranny*,' if we are at this short day compelled to submit to its exercise in practice, by a few individuals in each county."⁵²

The actual decision in *Marr v. Enloe* had little influence outside of Tennessee, but Judge Catron set the standard for legal arguments in many of the cases upon delegation of legislative power.

The next cases of constitutional importance arose in connection with the local option liquor legislation. In *Rice v. Foster*,⁵³ in which a local option liquor law was declared unconstitutional as a delegation of legislative power, Chief Justice Booth said:

"The proposition that an act of the legislature is not unconstitutional unless it contravenes some express provision of the constitution is, in the opinion of this court, untenable. The nature and spirit of our republican form of government; the purpose for which the constitution was formed, which is to protect life, liberty, reputation and property, and the right of all men to attain objects suitable to their condition, without injury by one to another; to secure the impartial administration of justice; and generally, the peace, safety and happiness of society, have established limits to the exercise of legislative power beyond which it cannot pass. An act of the legislature directly repugnant to the nature and spirit of our form of government, or destructive of any of the great ends of the constitution, is contrary to its true intent and meaning, and can have no more obligatory force, than when it opposes some express prohibition contained in that instrument. It is irrational to maintain that such an act is a law, when it defeats the very object and intention of granting legislative power."⁵⁴

⁵² *Ibid.*

⁵³ 4 Harr. 479 (Del. 1847).

⁵⁴ *Ibid.* 485.

Chief Justice Booth expressed also what seemed the decisive argument in the case:

"The frequent and unnecessary recurrence of popular elections, always demoralizing in their effects, are among the worst evils that can befall a republican government; and the legislation depending upon them must be as variable as the passions of the multitude. Each county will have a code of laws different from the others; murder may be punished with death in one; by imprisonment in another; by a fine in a third; slavery may exist in one, and be abolished in another. The law of today will be repealed or altered tomorrow, and everything be involved in chaos and confusion. The General Assembly will become a body merely to digest and prepare legislative propositions; and their journals a register of bills to be submitted to the people for their enactment. Finally, the people themselves will be overwhelmed by the very evils and dangers against which the founders of our government so anxiously intended to protect them; all the barriers so carefully erected by the constitution around civil liberty, to guard it against legislative encroachments, and against the assaults of vindictive, arbitrary and excited majorities, will be thrown down; and a pure democracy, 'the worst of all political ills' will hold its sway over the hollow and lifeless form of a republican government."⁵⁵

The case of *Parker v. Commonwealth*,⁵⁶ which arose in Pennsylvania in the same year, presents much the same line of judicial assertion, though reference should be expressly made to Justice Bell's remark that special precaution should be taken to guard against the violation of the spirit of the constitution "and the genius of the public institutions designed to be created by it." Although sensibly opposed from the beginning by some courts,⁵⁷ the doctrine against local option laws led an active career for a while;⁵⁸ now, however, it appears to languish, with but a limited application in Tennessee.⁵⁹

Notions of extra-constitutional limitations, based upon the spirit of government, have also aided in decisions against the submission of laws to the approval of electors of a state before such laws should come into operation. The result in the important New York case of *Barto v. Himrod*, which held unconstitutional a plan for a popular vote upon the adoption of a state system of free schools, seems to have been influenced by the views which are well expressed in the case by Justice Willard:

⁵⁵ *Ibid.* 498.

⁵⁶ 6 Pa. 507, 511 (1847). Cf. *Maize v. State*, 4 Ind. 342 (1853); *State v. Swisher*, 17 Tex. 441 (1856).

⁵⁷ Cf. *People v. Reynolds*, 10 Ill. 1 (1848); *Bancroft v. Dumas*, 21 Vt. 456 (1849).

⁵⁸ See, in addition to the cases already cited, *State v. Field*, 17 Mo. 529 (1853); *Geebrick v. State*, 5 Iowa 491 (1857); *Ex Parte Wall*, 48 Cal. 279 (1874); *Thornton v. Territory*, 3 Wash. Terr. 482 (1888).

⁵⁹ *Reelfoot Lake Levee District v. Dawson*, 97 Tenn. 151 (1896).

"If this mode of legislation is permitted and becomes general, it will soon bring to a close the whole system of representative government which has been so justly our pride. The legislature will become an irresponsible cabal, too timid to assume the responsibility of law-givers, and with just wisdom enough to devise subtle schemes of imposture, to mislead the people. All the checks against improvident legislation will be swept away; and the character of the constitution will be radically changed."⁶⁰

The reasoning of *Barto v. Himrod* was rejected by the Vermont court in 1854,⁶¹ and in the same year by four of the eight judges of the Michigan Supreme Court⁶² but the principle there laid down was applied against liquor legislation in Iowa in 1855,⁶³ and in Minnesota⁶⁴ at about the same time, and has been adopted in New Hampshire,⁶⁵ Massachusetts⁶⁶ and Maryland.⁶⁷ *Barto v. Himrod* still represents the weight of decisions, although a tendency the other way is indicated by decisions of the highest courts of Wisconsin and New Jersey holding it proper, despite the absence of express constitutional authorization, to make operation of a law contingent upon a favorable popular vote throughout the state.⁶⁸

Some of the decisions above referred to upon delegation of legislative power read more like political speeches than the sober and careful utterances of impartial tribunals. Especially is this true of the early local option decisions, from the results of which the courts themselves soon departed.⁶⁹ Theories favorable to a representative form of government and against pure democracy seem also responsible for a decision by the Texas Court of Criminal Appeals against the initiative and referendum in municipal affairs,⁷⁰ although a different attitude toward extra-constitutional limitations was taken by the Supreme Court of Texas.⁷¹ The cases upon the delegation of legislative power have been based upon provisions in constitutional texts, but the differing results must be attributed to influences outside the texts.

⁶⁰ 8 N. Y. 483, 496 (1853).

