

NATURAL LAW IN AMERICAN CONSTITUTIONAL THEORY

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I

NATURAL law has had many meanings and diversified interpretations. Whether in the form of *jus naturale*, the law of nature, the law of reason, *lex naturalis*, *lex aeterna*, natural justice, or due process of law; natural law, in the broadest sense, has evolved as the needs of a particular civilization and the endeavors of its legal scholars have directed.¹ It is significant, however, that as a philosophy of law, natural law continues to thrive, although the particular system which one community constructs may be abandoned by succeeding generations. Periods of growth in the law have been frequently accompanied by shiftings in natural law premises. An old system of natural law soon becomes sterile when there is immediate necessity for an extension of legal principles. The American Constitution has been a fertile ground for the seeds for natural law, and constitutional theory has already passed through several stages of development, and is apparently upon the threshold of a new period of growth.

When the due process of law clause was incorporated into the Constitution as a limitation upon State legislation, the subsequent expansion of legal doctrine to include the variety of situations with which the law was compelled to deal brought about the fashioning and the development of a new natural law philosophy to meet the growing demands upon constitutional jurisprudence. As the cases to which these doctrines were applied multiplied, newer and different tendencies have appeared to keep pace with the changing conditions, but in every phase of constitutional vicissitude natural law or its equivalent has been a powerful influence. A pronounced propensity

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¹For a brief summary of various phases of natural law, see Gareis, *Science of Law*, Kocourek's Translation (1924), Introduction, 18-21. See also Haines, "The Law of Nature in State and Federal Judicial Decisions" (1916), 25 *YALE L. J.* 617.

seems to have ever been manifested, on the part of the courts, to cling to the advantages of constancy and stability which natural law affords, abandoning particular grounds only when their inadequacy became obvious and apparent.

It is never easy to determine just where one tendency becomes predominant and others obsolete. Perhaps a system of natural law, having once become fixed in a jurisprudence, never completely lapses into desuetude. Its influences, at times obvious, at others subtle, may endure long after its premises have been discarded for conscious use in deciding concrete cases. Just how far reason, for example, as understood by Grotius, was influenced by the "nature of man," or by the "nature of law," as determined by legal experience, may be the subject of conjecture and disagreement. Undoubtedly the two cannot be divorced.¹ General tendencies, however, can be detected, and a recognition of such tendencies must serve some useful purpose in understanding the history and growth of the law—perhaps in predicting something of the future.

Of the contributions which Rudolf Stammler has made to legal philosophy, perhaps none is more important than the distinction which he never tires of making between *matter* and *form*.² He has attempted to point out the validity and significance of his distinctions at some length.³ Whether he has successfully demonstrated their applicability in what he calls "The Practice of Just Law,"⁴ is perhaps a question upon which his readers and students may differ. It is believed by some, however, that his philosophy has a peculiar application to certain phases of American law. Whether it can throw additional illumination upon American constitutional theory, as manifested by the persistent recurrence of some phase of natural law, is the purpose of this study to investigate.

One might expect from a philosophy which recognizes the *social* life of man as the underlying problem with which it is concerned, ⁴ a

¹Cf. Stammler, *Theory of Justice*, Husik's Translation (1925), 78-79.

²See, e.g., *Theory of Justice*, *supra*, 133 ff.

³See *ibid*, 471.

⁴*Ibid*, 243-267. See Professor Drake's review of *The Theory of Justice*, in *AMERICAN BAR ASSOCIATION JOURNAL*, July 1926, 476. Cf. also 25 *MICH. L. REV.* 762.

⁴Berolzheimer, *World's Legal Philosophies* (1912), 398-399.

significant application to a constitutional law which must measure and evaluate the wide variety of social interests which the Fourteenth Amendment to our Federal Constitution demands. In any consideration of natural law, one might expect enlightenment from a philosopher who restates the fundamental issue raised by natural law, in all ages, namely, the problem of determining the criterion of the legal ideal.^{4b} And finally, one might expect illumination upon any system of law from a jurist who has developed anything like a critical theory of law. It may be that something akin to Stammler's juristic idealism has found its way into our Constitutional law, in its later stages, as a working substitute for some of the older notions of natural law which time has rendered obsolete and void. Whether this be true or not, it cannot help but profit to analyze apparent tendencies with care in such light as philosophy affords, whether it emanates from Continental or Anglo-American sources. It may clarify the situation and facilitate the transposition of Stammler's doctrines to our body of constitutional principles to review, briefly, the successive stages through which natural law has passed in connection with its growth in our constitutional jurisprudence.

II

In the early history of the Constitution, long before the Fourteenth Amendment, juristic philosophy, following the prevailing political theory of the period, assumed decided natural law tendencies. The idea of individual liberty had steadily developed in English constitutional history since John's concessions in Magna Carta. When the Fifth Amendment was attached to the Constitution, it was eighteenth century law of the land that was contemplated rather than thirteenth century *lex terrae*. Political theory also was intensely individualistic. The Declaration of Independence, if it has no other significance, stands as a memorial to the devout belief that the science of politics had forever indubitably proved that a government of laws had for its one and only objective the protection of individual rights against both private and social interference.⁵ Legal philosophy was not slow to reflect this conviction in the jurisprudence that it developed

^{4b}*Ibid.*, 422.

