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"NATURAL RIGHTS"—A CONSTITUTIONAL DOCTRINE IN INDIANA

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Both the 1816 and the 1851 Constitutions of Indiana begin the Bill of Rights with a statement of Jeffersonian political theory. In its 1851 version the statement read:

> We declare, that all men are created equal; that they are endowed by their Creator with certain unalienable rights; that among these are life, liberty and the pursuit of happiness; that all power is inherent in the People; and that all free governments are, and of right ought to be, founded on their authority, and instituted for their peace, safety, and well-being. For the advancement of these ends, the People have, at all times, an indefeasible right to alter and reform their government.[1]

Let no one suppose that these sentiments are merely pious expressions of hope. Indiana state legislation, particularly that regulating economic affairs, is continually being tested in the courts to determine whether "unalienable" rights have been abridged. The judges have made the protection very specific indeed. The prices charged by barbers may not be fixed by law because of the first section of the Bill of Rights. The business of selling casualty insurance may not be confined to those who sell policies on a commission basis. A ticket scalper exercises his constitutional right when he sells two three-dollar tickets to the finals of the state basketball tournament for twenty-five dollars apiece. This essay will attempt to trace the development of judicial opinion whereby the constitutional expression of Nineteenth Century democratic principles became the basis for decisions concerning the price of a haircut or the sale of a basketball ticket.

I.

Although the Constitution of 1816 contained the equivalent of the present natural rights clause,[2] no legislation was invalidated on that ground by the

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1. IND. CONST. Art. I, § 1 (1851).

2. The first two sections of Article I of the Constitution of 1816 read:

> Sect. 1st. That the general, great and essential principles of liberty and free Government may be recognized and unalterably established;

Supreme Court of Indiana under the first Constitution. Not until the early years under the Constitution of 1851, specifically in the period 1855-7, did the Court struggle with the application of the clause.

Of the judges of the Supreme Court who sat during those years very little is known aside from the opinions which they wrote.[3] Three were Democrats: Perkins, Stuart and Davidson. Gookins, the most recently elected to the bench (in 1854), was a Whig. All had been born in the East: Stuart in Massachusetts, Davidson in Pennsylvania, Perkins and Gookins in Vermont, and had migrated to Indiana during their twenties. Only Gookins received all of his legal training in Indiana. Judge Perkins is the figure of principal interest because his views on the natural rights clause were those around which controversy centered. His conclusions were made most explicit in four opinions: one opinion of his own as an individual judge, two opinions in which Judge Davidson concurred and one dissent.

Perkins, a lawyer and sometime editor of a Democratic newspaper, the *Richmond Jeffersonian,* came to the Supreme Court in 1846 at the age of thirty-four. His usefulness to the Democratic Party was attested not only by his appointment to the Court but also by a previous appointment as prosecutor and his selection as an elector for President Polk in 1844.[4] Perkins belonged to that wing of the Democratic Party in Indiana which, under the leadership of Senator Jesse Bright, was sympathetic to the claims of the South immediately before the Civil War.[5]

> WE declare, That all men are born equally free and independent, and have certain natural, inherent, and unalienable rights; among which are the enjoying and defending life and liberty, and of acquiring, possessing, and protecting property, and pursuing and obtaining happiness and safety.
>
> Sect. 2. That all power is inherent in the people; and all free Governments are founded on their authority, and instituted for their peace, safety and happiness. For the advancement of these ends, they have at all times an unalienable and indefeasible right to alter or reform their Government in such manner as they may think proper.

These sections were probably copied from the Constitutions of Pennsylvania, Ohio and Vermont. Barnhart, *Sources of Indiana's First Constitution,* 39 INDIANA MAGAZINE OF HISTORY 55, 57-58 (1943).

3. Very brief biographical sketches of the judges can be found in I MONKS COURTS AND LAWYERS OF INDIANA 246-51 (1916) and in Thornton, *The Supreme Court of Indiana,* 4 THE GREEN BAG 249, 254-58 (1892).

4. *Ibid.* The sources in note 3 *supra* also reveal that Judge Perkins filled law professorships at Northwestern Christian University (1858) and Indiana University (1870-72). Defeated for re-election to the Supreme Court in 1864, he edited the Indianapolis Herald, the Democratic party organ of the state, for a time after 1868 and from 1872 to 1877 served as Judge of the Marion Superior Court. Perkins was elected a judge of the Supreme Court of Indiana in 1876, a position which he held until his death in 1879. His second term of duty as a Supreme Court judge was uneventful. Speeches made at memorial ceremonies for Judge Perkins are reported in 68 Ind. 601 (1880). Reputed to be an indefatigable worker he published the second digest of the Indiana reports (1858) and the first Indiana work on civil practice (1859).