⁶¹ *State v. Parker*, 26 Vt. 357 (1854); cf. *State v. Scampini*, 77 Vt. 92, 59 A. 201 (1904).

⁶² *People v. Collins*, 3 Mich. 343 (1854).

⁶³ *Santo v. State*, 2 Iowa 165 (1855).

⁶⁴ See *Roos v. State*, 6 Minn. 428, 433 (1861).

⁶⁵ *State v. Hayes*, 61 N. H. 264 (1881).

⁶⁶ *Opinion of Justices*, 160 Mass. 586, 36 N. E. 488 (1894).

⁶⁷ *Brawner v. Supervisors of Elections*, 141 Md. 586, 119 Atl. 250 (1922).

⁶⁸ *State ex rel. Van Alstine v. Frear*, 142 Wis. 320, 125 N. W. 961 (1910); *Hudspeth v. Swayze*, 85 N. J. L. 592, 89 Atl. 780 (1914).

⁶⁹ For an historical survey of the cases dealing with state-wide referenda and with local option laws, see OBERHOLTZER, *REFERENDUM IN AMERICA* (new ed.) 200-218, 311-334.

⁷⁰ *Ex parte Farnsworth*, 61 Tex. Cr. Rep. 342, 135 S. W. 533 (1911).

⁷¹ *Brown v. Galveston*, 97 Tex. 1, 75 S. W. 488 (1903).

The doctrine of an inherent right of local self-government is one largely created by extra-constitutional arguments. It is true, as Professor McBain has indicated,⁷² that Judge Cooley's opinion in *People ex rel Leroy v. Hurlbut*,⁷³ (the real foundation of the doctrine) was based upon the interpretation of an express constitutional provision, from which by implication was derived a prohibition of legislative appointments for purely municipal purposes. But it is also true that in a later Michigan case a statute providing for the appointment rather than the election of county commissioners was declared unconstitutional upon an argument which can only have as its basis the theory of local self-government, although here also the decision is justified as an interpretation of an express constitutional provision.⁷⁴

Irrespective of what may have been the influence of the doctrine in Michigan, however, it has undoubtedly served as the basis for declaring statutes unconstitutional, in the states of Indiana,⁷⁵ Iowa,⁷⁶ Nebraska,⁷⁷ and Kentucky,⁷⁸ independently of any provisions in the text of written constitutions. Curiously enough, the Indiana court states the orthodox notion that there are no limitations upon legislative power other than those in state and federal constitutions, and then in the same case applies the doctrine of an inherent right of local self-government.⁷⁹ Such contradictions are not uncommon in judicial opinions. In some of these cases, however, the courts suggest that the decisions are actually based upon constitutional texts, not, it is true, upon any one provision of a constitution, but upon "general implication" from the instrument as a whole.⁸⁰ These general implications are likely to be merely disguises for extra-constitutional limitations. But it is in the construction of specific constitutional provisions that the doctrine of an inherent right of local self-government has exerted its greatest influence;⁸¹ and in at least

⁷² For this whole subject, see McBain, *The Doctrine of an Inherent Right of Local Self-Government* (1916) 16 COL. L. REV. 190, 299; and the same author's LAW AND PRACTICE OF MUNICIPAL HOME RULE (1916).

⁷³ 24 Mich. 44 (1871).

⁷⁴ Board of Road Commissioners of Wayne County v. Board of Auditors, 148 Mich. 255, 111 N. W. 901 (1907).

⁷⁵ See an adherence to and citation of earlier cases in State v. Fox, 158 Ind. 126, 63 N. E. 19 (1902).

⁷⁶ State v. Barker, 116 Iowa 96, 89 N. W. 204 (1902).

⁷⁷ State v. Moores, 55 Neb. 480, 76 N. W. 175 (1898), over-ruled by Redell v. Moores, 63 Neb. 219, 88 N. W. 243 (1901).

⁷⁸ City of Lexington v. Thompson, 113 Ky. 540, 68 S. W. 477 (1902).

⁷⁹ *Supra* note 75, at 129, 63 N. E. at 20. And see 55 Neb. at 489, 76 N. W. at 177.

⁸⁰ See, for example, the language in 55 Neb. at 496, 76 N. W. at 179 and 158 Ind. at 132, 63 N. E. at 21.

⁸¹ In addition to cases referred to by Professor McBain's articles, *supra* note 72, see State v. Commissioners, 54 Ohio St. 333, 43 N. E. 587 (1896);

two cases its use has resulted in interpretations which seem to run directly counter to the texts.⁸²

The doctrine that taxes may not be levied except for a public purpose furnishes another illustration of the influence of extra-constitutional principles. The earlier cases often did not refer to constitutional texts, but a number of them upon careful examination may be found to rest in whole or in part upon provisions of the written constitution. So Chief Justice Black's opinion in the important case of *Sharpless v. Philadelphia*⁸³ is definitely tied up with a constitutional provision requiring a remedy "by due course of law;" and in the later Pennsylvania case of *Philadelphia Association v. Wood*, Justice Lowrie, in disregarding an act of 1861, said:

"It is depriving a man of his property without due process of law, even when it is sought to be done through the instrumentality of the courts, for the legislature cannot require one man to give his money to another, and then give him an action to enforce their will, and expect this to be treated as a remedy by due course of law."⁸⁴

The earlier Massachusetts cases dealing with the public purpose of taxation either were or could have been based upon a provision of the Massachusetts constitution,⁸⁵ authorizing taxation "for the public service, in the necessary defence and support of the government, and the protection and preservation of the subjects thereof. . . ." ⁸⁵ A series of pronouncements by the Maine court upon this same subject is also based either expressly or impliedly upon the constitutional text; in the first of the series there is reference to a multiplicity of constitutional clauses, among them the provision that no person shall "be deprived of his life, liberty, property or privileges, but by the judgment of his peers or the law of the land."⁸⁶

and *State v. Edwards*, 42 Mont. 135, 111 Pac. 734 (1910). As Professor McBain says, the doctrine was rejected by the Texas Supreme Court in *Brown v. City of Galveston*, 97 Tex. 1, 75 S. W. 488 (1903), although endorsed by the Texas Court of Criminal Appeals (a court of coordinate jurisdiction) in *Ex parte Lewis*, 45 Tex. Cr. 1, 73 S. W. 811 (1903). For an elaborate discussion and rejection of the doctrine see *Wilson v. McGuinness*, 78 N. J. L. 346, 75 Atl. 455 (1910). See also the several opinions in *People v. Draper*, 15 N. Y. 532 (1857). The doctrine was rejected in *Booten v. Pinson*, 77 W. Va. 412, 89 S. E. 985 (1915).