⁵*Cf.* Constitution of Washington, Art. I, sec. I, wherein the purpose of government is declared to be the protection of the individual.

about the Constitution. Natural law based upon the inherent nature of government and upon the rights and privileges of free men became a premise from which to reason in all cases involving the integrity of individual interests.⁶ The American colonists had resisted the mother country according to the best canon of orthodox constitutional theory as long as their patience endured. Convinced of the futility of such measures, they at last abandoned even a cloak of legality and, in open revolution, resorted to the non-constitutional theory of the natural rights of man in general.⁷ For the time, the natural rights of Englishmen were forgotten in the new enthusiasm for the rights of man according to the law of God and of nature.⁸ This legal doctrine emanating from these non-legal assumptions, being as it was, the progeny of the American and French revolutions,⁹ eventually secured such a firm hold upon juristic thinking that one needs but to look at many a twentieth century decision to realize that this phase of natural law still constitutes, in many instances, the "inarticulate major premise" of not a few freedom of contract opinions.¹⁰ The Courts found that there existed certain private rights which were completely beyond the control of the State; that these limitations arose out of the "essential nature of all free government," and were respected by all governments "entitled to the name."¹¹

When the nineteenth century was well advanced, the historical school began to displace this older natural law, grounded upon the nature of a government of men born free and equal, with a natural law with a historic content.¹² The philosophy of Hegel with its

⁶Cf. Pound, Introduction to the Philosophy of Law (1922), 51.

⁷See McMillwain, The American Revolution (1924), 152.

⁸See, e.g., James Otis, The Rights of the British Colonies, pp. 16, 17, 52-72.

⁹While the political philosophies which ignited the American and French revolutions are usually thought of as identical, the fact must not be ignored that the political philosophy of nature which made itself so profoundly felt in the American revolution, was, in its essence, thoroughly English, coming through the well known Jefferson-Locke-Hooker route. See Becker, The Declaration of Independence (1922), 79.

¹⁰For example, *Lochner v. New York*, 198 U. S. 45 (1905); *People v. Williams*, 189 N.Y. 131 (1907); *Ives v. Buffalo etc.*, 201 N. Y. 271 (1911). See also Haines, "The Law of Nature in State and Federal Judicial Decisions" (1916), 25 *YALE L. J.* 617, 623 ff.

¹¹*Loan Association v. Topeka*, 20 Wall. 655, 662-663 (1874), per Miller, J.

¹²See Pound, Law and Morals (1924), 16.

unfolding of the idea of liberty made itself felt in legal history.¹³ The rights of the Past became the natural law of the Present. A philosophy of history became the core of the system of natural law,¹⁴ and the rights of the individual were measured by the guarantees of the common law.

After the incorporation of the Fourteenth Amendment into the Constitution, thus making due process of law a check upon state legislation, there was soon precipitated a tremendous amount of litigation involving infringements upon individual interests. Around such cases, no small share of which turned upon the protection to freedom of contract which the Amendment affords, natural law with a historic content has developed an impressive philosophy. Courts have resorted to the origin of the due process of law clause to justify the assumption that what has received the sanction of time, by custom and usage, is protected by the guarantee of due process. When the reluctant Lackland made the concessions included in the *lex terrae* provisions of *Magna Carta*, there is little doubt but that he was assuring the barons that their lives and property would be respected according to the law of the land, custom and usage. C. H. McIllwain observes :

"There can be little doubt that these changes were in the direction of a more developed feudalism, but there is nothing in this inconsistent with the view that the *lex* so amended was in its origin in part ancient English customary law."¹⁵

In 1379 it was charged that one tried and fined in one county for an offense which took place in another county was deprived of his property contrary to the *lex terrae*.¹⁶ It was contrary to the custom and tradition of English trial. Bigelow says that the *lex terrae* provision of the Great Charter was an attempt to insure the safety of the person and his property from infringement except "by judicial proceedings according to the nature of the case."¹⁷ It did not neces-

¹³See Pound, *Interpretations of Legal History* (1923), 22-23, 45-49.

¹⁴*Cf.* Berolzheimer, *World's Legal Philosophies* (1912), 216.

¹⁵"Due Process of Law in *Magna Carta*" (1914), 14 *COL. L. REV.* 27, 51.

¹⁶*Lowestoft v. Yarmouth*. See *Select Cases before the King's Council*, 1243-1482; vol. 36, *Publications of the Selden Society*.

¹⁷*History of Procedure* (1880), 155, n.

sarily assure a trial by jury,¹⁸ for this was not always in accord with custom and feudal tradition.¹⁹ Some courts of high repute, however, have felt that the *lex terrae* included jury trial, a judge of no less distinction than Chief Justice Shaw holding to such view.²⁰

Due process of law has assumed, in our constitutional doctrine, a meaning similar to the *lex terrae* of the Great Charter. Both consciously and unconsciously the courts have come to regard the Fourteenth Amendment and the Fifth Amendment as incorporating a protection to the rights gradually evolved by tradition and custom, and sanctioned by the common law. At an early date the Supreme Court, through Mr. Justice Curtis, announced:

“The words ‘due process of law,’ were undoubtedly intended to convey the same meaning as the words ‘by the law of the land,’ in *Magna Carta*. Lord Coke in his commentary on those words (2 Inst. 50) says they mean ‘due process of law.’ * * * To what principles, then, are we to resort to ascertain whether this process enacted by Congress is due process * * *. We must examine the Constitution itself, to see whether this process be in conflict with any of its provisions. If not found to be so, we must look to those settled usages and modes of proceedings existing in the common and statute law of England, before the emigration of our ancestors, and which are shown not to have been unsuited to their civil and political condition by having been acted on by them after the settlement in this country.”²¹

In commenting on *Union Refrigerator Co. v. Kentucky*,²² Professor Beale observed²³ that “it is difficult to prove that a practice which has prevailed in half the States of the Union for a century was contrary to due process of law.” The Supreme Court reasserted the doctrine that customs sanctioned by usage were protected by due pro-

¹⁸McGhee, *Due Process of Law* (1906), 5-6.