5. In 1860 Senator Bright supported the presidential candidacy of John Breckenridge against Stephen Douglas before the Indiana Democratic State Convention. Perkins, the

Temperance legislation gave Perkins his first opportunity, in two related cases, to consider the question of natural rights. In 1855 the legislature had passed an act in substance prohibiting the manufacture and sale of liquor if the intoxicant was to be used as a beverage within the state. Moreover, the sale of liquor for medicinal, chemical and religious purposes was made the exclusive privilege of county agents. In short, the act was a prohibition law with a provision for a form of governmental liquor monopoly.

The act took effect on June 12, 1855, and on July 2, Roderick Beebe, an Indianapolis saloon-keeper, was arrested for brewing and selling beer.[6] When he refused to pay a fine of fifty dollars, he was jailed. In a habeas corpus proceeding, the county court upheld the liquor law against the contention that it violated the Constitution. Beebe appealed to the Supreme Court. Upon application of the State for more time to prepare argument the case was held over to the November term, 1855. Meanwhile in September or October, 1855, one Herman, having openly violated the statute, was arrested and jailed after his refusal to pay a fine. He obtained a writ of habeas corpus from Judge Perkins acting as an individual judge. The *Herman* and *Beebe* cases were submitted to both the Court and Judge Perkins on the same arguments. Perkins filed his individual opinion in the *Herman* case[7] on October 30, 1855, holding the liquor statute unconstitutional, two months before the decision of the Court in the *Beebe* prosecution in which the Court divided equally on the crucial constitutional question.

In the *Herman* opinion Judge Perkins established to his own satisfaction that the Act was "prohibitory," and then proceeded quickly to the central question, whether the legislature possessed the power to prohibit the liquor business. If the government lacked the power to prohibit this type of enterprise, the state certainly could not monopolize it. While some undertakings were of "a public character," certainly "the ordinary pursuits of a private citizen" were not, for these pursuits existed before the organization of the government and if the government were to seize upon them it would be "subversive of the very object for which . . . [the government] . . . was created."[8]

No competent judicial authority existed which would sustain the enactment of a prohibitory liquor law. Some non-legal philosophical references

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Bright candidate, was defeated by a Douglas supporter in his attempt to become permanent Chairman of the Convention. Zimmerman, *The Republican Party in Indiana.* 13 INDIANA MAGAZINE OF HISTORY 349, 374 (1917). Senator Bright was expelled from the United States Senate in 1862 because of his alleged sympathies for the South. STAMPP, INDIANA POLITICS DURING THE CIVIL WAR 97-8 (1949).

6. This statement as well as the others in the same paragraph is made on the authority of an undocumented account in Canup, *Temperance Movements and Legislation in Indiana,* 16 INDIANA MAGAZINE OF HISTORY 3, 25 (1920).

7. Herman v. State, 8 Ind. 545 (1855).

8. *Id.* at 549-50.

could be found to show that legislative power was unlimited, but these authorities were principally European writers who wrote against the background of a society foreign to American free institutions. The decisions of the United States Supreme Court refusing to declare state prohibitory laws inoperative were not in point because the nullification of that kind of legislation did not fall within the competence of the federal courts.

Lacking relevant judicial authority, Perkins turned to the general principles of a free society and to the Constitution of Indiana. It might not be essential to anchor his decision to any specific portion of the state constitution, since principles of natural justice "independently of all constitutional restraints" could inhibit a legislature. Indeed, in an early dictum, the Indiana Supreme Court had said: "There are certain absolute rights, and the right of property is among them, which in all free governments must of necessity be protected from legislative interference, irrespective of constitutional checks and guards."[9] But reference to these principles was not necessary in this case if the Constitution in its terms sufficiently protected natural rights from legislative interference.

The First Section of the First Article of the Indiana Constitution declared that certain inalienable rights were guaranteed to the people of Indiana. For Judge Perkins this clearly included the protection of property. Both Chancellor Kent and Jean-Baptiste Say,[10] in his book *Political Economy,* asserted that the freedom to enjoy property was one of man's natural rights. And other sections of the Indiana Constitution indicated that property rights were to be accorded a special protection from the interference of allegedly omnipotent legislatures. The Constitution guaranteed a person's property against unreasonable searches and seizures; prohibited the taking of property by the state without payment; guaranteed to every man a remedy for injuries done to person, property or reputation; and deprived the legislature of the power to impair the obligation of a contract. Judge Perkins deduced that the Constitution protected the right to pursue the liquor business and the right to use property in the conduct of the enterprise.

In considering the limitations on the legislature which flowed from the expressed provisions of the Constitution of Indiana, Judge Perkins found it necessary to meet the argument that the legislature could declare *any* practice a nuisance and prohibit it. Authority for the proposition was found in a recent dictum of his Court;[11] but, said Perkins, the dictum could not be torn from the context of the case actually before the Court. The proper question

9. Andrews v. Russell, 7 Blackf. 474, 477 (Ind. 1845).

10. Say, a French economist, was the author of an influential treatise on political economy widely read in the United States. In content, the book was principally a popularization of Adam Smith's WEALTH OF NATIONS.