⁸² *State v. Eldredge*, 27 Utah 477, 76 Pac. 337 (1904); *Ex parte Corliss*, 16 N. D. 470, 114 N. W. 962 (1907).

⁸³ 21 Pa. 147 (1853).

⁸⁴ 39 Pa. 73, 82 (1861).

⁸⁵ *City of Lowell v. Oliver*, 8 Allen 247 (Mass. 1864); *Freeland v. Hastings*, 10 Allen 570 (Mass. 1865).

⁸⁶ Opinion of Justices, 58 Me. 590 (1871); *Thompson v. Pittston*, 59 Me. 545 (1871); *Allen v. Jay*, 60 Me. 124 (1872).

Yet it is true that in earlier Iowa cases a view was adopted which substantially placed the limitation of taxation to public purposes upon an extra-constitutional basis;⁸⁷ and the same statement may be made of cases in Wisconsin⁸⁸ and Michigan⁸⁹ in 1869 and 1870, respectively. The basis of the Michigan decision was clearly expressed by Judge Cooley:

"It is conceded, nevertheless, that there are certain limitations upon this power, not prescribed in express terms by any constitutional provision, but inherent in the subject itself, which attend its exercise under all circumstances, and which are as inflexible and absolute in their restraints as if directly imposed in the most positive form of words."⁹⁰

A South Carolina decision of 1884 is based upon much the same view.⁹¹

In *Loan Association v. Topeka*⁹² the Supreme Court of the United States was passing upon the power, under a state constitution, of a state legislature to tax for a private purpose. The decision by the United States Supreme Court, in this and subsequent cases of a similar character, has its real foundation in Justice Miller's statement that,

"There are limitations on such power (of the departments of government) which grow out of the essential nature of all free governments. Implied reservations of individual rights, without which the social compact could not exist, and which are respected by all governments entitled to the name."⁹³

In an article devoted to this subject, Professor McBain says with respect to the doctrine of public purpose:

"The point is that it is established as a general doctrine, not upon the basis of the due-process-of-law clause or any other clause of federal or state constitutions, but upon an extra-constitutional basis. It rests where Mr. Justice Miller put it in the *Loan Association* case when he declared that 'there are limitations on such (legislative) power which grow out of the essential nature of all free governments, implied reservations of individual rights, without which the social compact could not exist, and which are respected by all governments entitled to the name.'

⁸⁷ *State v. Wapello County*, 13 Iowa 388 (1862); *Hanson v. Vernon*, 27 Iowa 28 (1869); overruled by *Stewart v. Board of Supervisors*, 30 Iowa 9 (1870).

⁸⁸ *Curtis' Administrator v. Whipple*, 24 Wis. 350 (1869).

⁸⁹ *People v. Salem*, 20 Mich. 452 (1870).

⁹⁰ *Ibid.* 473.

⁹¹ *Feldman v. Charleston*, 23 S. C. 57, 63 (1884). *Perry v. Keene*, 56 N. H. 514 (1876), might be classed with these cases, were it not for the fact that the issue as to public purposes was uncontested.

⁹² 20 Wall. 655 (U. S. 1874).

⁹³ *Ibid.* 663. See also *Cole v. La Grange*, *supra* note 29.

It rests where Chief Judge Dixon of the Wisconsin supreme court put it when he declared that 'such a power would be obviously incompatible with the genius and institutions of a free people; and the practice of all liberal governments, as well as all judicial authority, is against it.'⁹⁴ It rests where the New York court of appeals put it when the view was expressed that '*on general principles*, it (the power of taxation) has, at least, one limitation,'⁹⁵ or where Judge McIver of the South Carolina court put it when he said that 'it seems to be universally conceded . . . that a law authorizing taxation for any other than a public purpose is void.'⁹⁶ It may be that this principle might have been included under the requirement of due process of law with quite as liberal show of reason as certain other principles to which that guarantee has given rise; but the fact remains, as the law now stands, that it has not been so included and that it is not a principle of the federal constitution at all. It stands, in truth, as perhaps the sole example of a fundamental and far-reaching 'constitutional' doctrine founded not even upon implication from some elastic clause of federal or state constitutions, but upon nothing more concrete and definitive than 'general principles.'⁹⁷

This statement has much truth, but it cannot be altogether accepted. A number of the important earlier cases were based in part on constitutional provisions, but it is true that courts reached the doctrine, whether with or without express constitutional basis. They apparently felt that a certain result was to be reached, and as is oftentime true when new cases are presented, were uncertain as to the arguments by which the result was to be sustained. In such cases of uncertainty, courts have here, as elsewhere in our constitutional law, relied upon principles growing out of the essential nature of free governments. But here, as elsewhere, the need for a textual basis soon results in one being found. Perhaps a satisfactory basis might have been found in the customary provision that "private property shall not be taken for public purpose without just compensation," which was actually employed in Maine.⁹⁸ But resort to the broadest of constitutional guaranties was natural, and it is not surprising to find that early cases both in Pennsylvania and Maine were based in part upon "due process of law." In this broad harbor of constitutional refuge it seems that "public purpose in taxation" has at last found a safe and ample haven. In many of the later cases due process of law is not expressly referred to, but appears to be the real basis of the decision.