¹⁹See Powicke, *Per Iudicium parium vel per legem Terrae*, *Magna Carta Commemoration Essay* (1917), 96, 103.

²⁰*Jones v. Robbins*, 8 Gray (Mass.) 329, 341-343.

²¹*Murray's Lessee v. Hoboken Land etc. Co.*, 18 How. 272, 276 (1855).

²²199 U. S. 194 (1905).

²³*Jurisdiction to Tax* (1919), 32 HARV. L. REV. 587, 592.

cess of law when it declared, in a leading case,²⁴ "We are bound to be very cautious in coming to a conclusion that the Fourteenth Amendment has upset what thus has been established and accepted for a long time."

In reviewing numerous police regulations, extended by the States in the interest of the public morals, safety, health, convenience and general welfare, courts have frequently subjected the measure to the test of usage and custom to determine its constitutionality under the Fourteenth Amendment. Labor legislation, with the accompanying freedom of contract controversy, has not escaped this process. Frequently the courts have expressly stated that what has been conceded by the law for centuries cannot be denied, consistently with due process of law. In *Noble State Bank v. Haskell*,²⁵ it was asserted that the police power might be put forth in aid of what was sanctioned by usage, the same coming within the constitutional requirements of due process of law. In a more recent case,²⁶ the Court, per McReynolds, J., declared:

"While this Court has not attempted to define with exactness the liberty thus guaranteed, the term (due process of law) has received much consideration and some of the included things have been definitely stated. Without doubt it denotes not merely freedom from bodily restraint but also the right of the individual to contract, to engage in any of the common occupations of life, to acquire useful knowledge, to marry, to establish a home and bring up children, to worship God according to the dictates of his own conscience, and generally to enjoy those privileges long recognized at common law as essential to the ordinary pursuit of happiness by free men."²⁷

In accordance with the doctrine underlying these expressions, due process of law has been regarded as embodying certain "fundamental

²⁴*Otis Co. v. Ludlow Mfg. Co.*, 201 U.S. 140, 154 (1906). See also *Grant Timber & Mfg. Co. v. Gray*, 236 U. S. 133 (1915); *Patterson v. Bark Eudora*, 190 U. S. 169 (1903); *Ochoa v. Hernandez*, 230 U. S. 139 (1913).

²⁵219 U. S. 104 (1911).

²⁶*Meyer v. Nebraska*, 262 U. S. 390 (1923).

²⁷*Ibid.*, 399.

principles of justice" which States are not at liberty to abridge.²⁸ These fundamental principles of justice seem to be those privileges which have been so long enjoyed that one's sense of natural right is offended when they are denied. This is nineteenth century natural law, or natural law with a historic content. It is natural for men to resent any infringement upon that which they have immemorially been accustomed to enjoy. That which is familiar becomes sacred and the novel becomes absurd and frequently shocking. Change, when compelled by law, is always contrary to the natural right of those who are not benefited thereby. The man who has arbitrarily directed the conduct of others at his own will, because he willed it, thinks that he is denied a "natural" right when his will is checked because the departure from the customary and familiar course deprives him of that which he has been permitted to enjoy and which, therefore, he has come to regard as a natural or inalienable right.²⁹ Courts have too frequently found that customs and institutions with which they were most familiar were sanctioned by the Constitution, for it was incomprehensible to them that such customs and institutions could be interfered with consistently with due process of law. Still, in the words of Mr. Justice Holmes, "the accident of our finding certain opinions natural and familiar or novel and even shocking ought not to conclude our judgment upon the question whether statutes embodying them conflict with the Constitution of the United States."³⁰ In commenting upon the distinctions between the functions of the judge and jury, the same learned Justice remarked, in *Rawlins v. Georgia*,³¹ and again in *Chicago, R. I. & P. v. Cole*,³² that there was nothing in the Constitution or any of the Amendments thereto which

²⁸*Cf.* *Collins v. Kentucky*, 234 U. S. 634, 638 (1914); also *O'Neill v. Leamer*, 239 U. S. 244-254 (1915).

²⁹Slavery has had many champions among jurists who espoused a natural law. See Pound, *Law and Morals* (1924), 100, 101. "One cannot but see," asserts the writer, "that the circumstances that one wrote where slavery had long ceased to exist, while the others were familiar with it as an institution, had decisive effect upon the dictates of reason." It is not without significance that this same natural law was employed to defend the "divine right" of kings in the earlier phases of that doctrine in England. See McIlwain, *The American Revolution* (1924), 161.

³⁰*Lochner v. New York*, dissenting opinion, 198 U. S. 45, 75 (1905).

³¹201 U. S. 638 (1906).