Extra-constitutional principles also supplemented written con-

⁹⁴ *Curtis v. Whipple*, 24 Wis. 350, 354 (1869).

⁹⁵ *Bush v. Board of Supervisors*, 159 N. Y. 212, 216 (1899).

⁹⁶ *Feldman v. Charleston*, 23 S. C. 57, 62 (1884).

⁹⁷ *McBain, Taxation for a Private Purpose* (1914) 29 *POL. SCI. Q.* 185, 200. See this article for a citation and analysis of cases.

⁹⁸ *Opinion of Justices*, 58 Me. 590 (1871).

stitutional texts with respect to compensation for private property taken for public use. This subject has been discussed in a recent article by Professor J. A. C. Grant.⁹⁹ Many of the early state constitutions contained no explicit requirement of compensation for private property taken for public use, and several state constitutions still contain no such provision. In *Barron v. Baltimore*,^{99a} the United States Supreme Court held that the Fifth Amendment to the federal constitution did not apply to the states. Until the "due process of law" clause was inserted into the Fourteenth Amendment and construed broadly enough to afford protection, reliance could be placed only on state constitutions to prevent the taking of private property for public use without compensation. In the states having no specific constitutional provisions, the courts were faced with the problem of finding a ground upon which to afford protection. Statutory construction accomplished this purpose in *Gardner v. Trustees of Newburgh* and *Sinnickson v. Johnson*,^{99b} but in the *Newburgh* case Chancellor Kent went beyond the ordinary limits of statutory construction. The New Hampshire court afforded protection under a constitutional provision that "no part of a man's property shall be taken from him or applied to public uses, without his own consent, or that of the representative body of the people";^{99c} the Maryland High Court of Chancery relied upon "the law of the land", and upon the statement that to deprive a man of his property is to pronounce a sentence and not to enact a law.^{99d} The Arkansas court relied upon "due process of law," but also said that the requirement of compensation "is implied from the nature and structure of our government, even if it were not embraced by necessary implication in other provisions of the bill of rights".^{99e} The Georgia court found no explicit constitutional provision upon which to rely, but reached the same result, asserting that "a power to take private property, without compensation, does not belong to any government".^{99f}

The development just sketched illustrates the manner in which extra-constitutional limitations have affected American constitutional law. Relatively few cases have been based exclusively upon limitations other than those in texts of constitutions. Cases

⁹⁹ Grant, *The "Higher Law" background of the Law of Eminent Domain* (1931), 6 Wis. Law Rev. 67.

^{99a} 7 Pet 243 (U. S. 1833).

^{99b} *Supra*, notes 47, 49 and 50.

^{99c} *Piscataqua Bridge v. N. H. Bridge*, 7 N. H. 35, 66 (1834).

^{99d} *Harness v. Chesapeake and Ohio Canal Co.*, 1 Md. Ch. 248, 252 (1848).

^{99e} *Ex parte Martin*, 13 Ark. 198, 207 (1853); *Cairo and Fulton R. R. Co. v. Turner*, 31 Ark. 494, 499 (1876).

^{99f} *Young v. McKenzie*, 3 Ga. 31 (1847); *Parhan v. The Justices*, 9 Ga. 341, 351 (1851).

having such a basis have frequently come in the earlier stages of the development of judicial protection. Independent notions of natural law or of vested rights did not long continue as the primary or sole bases of constitutional decisions, because textual provisions could be interpreted so as to afford safer protections. It was not a mere coincidence that in one of the greatest early cases expanding the notion of "due process of law" the theory of extra-constitutional limitations was expressly rejected.¹⁰⁰ An extra-constitutional limitation which has not found a constitutional text into which it may be conveniently read leads a feeble and languishing existence. The doctrine of an inherent right of local self-government is an illustration of this statement.

The close relationship of constitutional to extra-constitutional limitations is well illustrated by Judge Cooley's *Constitutional Limitations*. The learned author urges the doctrine that there are no limitations upon legislatures outside of constitutional texts, and seeks to explain an apparently opposing view of Justice Story in *Wilkinson v. Leland*.¹⁰¹ Cooley says:

"The question discussed by the learned judge in this case is perceived to have been, What is the scope of a grant of legislative power to be exercised in conformity with the laws of England? Whatever he says is pertinent to that question; and the considerations he suggests are by way of argument to show that the power to do certain unjust and oppressive acts was not covered by the grant of legislative power. It is not intimated that if they were within the grant, they would be impliedly prohibited because unjust and oppressive."¹⁰²

This comes perilously near to saying that there are no limitations outside of the constitution, because every limitation desired can be read into the constitution as a restriction upon the grant of "legislative power." The notion is further elaborated in a form that brings this out even more clearly:

"But when only the legislative power is delegated to one department and the judicial to another, it is not important that the one should be expressly forbidden to try cases, or the other to make laws. The assumption of judicial power by the legislature in such a case is unconstitutional because, though not expressly forbidden, it is nevertheless inconsistent with the provisions which have conferred upon another department the power the legislature is seeking to exercise. And for similar reasons a legislative act which should undertake to make a judge the arbiter in his own controversies would be void because, though in form a provision for the exercise of judicial power, in substance it would be the creation of an arbitrary and irresponsible author-

¹⁰⁰ *Wynehamer v. People*, 13 N. Y. 378, 390-2, 411-12, 430, 452-3 (1856).

¹⁰¹ 2 Pet. 627, 657 (U. S. 1829).

¹⁰² 1 COOLEY, *CONSTITUTIONAL LIMITATIONS* (8th ed. 1927) 343.

ity, neither legislative, executive, nor judicial, and wholly unknown to constitutional government. It could not be necessary to forbid the judiciary to render judgment without suffering the party to make defence; because it is implied in judicial authority that there shall be a hearing before condemnation. Taxation cannot be arbitrary, because its very definition includes apportionment, nor can it be for a purpose not public, because that would be a contradiction in terms. The right of local self-government cannot be taken away, because all our constitutions assume its continuance as the undoubted right of the people, and as an inseparable incident to republican government. The bills of rights in the American constitutions forbid that parties shall be deprived of property except by the law of the land; but if the prohibition had been omitted, a legislative enactment to pass one man's property over to another would nevertheless be void. If the act proceeded upon the assumption that such other person was justly entitled to the estate, and therefore it was transferred, it would be void because judicial in its nature; and if it proceeded without reasons, it would be equally void, as neither legislative nor judicial, but a mere arbitrary fiat. There is no difficulty in saying that any such act, which under pretence of exercising one power is usurping another, is opposed to the constitution and void. It is assuming a power which the people, if they have not granted it at all, have reserved to themselves. The maxims of Magna Charta and the common law are the interpreters of constitutional grants of power, and those acts which by those maxims the several departments of government are forbidden to do cannot be considered within any grant or apportionment of power which the people in general terms have made to those departments."¹⁰³

If the limitations listed in this quotation can be obtained from the mere creation of three departments of government (without even a formal announcement of the principle of separation of powers), clearly no court should for long feel a necessity of basing decisions upon extra-constitutional limitations.

Extra-constitutional limitations have been primarily influential in the determination of the validity of state laws. They have also been present to some extent, usually as dicta, in the decisions of the United States Supreme Court upon federal laws;¹⁰⁴ but in the determination of the extent of Congressional authority, emphasis has been placed upon powers rather than upon limitations.

In theory a court is testing the agreement of an act with the terms of a written constitution, but the process is not and cannot be merely a mechanical one. Professor John C. Gray truly said that in statutory interpretation "the meaning is derived from the words according to the feeling of the judges, and not by any

¹⁰³ *Ibid.* 356.

¹⁰⁴ See statements in *Downes v. Bidwell*, 182 U. S. 244, 282, 290, 291, 21 Sup. Ct. 770, 785, 788 (1901). Citations to cases in the United States Supreme Court are fully collected by Reeder, *Constitutional and Extra-Constitutional Restraints* (1913) 61 U. of PA. L. REV., 441, 444.

exact and fore-knowable processes of reasoning. Undoubtedly rules for the interpretation of statutes have been sometimes laid down but their generality shows plainly how much is left to the opinion and judgment of the court."¹⁰⁵ This statement applies even more aptly to the broad and undefined words of constitutions. Cooley's *Constitutional Limitations* devotes a chapter to the construction of state constitutions, but the burden of the discussion is merely that courts should construe constitutional provisions in the light of the purposes to be accomplished thereby (the purpose to be found by the court), using such aids as may be available to reach this result. And Judge Cooley then thought it necessary to suggest a warning against external aids or arbitrary rules in constitutional construction.

Attempts to formulate rules of construction only emphasize the area of discretion which is always present in the exercise of the judicial function. Through the exercise of this discretion it has been possible for courts to bring within the terms of constitutional provisions the rights designated by Justice Field as "those which of right belong to the citizens of all free governments". The content of broad constitutional guaranties is not and cannot be determined by the constitutional language alone, but is determined by judges in applying the guaranty to individual cases as they arise. The person who as judge decides the issue cannot separate his judicial capacity from himself and his normal mental processes; his view as to what ought to be is inseparable from his determination of what is to be.¹⁰⁶ Broad clauses cannot receive a real application in individual cases unless guided by some principles of political or social philosophy. Perhaps the term "natural law" may properly be applied to the influences that in fact control the decisions in these cases; but nothing is either gained or lost by such a designation.

It is not unusual to find a broad constitutional provision akin to "equal protection of the laws" applied unequally in different types of cases. Witness, for example, the liberality of the Supreme Court of Illinois as to classification for women's labor, and its strictness against more defensible classifications in legislation

¹⁰⁵ GRAY, *NATURE AND SOURCES OF LAW*, (2d ed. 1921) 198.

¹⁰⁶ If the statement above is true, one would expect judges as well as others in the community, to be influenced by their political opinions. That this is occasionally the case may appear from *Pratt v. Breckinridge*, 112 Ky. 1, 65 S. W. 136 (1901); *State ex rel. Dowal v. Hamilton*, 20 N. D. 592, 129 N. W. 916 (1910); *State ex rel. George v. Aiken*, 42 S. C. 222, 20 S. E. 221 (1894); and *State v. Roach*, 230 Mo. 408, 130 S. W. 689 (1910). The last case cited deals with legislative apportionment, and upon this question courts are perhaps apt to find more of constitutional defect in an apportionment made by the party opposed to that of the majority of the court. *Ex parte Heyman*, 45 Tex. Cr. Rep. 532, 78 S. W. 349 (1904), is impossible to understand on any legal basis, and probably had a political background.

as to adult males.¹⁰⁷ The establishment of the doctrine that the power to regulate interstate commerce includes the power to prohibit was directly assisted by considerations of wisdom and morality which were expressly asserted by the United States Supreme Court in upholding congressional prohibitions of interstate commerce in articles affecting health, safety or morals.¹⁰⁸ When "due process of law" comes to mean "reasonable law," the judge's view of what is reasonable¹⁰⁹ must be given specific application, and from his philosophy (whether individualistic or collectivistic) the clause derives its real content.

Such influences also make themselves felt upon clauses of a more specific and technical character. So where a court is testing sufficiency of title and singleness of subject in a bill, it appears occasionally to be affected by its own opinion of the desirability of the measure. But in such cases as this, where the issue is akin to one of fact rather than to one of law, the judge's point of view, instead of becoming generalized as an influence upon later decisions, limits itself primarily to the one case before the court.