³²251 U. S. 54 (1919).

required a State to maintain the line with which we are familiar between the functions of the jury and those of the court. But even Justice Holmes is deeply impressed with the relationship between due process of law and long established rights. Thus he observes,

"It would be a surprising extension of the Fourteenth Amendment if it were held to prohibit the continuance of one of the most universal and best known distinctions of the medieval law."³³

The great preponderance of Holmes' opinions, however, indicate without doubt that he has not taken the stand that long established customs are protected without qualification by due process of law. In cases wherein he has apparently arrived at such a result, it has been through reasoning from entirely different premises, as will subsequently be indicated.

The results of both the earlier and later trends of natural law which developed about the Constitution and especially the Fifth and Fourteenth Amendments, have been repeatedly demonstrated to be inadequate to meet the demands which society places upon that instrument. Economic and social developments of late years have made inevitable a socialized view of the law. Since Jhering, the social attitude toward jurisprudence has begun to replace the outworn individualism of preceding centuries.³⁴ Law as a safeguard and a guardian of social interests meets law as a guarantee of the integrity of individual interests. Especially is this true of Constitutional law under the Fourteenth Amendment. The sociological brief, containing vast amounts of social and economic data has replaced the earlier jejune notions of "common understanding" and "general knowledge."³⁵

The chief reason for the inadequacy of the earlier phase of natural law, derived from the nature of government and the inherent rights of free men, was that it conduced to the development of what Jher-

³³Grant Timber etc. Co. v. Gray, 236 U. S. 133, 134 (1915).

³⁴Cf. Pound, "Scope and Purpose of Sociological Jurisprudence" (1911), 25 HARV. L. REV. 140, 143.

³⁵See Muller v. Oregon, 208 U. S. 412 (1908). Cf. Complaints of the court in People v. Schweinler Press, 214 N. Y. 395 (1915) as to the inadequacy of such data in People v. Williams, 189 N. Y. 131 (1907), eight years earlier.

ing contemptuously referred to as a jurisprudence of "pure conceptions." Complete conceptions were formulated as to inalienable rights, freedom of contract, the nature of man, and the like, one of which constituted a premise from which the correct decision could be syllogistically deduced for every controversy. Facts in the particular circumstance were ignored; the conceptions were self-sufficient.³⁶ Absolute notions of freedom of contract could not possibly be affected by facts, however notorious. A long list of labor controversies bear witness to this process, among which are decisions denying the right of the State to legislate in behalf of those who toil in mines and factories to prevent their economic slavery by payment in scrip or store orders instead of in cash,³⁷ denying the power of the State to compel employers to give discharged laborers service letters stating the reasons for their dismissal,³⁸ statutes regulating the basis of payment for coal at the mines,³⁹ and acts prohibiting the discharge of laborers because of membership in labor organizations.⁴⁰ In each of these situations the facts attending the circumstances of the laboring man were of such a nature that immediate and drastic relief was imperative. Legislatures in many States and many countries had considered and passed appropriate remedies. In the face of these facts both notorious and obvious, courts reasoned abstractly from unqualified premises to uncompromising conclusions, untested by facts and unsuited to the realities of a developing society.

When this conceptual natural law had, in a measure, been sup-

³⁶*Cf.* Pound, "Liberty of Contract" (1909), 18 *YALE L. J.* 454, 462.

³⁷*Godcharles v. Wigeman*, 113 Pa. St. 431 (1886); *State v. Loomis*, 115 Mo. 307 (1893); *State v. Haum*, 61 Kan. 146 (1899); *State v. Mo. Tie & Lumber Co.*, 181 Mo. 536 (1904). See *Leep v. St. Louis, Iron Mt. & So.*, 58 Ark. 407 (1894) for an act requiring wages to be paid on discharge unconstitutional as to natural persons. One judge was of the opinion that it was also unconstitutional as to corporations. See *Johnson v. Goodyear Mining Co.*, 127 Cal. 4 (1899) for an act providing for liens on corporation property for unpaid wages declared unconstitutional.

³⁸*Wallace v. Georgia C. & N. Ry.*, 94 Ga. 732 (1894), on grounds of being an unconstitutional infringement of "liberty of silence;" *A. T. & S. F. R. R. v. Brown*, 80 Kan. 312 (1909); *St. Louis Southwestern R. R. etc. v. Griffin*, 106 Tex. 477 (1914) on grounds that liberty of contract was a "natural right" which the Government could not take away from a citizen.

³⁹*Millet v. People*, 117 Ill. 294 (1886); *Re Preston*, 63 Ohio St. 428 (1900).

⁴⁰*Coppage v. Kansas*, 236 U. S. 1 (1912).

planted by a natural law with a historic content, the situation was only partly and temporarily relieved. Soon this test for due process of law displayed defects quite as fatal as the older system. The courts have constantly been constrained to reject the principles contained therein. In 1905 the Supreme Court considered a Kentucky tax enactment which placed a tax upon the cars of a domestic corporation, which were employed permanently without the State.⁴¹ A fair result demanded that the tax be invalidated and the Court so held. The rule here announced has been the law ever since as applied to personal, tangible property, although prior to the *Union Refrigerator* case States had for years taxed such property at the domicile of the owner, upon the strength of the ancient maxim *mobilia sequuntur personam*. In 1923, in reviewing the minimum wage law for the District of Columbia, however, the Court, following the historic content of our natural law, invalidated the statute because it could not be classified with any of the statutes already declared constitutional as being a fair exercise of the police power.⁴² Perhaps no more typical instance of the authority of concrete manifestations of this phase of natural law could be found than this unconvincing decision. After summarizing the various cases in which State statutes had been declared constitutional, as within the police power, Mr. Justice Sutherland, speaking for the Court, said:

"If now in the light furnished by the foregoing exceptions to the general rule forbidding legislative interference with freedom of contract, we examine and analyze the statute in question, we shall see that it differs from them in every material respect."⁴³

This difference between the minimum wage act and constitutional exercises of the police power, as established by judicial history, was sufficient to justify the Court in invalidating the former.