If the foregoing statements have any basis in fact, one would expect to find the courts giving a liberal and expanded interpretation to some provisions in constitutions and perhaps a restricted interpretation to others. Judge Cooley has said:

"We do not say, however, that if a clause should be found in a constitution which should appear at first blush to demand a construction leading to monstrous and absurd consequences, it might not be the duty of the court to question and cross-question such clause closely, with a view to discover in it, if possible, some other meaning more consistent with the general purposes and aims of these instruments."¹¹⁰

In state constitutions interpretation has generally been an extended one, unfavorable to legislative power, rather than a restricted and favorable one; and in some instances of the latter the application of one clause has been restricted so as to give broader application to another clause limiting legislative power.¹¹¹ By a narrow construction the courts have wisely de-

¹⁰⁷ Compare *People v. Elerding*, 254 Ill. 579, 98 N. E. 982 (1912), with *Josma v. Western Steel Car & Foundry Co.*, 249 Ill. 508, 94 N. E. 945 (1911).

¹⁰⁸ See, for example, *Lottery Case*, 188 U. S. 321, 23 Sup. Ct. 321 (1903); *Hoke v. United States*, 227 U. S. 308, 33 Sup. Ct. 281 (1913) (white slave traffic); *Seven Cases v. United States*, 239 U. S. 510, 36 Sup. Ct. 190 (1916) (pure foods and drugs); *Brooks v. United States*, 267 U. S. 492, 45 Sup. Ct. 345 (1925) (stolen automobiles).

¹⁰⁹ Whether the test is whether he would regard it as reasonable, or whether he could regard it as a view to be taken by a reasonable man.

¹¹⁰ Cooley, *op. cit. supra* note 102, at 153.

¹¹¹ For cases of this sort, see *Ex parte Corliss*, 16 N. D. 470, 114 N. W.

prived of much of its meaning the constitutional guaranty of a right to keep and bear arms which was once thought important.¹¹² Laws providing for the use of injunctions to enforce policies as to liquor and morals have been upheld, although, unless we assume the judges to be ignorant of facts known to the rest of the community, they must have been aware that they were in this respect restricting the sphere of trial by jury. The West Virginia constitution contains the most specific provisions against the replacing of civil by military authority, but these provisions were ignored by the West Virginia Court when in the opinion of the court military authority was justified.¹¹³ Perhaps the most striking case in American constitutional law of a restrictive interpretation is that which in the *Slaughter House Cases*¹¹⁴ read out of the fourteenth amendment the "privileges and immunities" clause. This was done in the interest of state power, but the ground thus ceded by the United States Supreme Court was later retaken in large part under the "due process of law" and "equal protection of the laws" clauses of the fourteenth amendment.

Examples of extended construction unfavorable to legislative power are much more numerous. The expansion of the principle of separation of powers has already been referred to. There has been an extension by construction of every part of the constitutional provision that "no person shall be deprived of life, liberty or property without due process of law."¹¹⁵ The federal

962 (1907) and *In re Dorsey*, 7 Porter 293 (Ala. 1838). See also Dodd, *Implied Powers and Implied Limitations* (1919) 29 YALE L. J. 137.

¹¹² See the discussion in *Strickland v. State*, 137 Ga. 1, 72 S. E. 260 (1911).

¹¹³ *State v. Brown*, 71 W. Va. 519, 77 S. E. 243 (1912); *In re Jones*, 71 W. Va. 567, 77 S. E. 1029 (1912). But see *Ex parte Lavinder*, 88 W. Va. 713, 108 S. E. 428 (1921).

¹¹⁴ 16 Wall. 36 (U. S. 1873). See McGovney, *Privileges or Immunities Clause—Fourteenth Amendment* (1918) 4 IOWA L. BULL. 219.

¹¹⁵ This expansion has been in part traced by Shattuck, *The True Meaning of the Term "Liberty"* (1891) 4 HARV. L. REV. 365; Pound, *Liberty of Contract* (1909) 18 YALE L. J. 454; and Warren, *The New "Liberty" Under the Fourteenth Amendment* (1926) 39 HARV. L. REV. 431. And see *Baldwin v. Missouri*, 281 U. S. 586, 50 Sup. Ct. 436 (1930).

"Due process of law" or the "law of the land" was capable of expansion under a theory that it embodied into constitutions by implication all procedure and standards of protection at common law. The South Carolina Supreme Court actually took the view that "law of the land" meant "the common law and the statute law existing in this state at the adoption of our constitution." *State v. Simons*, 2 Speers 761, 767 (S. C. 1844). See also *Zylstra v. Corporation of Charleston*, 1 Bay 382, 391 (S. C. 1794); *Lindsay v. Commissioners*, 2 Bay 38 (S. C. 1796); *State v. Doherty*, 60 Me. 504 (1872); and dissent in *Smith v. L. S. & M. S. Ry.*, 114 Mich. 460, 72 N. W. 328 (1897). Such a view would largely have destroyed possibilities of legal progress, and has wisely been rejected. See *Bertholf v.*

prohibition against state laws impairing the obligation of contracts was almost at once extended to transactions not within the common law use of the term "contract", and this although there is a frequently-quoted rule that language in constitutions should be interpreted in the light of the common law.¹¹⁶

What has been said above amounts to a statement that courts do consider the wisdom or expediency of interpreting a constitutional provision in one way rather than in another; and this practically amounts to saying that the courts consider the wisdom or expediency of statutes whose constitutionality is tested before them. And yet, in judicial decisions perhaps no statement is more often made than the one that the issue before the court is purely one of constitutionality, and that the desirability of the measure is not to be considered.¹¹⁷ But in new and doubtful cases of constitutional construction these considerations are precisely the ones that are seldom absent. And although it has been repeatedly said that legislative motives are not to be considered in passing upon questions of constitutionality, yet courts have not been averse in a number of cases to commenting upon and giving weight to what they regarded as the motive of the legislature.¹¹⁸

Occasionally, though not frequently, courts have frankly avowed expediency as the basis for their decisions. The Ohio Supreme Court for many years sustained special legislation for cities which seemed to run counter to the constitutional text. The court later changed its attitude in this matter, and Justice Davis in commenting upon the earlier view said:

O'Reilly, 74 N. Y. 509 (1878). Instead of this, the courts have wisely adopted a notion of "due process" which permits them to recognize that there is a changing content of this provision as protecting fundamental rights. Perhaps it may be said that the courts have come to realize that there is no fixed and unchangeable body of natural rights. See Freund, (1916) 27 *INTERNATIONAL JOURNAL OF ETHICS* 2. But in 1923, Mr. Justice McReynolds, speaking for the court in *Meyers v. Nebraska*, 262 U. S. 390, 43 Sup. Ct. 625 (1923), said that liberty under the Fourteenth Amendment includes "those privileges long recognized at common law as essential to the orderly pursuit of happiness by free men."

¹¹⁶ *Fletcher v. Peck*, 6 Cranch 87 (U. S. 1810).

¹¹⁷ For a review of cases before 1875 see *Slack v. Jacob*, 8 W. Va. 612, 634 (1875).

¹¹⁸ *Lochner v. New York*, 198 U. S. 45, 25 Sup. Ct. 539 (1905); *Hopper v. Britt*, 203 N. Y. 144, 157, 96 N. E. 371, 375 (1911); *People v. Ringe*, 197 N. Y. 143, 151, 90 N. E. 451, 454 (1910).

Legislation is necessarily to a large extent a result of a play of interests (social, economic, political), with first one successful and then another; and judges cannot be unconscious of this. See expression of Justice Holmes, dissenting, in *Coppage v. Kansas*, 236 U. S. 1, 35 Sup. Ct. 240 (1915). Courts do comment on (and are influenced by) the results aimed at by legislation, and the differences between this and commenting upon legislative motives is in some cases merely a matter of words.

"It must be admitted that occasionally the court has seemed to yield to considerations of expediency rather than to firmly apply the unambiguous provisions of the constitution."¹¹⁹

It is not unusual, either in expressions of judges or in legal commentaries, to find judicial theory and judicial practice kept in separate and unconnected compartments. Persons who as judges strongly urge that the wisdom or expediency of measures is not to be considered in constitutional construction praise in unofficial utterance the wise expediency through which Chief Justice Marshall established constitutional principles favorable to national power.¹²⁰ An equally wise expediency brought the court under Taney's chief justiceship to reverse an earlier too narrow construction, and to extend the admiralty and maritime jurisdiction of the United States to all navigable waters, irrespective of whether the tide ebbed and flowed therein.¹²¹ And the modification of earlier views with respect to the obligation of contract, by *Charles River Bridge v. Warren Bridge*,¹²² was dictated by a wise expediency, evidence of which appears upon the face of Chief Justice Taney's opinion.

In state decisions, influences based upon the court's view of the expediency or wisdom of measures clearly appear in the earlier local option cases; in Michigan and Ohio cases affecting cumulative methods of voting; and in many of the cases, heretofore cited, upon public purpose and an inherent right of local self-government. One can hardly read the *Lawyers' Tax Cases* which arose in Tennessee in 1875 without feeling that the judges had distinct convictions against the wisdom of imposing license taxes upon lawyers.¹²³ *Mott v. Pennsylvania Railroad Company*^{123a} seems to be pretty clearly a case in which the Pennsylvania court reached a certain result because it thought the result wise, and one can hardly read the case without feeling that the result was wise, irrespective of what he may think of the constitutional

¹¹⁹ *Platt v. Craig*, 66 Ohio St. 75, 77, 63 N. E. 594, 595 (1902). And see *Allen v. Scott*, Dallam 615 (Texas 1844); *Commonwealth v. Holloway*, 42 Pa. 446 (1862); *Ex parte Anderson* 134 Cal. 69, 66 Pac. 194 (1901).

¹²⁰ See, for example, Judge Cooley's statements in *CONSTITUTIONAL HISTORY OF THE UNITED STATES AS SEEN IN THE DEVELOPMENT OF AMERICAN LAW* (1890).

¹²¹ *Genessee Chief v. Fitzhugh*, 12 How. 443 (U. S. 1851).

¹²² 11 Pet. 420 (U. S. 1837). For other cases upon the face of which expediency appears, see *United States v. Kagama*, 118 U. S. 375, 6 Sup. Ct. 1109 (1886); *Downes v. Bidwell*, 182 U. S. 244, 21 Sup. Ct. 770 (1901); *Hawaii v. Mankichi*, 190 U. S. 197, 23 Sup. Ct. 787 (1903); and the recent series of cases of which *Baldwin v. Missouri*, 281 U. S. 586, 50 Sup. Ct. 436 (1930), is the latest.

¹²³ 8 Heis. 565 (Tenn. 1875).

^{123a} *Supra* note 23.

arguments. The desire to decide in accordance with the merits of a particular case often leads to the announcement of troublesome principles.¹²⁴

The test of proportionateness of the legislative remedy to the evils to be corrected, a test pretty well accepted in the field of the police power, is at least partly based upon the opinion of the judges as to the desirability of the remedy. Judicial authority has not fully accepted Justice Holmes' statement that the police power "may be put forth in aid of what is sanctioned by usage, or held by the prevailing morality or strong and preponderant opinion to be greatly and immediately necessary to the public welfare."¹²⁵ But Justice Holmes' standard, although more favorable to the validity of legislation than that frequently employed by the Court, is equally as indefinite as that generally applied under "due process of law;" in any case the judge's view as to what is the "prevailing morality," (a view necessarily influenced by his own moral views) would be decisive. Even the so-called liberal members of the United States Supreme Court are not immune from the influences that determine the opinions of other judges. Thus we find Mr. Justice Holmes writing the court's opinion in *Pennsylvania Coal Co. v. Mahon*,¹²⁶ and Mr. Justice Brandeis in dissent using the arguments often found in Justice Holmes' dissents. And we find both Holmes and Brandeis uniting in aid of the invalidation of Kansas legislation providing for the compulsory arbitration of industrial disputes.¹²⁷