In 1925, in *Frick v. Pennsylvania*,⁴⁴ a vast amount of personal, tangible property had been left by the deceased in New York and Massachusetts. Pennsylvania, the domicile of the testator, sought to

⁴¹*Union Refrigerator Transit Co. v. Kentucky*, 199 U. S. 194 (1905).

⁴²*Adkins v. Children's Hospital*, 261 U. S. 525 (1923).

⁴³*Ibid.*, 554.

⁴⁴268 U. S. 473 (1925).

impose a succession tax upon this property, but the statute authorizing such tax was invalidated by the Supreme Court. It was not due process of law, albeit the decision upset the inheritance tax laws of at least three fourths of the States of the Union. The historic practice of the States was here restrained in respect to inheritance taxes in the same manner as property tax laws had been affected by the *Union Transit* case, twenty years earlier. The historic development of the content of the natural law of the Fourteenth Amendment was again inadequate to produce a fair and desirable result, and the Court was forced to bodily disregard the time honored principles upon which many States had been extorting taxes on the same property or the same act.

Both the eighteenth and nineteenth century trend of natural law, then, has been insufficient to produce a lasting juristic philosophy. The former made the mistake of seeking absolute truth in the positive manifestations of the ideal law.⁴⁵ When the law of nature was revealed unto men, there was no need for additions or subtractions. The total absence of any provisions for alteration or amendment in at least six of the revolutionary constitutions bears eloquent testimony to the confidence reposed in the infallible revelations of this law.⁴⁶ "The eighteenth century did not abandon the old effort to share in the mind of God," says Becker,⁴⁷ "it only went about it with greater confidence, and had at last the presumption to think that the infinite mind of God and the finite mind of man were one and the same thing." The French, too, thought that their Civil Code was an ideal codification.

The nineteenth century natural law, Dean Pound thinks, was an ideal development of the principles of the common law, and natural rights in American courts meant rights long enjoyed by Englishmen and Americans and protected by the common law.⁴⁸ As a philosophy this system was defective just as Hegel's philosophy of law was defective, and for the same reason. Here what purports to be a philosophy is lacking, so Stammler and many others think, in an ele-

⁴⁵See Pound, *Law and Morals* (1924), 14, 15.

⁴⁶See Dodd, *The Revision and Amendment of State Constitutions*, Johns Hopkins Press (1910), 118.

⁴⁷The Declaration of Independence (1922), 39.

⁴⁸*Cf.* Pound, "Scope and Purpose of Sociological Jurisprudence" (1911), 24 *HARV. L. REV.* 591, 611.

ment of universal validity. The principles of the system have repeatedly failed to produce satisfactory results; courts have been compelled, from time to time, to abandon them. Hegel's conception of philosophy as the study of the evolutionary processes by which law is formed resulted in his approach to philosophy as a historian, and made his philosophical view of history as applied to law, his philosophy of law.⁴⁹ Hegel's unfolding of the idea of liberty or "right" constantly undergoes changes; as history alters the content, so changes the foundation of his natural law philosophy. And so it has been with us when we, in our constitutional law, look solely to a scientific organization of traditional and historic principles to determine due process of law issues in modern society. It has resulted in a belated individualism which has crept into such decisions as that of the *Lochner* case,⁵⁰ and its *a priori* process has produced such results as that in the minimum wage decision, above.⁵¹

III

Another phase of natural law has grown up around the Amendment in the last fifty years and indications point to more fruitful results from this branch of the law of nature. The fusion of moral judgment into constitutional law, as found in the standard of reasonableness, has furnished a genuine philosophy of law.⁵² One of the ever-present difficulties with the older natural law systems was the constant confusion of the philosophical with the non-philosophical elements; a failure to distinguish between the enduring and the changeable elements. What Stammler speaks of as *form*, *matter*, and *content* have never been clearly differentiated by the jurists. In every rule of external human conduct, declares the Berlin professor, there are two elements, (1) *materia*, matter, that is, the changeable and concrete material; (2) *forma*, form, the intellectual element of a will content, universally contained in every law.⁵³ This distinction is one of vital importance in the development of a philosophy of law that is to meet new and unexpected conditions and circumstances and

⁴⁹See Berolzheimer, *The Worlds Legal Philosophies*, *supra*, 216 ff.

⁵⁰*Supra*, n. 10.

⁵¹*Supra*, n. 42.

⁵²*Cf.* Pound, *Law and Morals*, *supra*, 60.

⁵³Stammler, *Theory of Justice*, 133. *Cf.* "Fundamental Tendencies in Modern Jurisprudence" (1923), 21 *MICH. L. REV.* 881.

solve the ever new and novel problems which a complex society constantly raises. Stammler employs the distinction to clarify the philosophy of law as applied to the entire legal system. The immediate problem herewith is to test its application only to such portion of our constitutional jurisprudence as has developed under the due process of law clause in respect to legislation of the several States. When Stammler, then, speaks of "law," consistency demands that we confine the use of the term, for our immediate purpose, to Constitutional law.

Form is described as the "uniform method of ordering,"⁵⁴ that is, in Constitutional law, the element which gives constancy and unification to our jurisprudence—the universal element thereof. *Materia* can be only those concrete decisions which have manifested themselves from time to time as the Court has had occasion to pass upon the validity of statutes of the States under the Amendment. The abstract must not be confused with the concrete.⁵⁵ Neither must it be thought that the pure form can be fully expressed in the concrete; the abstract ideal can never be expressed or fashioned into concrete, positive being. On the other hand the form and the matter cannot be entirely separated. "They are always found united," says Stammler,⁵⁶ "neither exists prior to the other. * * * Since on the contrary, as has been said, they make their appearance only at the same time and in union with one another, their discovery necessarily involves a critical analysis of an already existent synthesis. How this synthesis occurs does not bear on the question of systematic analysis as such. * * * For purposes of the present discussion, we have to start from the proposition that throughout our entire experience our impressions and aspirations are synthesized, and that in these composite experiences can be distinguished the uniformly determining

⁵⁴See "Fundamental Tendencies," *supra*, 882.

⁵⁵See *ibid*, 885, for the confusion between abstract law and the historical application of law, when the distinction should be made between *the* law and *a* law. This was the trouble with eighteenth century natural law on the Continent when the attempt was made to make particular law (Code) coincide with the abstract conception of law, as a manifestation, in positive form, of the same. Cf. Stammler's criticism of the French Civil Code, *ibid* 645. Cf. also the criticism applied to the Canon law, *The Theory of Justice*, 106.

⁵⁶"Fundamental Tendencies," *supra*, 881, 882.

method of ordering, on the one hand, and the particular facts determined thereby on the other."

We must distinguish, then, in our thinking, between those uniform methods of ordering which, in Constitutional law, lend continuity to the fabric which the decisions have woven, and the particular conclusions in concrete cases which constitute the matter ordered thereby. Yet we are to look for these two elements together, for the one does not exist without the other. Distinct from these two elements, for philosophical purposes, there is still a third element involved, namely the relationship between the universal, unifying element and the concrete matter. Stammler has called this relationship the *content*.⁵⁸

By introducing into constitutional jurisprudence the unchangeable and immutable element of reason as a standard, we have provided a universal of unconditioned and unvarying validity. It is here that our natural law becomes truly philosophical. "It (legal philosophy)," says Pound,⁵⁹ "has had faith that it could find the everlasting, unchangeable, legal reality in which we might rest and could enable us to establish a perfect law by which human relations might be ordered forever without uncertainty and freed from need of change." It is thus that our standard of reason provides a genuine philosophical basis for an enduring Constitutional jurisprudence.

A number of years ago Mr. Justice Holmes said of the doctrine of reasonableness, as applied in private law:

"When we rule on evidence of negligence we are ruling on a standard of conduct, a standard which we hold the parties bound to know beforehand, and *which in theory is always the same upon the facts* and not a matter dependent upon the whim of a particular jury or the eloquence of a particular advocate."⁶⁰

And as to this same element of reason in public law, where the

⁵⁸See *ibid*, 882. *Content*, literally "holding with" or "holding together" *cum+teneo*. The German is *Inhalt*, with a similar etymology, *in+halten*.

⁵⁹See Introduction to the Philosophy of Law (1922), 17. "It is an ancient, never-ending dream of mankind that there is a peculiar, rigid and unchangeable law." Gareis, Introduction to the Science of Law (1924), Introduction, 19, quoting Windscheid.

⁶⁰Law in Science and Science in Law, Collected Papers (1920), 210, 233. Italics are mine. Cf. Common Law (1881), 111.

police power of the State was involved, the words of Mr. Justice Eakin in *Stettler v. O'Hara*⁶¹ have a far reaching significance:

“There have been many attempts to define the police power and its scope; but because of confusing the power itself with the changing conditions calling for its application, many of the definitions are inexact and unsatisfactory. The courts have latterly eliminated much of the confusion by pointing out that, *instead of the power being expanded to meet new conditions, the new conditions are, as they arise, brought within the immutable and unchanging principles underlying the power.*”

So the constitutional question presented in due process of law, as applied to statutes under the police power, is essentially a philosophic question, because it involves the element of unchanging validity. A great deal has been said by the courts about the question of reasonableness, whether it was a question of law or a question of fact. Austin, long ago, pointed out that it was neither, but rather a question involving the *relationship between the given law and the given facts*,⁶² what Stammler calls the *content*. This question, involving a pure intellectual process, is primarily a moral one.⁶³ This, it must be, is what Mr. Justice Holmes has in mind when he declares that the standard of the reasonable man is not a legal standard at all. In so far as the standard becomes incorporated into the law, many jurists will call it a legal standard,⁶⁴ but its application implies the exercise of what is fundamentally a moral judgment.⁶⁵

Stammler, speaking of the philosophy of law, says,

“By the philosophy of law we understand the theory of that which in judicial discussion, is assumed to be of unconditioned, universal validity.”⁶⁷

⁶¹69 Oregon 519, 532 (1914), quoting. Italics are mine.

⁶²Jurisprudence (1885), I, 236.

⁶³See Pound, Law and Morals (1924), 60, 61.