The recent case of *O'Gorman and Young v. Hartford Fire Insurance Company*,^{127a} indicates that the United States Supreme Court is now inclined to take a more favorable view toward acts of the legislature. The classic statement of such a view, by Justice Holmes in *Noble State Bank v. Haskell*,^{127b} gives a wider range to legislative activity and places responsibility for success or failure upon the political departments of the government, where it properly belongs. A difference of judicial view would have avoided the sad experience of a number of states with laws for

¹²⁴ See *Witter v. Commissioners*, 256 Ill. 616, 100 N. E. 148 (1912); *People v. McCormick*, 261 Ill. 413, 103 N. E. 1053 (1914). See also *State v. O'Neil*, 147 Ia. 513, 126 N. W. 454 (1910), where the decision could have been but one way, but where the explanation of the decision made difficulty for the members of the court.

¹²⁵ *Noble State Bank v. Haskell*, 219 U. S. 104, 111, 31 Sup. Ct. 186, 188 (1911).

¹²⁶ 260 U. S. 393, 43 Sup. Ct. 158 (1922).

¹²⁷ *Wolff Packing Co. v. Court of Industrial Relations*, 262 U. S. 522, 43 Sup. Ct. 630 (1923); *Dorchy v. Kansas*, 264 U. S. 286, 44 Sup. Ct. 323 (1924); *Wolff Packing Co. v. Court of Industrial Relations*, 267 U. S. 552, 45 Sup. Ct. 441 (1925).

^{127a} 51 Sup. Ct. 130 (1931).

^{127b} *Supra*, note 125.

the guaranty of bank deposits,^{127c} but the judicial department cannot and should not act as guardian of the people. Yet a line must be drawn somewhere, and we have given to the court the discretionary power to draw that line.

What has been said above should not be construed as a statement that courts annul statutes merely because they regard them as inexpedient. But it does appear that courts in a great number of cases consider the element of expediency in reaching their conclusions, and this element may be decisive in determining that the decision shall go one way rather than another. This is not intended as a criticism of the courts, but rather as a statement of mental processes common to judges as well as to other human beings. In constitutional law, as elsewhere in human institutions, there is truth in Holmes' statement:

"The felt necessities of the time, the prevalent moral and political theories, intuitions of public policy, avowed or unconscious, even the prejudices which judges share with their fellowmen, have had a good deal more to do than the syllogism in determining the rules by which men should be governed."¹²⁸

By the side of this statement may well be placed that of Mr. Justice Harlan, in *Monongahela Bridge Company v. United States*:

"Suffice it to say that the courts have rarely, if ever, felt themselves so restrained by technical rules that they could not find some remedy, consistent with the law, for acts, whether done by government or by individual persons, that violated natural justice or were hostile to the fundamental principles devised for the protection of the essential rights of property."¹²⁹

The discretionary element in constitutional construction has much justification. With constitutions that are in many cases difficult to change, and with broad constitutional guaranties which must obtain their effectiveness largely through judicial construction, the changing views of judges as to the expediency or wisdom of legislation serve as a slow but progressive means by which constitutions change to meet new conditions.¹³⁰ For

^{127c} Butts, *Guaranty of Bank Deposits in Eight States* (1931), 3 Miss. Law J., 186.

¹²⁸ HOLMES, *THE COMMON LAW*, (1881) 1.

¹²⁹ 216 U. S. 177, 195, 30 Sup. Ct. 356, 361 (1910).

¹³⁰ Compare, for example, the judicial point of view in *Ritchie v. People*, 155 Ill. 98, 40 N. E. 454 (1895), with that in *Ritchie v. Wayman*, 244 Ill. 509, 91 N. E. 695 (1910); that of *People v. Williams*, 189 N. Y. 131, 81 N. E. 778 (1907) with that of *People v. Schweinler Press*, 214 N. Y. 395, 108 N. E. 639 (1915); that of *State v. Mo. Pac. R. R.*, 242 Mo. 339, 147 S. W. 118 (1912) with the previous Missouri cases therein discussed; *Lochner v. New York*, 198 U. S. 45, 25 Sup. Ct. 539 (1905), with *Bunting*

example, the narrow judicial restrictions on delegation of legislative power which were applied fifty years ago would be difficult of operation under the complex industrial conditions of the present day. If broad constitutional texts were construed in the same manner from generation to generation (through a rigid adherence to precedent) adjustments would be much more difficult, and written guaranties possessing judicial enforceability would have proven too burdensome an institution.

Constitutional change through judicial construction is not accomplished by a single judge nor by a court in a single instance. A judge who writes an opinion is necessarily influenced and to a large extent controlled by his associates. The court is influenced by its own prior views and by the views of other courts. But the doctrine of *stare decisis* is less controlling than in the fields of private law, in part because reversals are less likely to upset private rights, and in part because the constitutional problems of one generation differ from those of another.

v. Oregon, 243 U. S. 426, 37 Sup. Ct. 435 (1917); and *Blackstone v. Miller*, 188 U. S. 189, 23 Sup. Ct. 277 (1903) with *Baldwin v. Missouri*, 281 U. S. 586, 50 Sup. Ct. 436 (1930). Harper, *Natural Law in American Constitutional History* (1927) 26 MICH. L. REV. 62, refers to the judicial application of broad constitutional provisions as involving "what may be called natural law with a changing content." A somewhat similar view appears in HAINES, *REVIVAL OF NATURAL LAW CONCEPTS* (1930). For a brief discussion of Rudolf Stammler's theory of "a natural law with a variable content," see Professor Haines' volume, at 248-250.

For an interesting recent review of this subject, see Grant, *The Natural Law Background of Due Process* (1931) 31 COL. L. REV. 56.