⁶⁴See Theory of Justice, *supra*, 40 ff. Inasmuch as the moral principle involved influences and controls conduct, it may be said to be *legal*.

⁶⁵*Cf.* Salmond, Jurisprudence (7th ed, 1924), 80.

⁶⁷Lehrbuch der Rechtsphilosophie, § 1.

Scientific propositions do not involve elements of *unconditioned, universal validity*; science is concerned primarily with the general. Thus Stammler defines what he conceives to be the fundamental questions with which the philosophy of law is concerned, namely, (1) What is law; (2) why does it bind; (3) upon what principles are laws just?⁶⁸ These, he declares, cannot be solved by the consideration merely of definite historical law. They are questions involving a consideration of that which is "assumed to be of unconditioned, universal validity." The various answers which the courts have made to these three questions, as they have arisen under the police power and the Fourteenth Amendment, indicate the relation of the doctrine of reasonableness to each.⁶⁹ The answer to each question involves considerations, for the treatment of which science is jejune and empty, but to which philosophy is germane and pertinent. Science has its place in Constitutional law, in the determination of the facts for the creation of the *materia*, in order that the *content* may be established, but with the *pure form*, philosophy alone is concerned.

Thus natural law with its philosophic element must be kept distinct from the factual determination involved in the *matter*. In the latter, the first question is one for science. Here there is no drawing of the line, and no pure form is involved, but only the most expeditious method of determining the factual foundation for the concrete manifestation of the law in the particular case. In arriving at the particular conclusion, however, an intellectual process involving the application of a norm, forever unchangeable and immutable upon the facts, is employed. It is thus that the *content* is established. So it may follow that the content of this natural law may be incorrect; it may be poor law, and yet the standard applied be always a just one, and be good law. Just as mathematicians make errors in handling universal conceptions, so jurists err in the exercise of the standard of reasonableness, but the idea undergoes no change or no modification. The ideal harmony which it is the aim of Constitutional law to effect be-

⁶⁸The Theory of Justice, 85. Cf. Rechtsphilosophie, *supra* § 47.

⁶⁹Cf. the language of the court in *Commonwealth v. Alger*, 7 Cush. (Mass.), 53, 85 (1851); *Lochner v. New York*, 198 U. S. 45, 53 (1905), Holmes, dissenting; *Chicago, B. & Q. R. R. v. Drainage Commissioners*, 200 U. S. 561, 592 (1906); *Stettler v. O'Hara*, *supra*, 532.

tween individual interests and social interests can only be attained through the correct application of a universal standard. The result of such perfect application must be, in theory, the ideal community where the purposes of different individuals are reciprocally set up as means for others, with a perfect harmony of all ends,⁷⁰ or, in other words, the result must be what Stammler speaks of as the conception of complete harmony of all conceivable will contents.⁷¹

To effect such a result is precisely the problem in all freedom of contract issues. Even the most naive courts no longer regard freedom of contract as an absolute and unqualified right. Such was the attitude adduced from the older notions of natural law, but modern courts have, in large parts, become emancipated from such an intellectual bondage. Since it follows, then, that a line must be drawn, every such circumstance presents an occasion for the correct application of a legal norm.⁷² Older views regarded this as a purely moral question, but, as Stammler points out, it is a question of just law and not ethical doctrine, for "it is a problem of justly regulating the external conduct of those living under the law, and not of forming their good intentions in relation to others."⁷³

Thus it is that with varying results from the application of an immutable standard to constantly changing conditions we have evolved what has been called a natural law with a changing content.⁷⁴ As society progresses there must be a similar progression in the law, for the law is, or ought to be, a social institution. Continual changes in economic and social conditions constantly give rise to new social interests which demand the protection of the law, for the law is pledged to protect both private and public interests. The

⁷⁰See *Theory of Justice*, 161; see also "Fundamental Tendencies," 21 *MICH. L. REV.* 889.

⁷¹"Fundamental Tendencies," *supra*, 887.

⁷²*The Theory of Justice*, 303.

⁷³*Ibid.*, 303; *cf. ibid.*, 40.

⁷⁴See *The Theory of Justice*, 107; *cf. ibid.*, 19. "We may at least have a natural law with a growing content—an idealized ethical custom and an ideal picture of the end of law, painted it may be, with reference to the institutions and ethical customs of the time and place, which may serve as an instrument of shaping and developing legal materials and of drawing in and fashioning materials from outside the law." Pound, *Law and Morals* (1924), 113.

Fourteenth Amendment especially contains evidences of this dual guardianship. The very words of the due process clause imply that there must be a weighing and balancing of interests before the validity of a given process is determined. As additional social interests increase, the scope of "due process of law" will be extended, and the variability of the *content* of natural law occurs. The result is a system of natural law consisting, in essence, of "precepts of right and law under relations empirically conditioned."⁷⁵ The doctrine of reason is the precept of right and law which contains theoretically just law. The changing economic and social conditions result in concrete situations which constitute the *materia* to which the law is applied. The relationship established between these "conditions empirically determined" and the norm of just law effects the *content*. Consequently in sustaining a ten hour day for factory workers in 1917,⁷⁶ the Supreme Court did not necessarily overrule the decision invalidating a ten hour day for bakers in 1905.⁷⁷ Assuming no mistakes or errors in the application of the standard in either case,⁷⁸ the change in *content* was produced, not by a change

⁷⁵Wirtschaft und Recht (2nd ed.), 181.

⁷⁶Bunting v. Oregon, 243 U. S. 426 (1917).

⁷⁷Lochner v. New York, 198 U. S. 45 (1905).

⁷⁸Analysis indicates that in the Lochner case the Court neither determined the facts which constituted the *materia* in a scientific manner, nor applied the pure *form*, the standard of reason, correctly. Hence neither the science nor the philosophy of constitutional law was properly employed. As to the factual situation, The Court relied upon what it called common understanding. It was before the day of the sociological brief, and the personal knowledge, education, training, prejudice and bias of each judge constituted the "common understanding." Experience has verified the fact that the common understanding is only another name for popular ignorance and, frequently, superstition. Under this principle, the work and experiments of scientists, legislators, and sociologists was subjected to the test of a common understanding which was usually synonymous with the personal feelings of the particular judge.

As to the way in which the standard of reason was applied, it is only necessary here to point out that the majority and minority opinions of the case indicate that something more than a mere difference in result was achieved. It is difficult to believe that any of the members of the Supreme Court are unreasonable men, and still we have continual dissents in cases arising under the Fourteenth Amendment. A more probable explanation is that there is a decided difference in the method of application of the standard, which would result, were dissenting opinions law, in a divergent *matter* with an accompanying irreconcilable *content*.

in the standard applied, but solely by the conditions to which it was applied. To assume that the process of the Court was correct in the *Lochner* case may be difficult to do, but this explanation can justify, or at least explain the fact that both decisions are good law, theoretically, today.

When courts are presented with a problem of the kind in question, they grapple with one of the most fundamental issues which the law affords. In each case the general principles are usually not the subject of disagreement. No one will dispute that the Fourteenth Amendment may be called upon to protect private rights. On the other hand the police power is conceded to be a power of government which may be put forth in aid of what the prevailing morality or strong and preponderant opinion holds to be greatly and immediately necessary to the public welfare.⁷⁹ In the word of Justice Holmes "there is no dispute about general principles. The question is whether this case lies on one side or the other of a line which has to be worked out between cases differing only in degree."⁸⁰ Any line which the law draws looks arbitrary, and still the theory of the law is that the line must be drawn. Statutes are either reasonable or unreasonable. In 1895 the Illinois court found an eight hour law for women an unreasonable exercise of the police power,⁸¹ but in 1910 a ten hour restriction was entirely reasonable.⁸² The distinction between the two statutes was expressly stated to rest upon the difference in the hours of labor allowed by the statutes.⁸³

The general principles being agreed upon, it follows that the source of conflict and difference of opinion lies in the application of the standard and the method of approach. This is invariably true when courts are presented with the necessity of applying a standard—a norm of "unconditioned, universal validity." But it is in the intellectual process thus involved that the natural law with variable con-

⁷⁹*Noble State Bank v. Haskell*, 219 U. S. 104 (1911).

⁸⁰See *Missouri, Kan. & Tex. R. R. v. May*, 194 U. S. 267, 269 (1904).

⁸¹*Ritchie v. People*, 155 Ill. 98 (1895).

⁸²*Ritchie v. Wayman*, 244 Ill. 509 (1910).

⁸³*Ibid.*, 528. But see the language of Mr. Justice Peckham in *Lockner v. New York*, *supra*, 62 in which he refused to recognize the validity in the line of reasonableness drawn between ten and ten and one-half hours of toil by bakers.

tent is born, for the existing body of dogma is here carried, as Holmes says, "into its highest generalizations by the help of jurisprudence."⁸⁴

Science is useful and so is history, but a genuine philosophy is indispensable to complete the legal process in problems under discussion. Science can aid in ascertaining the facts, particularly where economic and social phenomena are involved. History is servicable to illustrate how rules and principles have been applied to concrete situations in the past and to thereby assist in meeting such and similar situations in the future, but never as self-sufficient premises from which to deduce, by syllogistic logic, rules to govern every case that may arise.⁸⁵ Science and history supplement and augment each other. The tendency of our Constitutional law in the past to follow, exclusively, the path of history has, as we have seen, failed, for law cannot be developed as Stammler says, "by casual historical observation," nor yet empirically.⁸⁶ On the other hand the *content* of just law cannot be derived solely from ethics or morals, even when fused into and amalgamated with law,⁸⁷ only the form can be thereby affected. When correctly applied, with science, history and philosophy doing their part, perhaps this natural law with its variable content may reconcile the two great demands made upon any jurisprudence, namely, the need for fixity and stability and the necessity for flexibility that the law may not be stunted in its growth and development. Regardless of the ultimate results attained by the present tendency, it is servicable to examine our Constitutional law in the light of valid critical theory, distinguishing *form* and *matter* and *content*; "because," in the words of Del Vecchio, "criticism has taught us to distinguish the truth of phenomenon from that of the ideal norm which governs it, while offering us a means of recognizing its gradual reconciliation in history."⁸⁸

⁸⁴"The Path of the Law," Collected Papers, *supra*, 167, 198.

⁸⁵Pound, "Scope and Purpose of Sociological Jurisprudence," (1911), 25 HARV. L. REV. 140, 147.

⁸⁶See Berolzheimer, *World's Legal Philosophies* (1912), 415.

⁸⁷*Ibid.*, 412.

⁸⁸Formal Bases of Law, Lisle's Translation (1921), 335.