11. Bepley v. State, 4 Ind. 264 (1853).

was whether the legislature had the power to deal with the matter at hand. If it did, there was no need to call it a nuisance. If the legislature lacked the power, labeling a practice a nuisance added nothing.

At this point in the opinion Judge Perkins, without seeming to realize the change in emphasis, spoke of the constitutional right of a person to drink the prohibited liquor. He laid down the general proposition:

> . . . the right of liberty and pursuing happiness secured by the constitution, embraces the right, in each *compos mentis* individual, of selecting what he will eat and drink, in short, his beverages, so far as he may be capable of producing them, or they may be within his reach, and . . . the legislature cannot take away that right by direct enactment. If the constitution does not secure this right to the people, it secures nothing of value.[12]

He characterized the statute as a sumptuary law, a law passed to save the people from poor judgment in the matter of expenditure. In a free government a sumptuary law was intolerable. In addition, there was ample testimony in history and in the lives of peoples of other nations that the use of liquor as a beverage was a positive good in the community. Perkins cited the Bible itself as authority: "It thus appears, if the inspired psalmist is entitled to credit, that man was made to laugh as well as weep, and that these stimulating beverages were created by the Almighty expressly to promote his social hilarity and enjoyment."[13] Merely because liquor might be misused was not a sufficient argument to justify prohibition, because such a principle "would, if enforced by law in general practice, annihilate society, make eunuchs of all men, or drive them into the cells of the monks, and bring the human race to an end, or continue it under the direction of licensed county agents."[14] *Regulation* of some sort was possible, but complete *prohibition* would rob man of his God-given right to be a free agent.

For all these reasons it followed ". . . the liquor act of 1855 is void. Let the prisoner be discharged."[15]

The opinion in this first case contains the essence of Judge Perkins's views on the constitutional limitations imposed on the legislature by Article I, Section I of the Indiana Constitution. Natural rights, by expressed provision and by implication, were a part of the Constitution. It was for the courts to give them definition. A legislature had no right to monopolize an ordinary business nor to prohibit a common pursuit nor to interfere excessively with the rights of property. A free man must be allowed to choose what he would consume.

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12. Herman v. State, 8 Ind. 545, 558 (1855).
13. *Id.* at 561.
14. *Id.* at 563.
15. *Id.* at 567.

The general structure of the *Herman* case was incorporated in Perkins's later opinion in *Beebe v. State*[16] which differs from the *Herman* essay in only three principal respects. First, a new argument was recognized and disposed of. The 1816 Constitution, at the end of the Bill of Rights, had contained a statement expressly excepting from legislative power all of the rights retained by the people.[17] The new Constitution did not contain such a section; therefore, perhaps the constitutional convention of 1851 meant the first article of the Bill of Rights to be merely an abstract statement of political theory and not a limitation on the legislature.[18] Perkins met this position with an outright denial of its validity. The new Constitution certainly did not intend to weaken the rights of the people. The section was omitted simply because it was unnecessary.

Perkins, hard pressed by the concurring and and dissenting judges to set forth more objective standards for the determination of what rights were natural rights, resorted to the common law. Obviously the common law provided for the protection of property, and property interests extended beyond mere possessory rights. Rights recognized by the common law included the right to pursue a trade, to buy and sell and to engage in all "lawful" practices making use of the world's goods. The constitutional requirement that debtors have the protection of appropriate exemption laws was added to Perkins's list of those constitutional provisions which suggested the inviolability of property rights.

It is in its attempt to explain the relationship between the legislature and the judiciary that Perkins's *Beebe* opinion broke the most new ground. The legislature alone could not decide whether a practice was a nuisance; that question was inherently judicial and hence determinable by the courts alone. The question of impairment of contract was for judicial decision; so also were other issues, the resolution of which might annihilate "a great pursuit involving millions of dollars and innumberable contracts."[19] Even though the liquor legislation was a regulation of commerce its validity could be subjected to judicial review when the express provisions of the Constitution exempted a citizen from such commercial regulation.

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16. 6 Ind. 501 (1855).

17. "Sect. 24. To guard against any encroachments on the rights herein retained, we declare, that every thing in this Article, is excepted out of the general powers of Government, and shall forever remain inviolate."

IND. CONST. ART. I, § 24 (1816).

18. The 1850 convention debate on Art. 1, § 1 is reported in I REPORT AND PROCEEDINGS OF THE CONVENTION 952 ff. (1850). The debates were concerned only with whether the equalitarian ideas of Section I were sound in the light of the 1850 legal position of slaves and women.

19. Beebe v. State, 6 Ind. 501, 517 (1855).

> And whenever the legislature does so invade the constitutional right of the citizens, they are not bound to submit to the outrage for two years, till the assembling of another legislature nor to resort to the terrible remedy of revolution, but may quietly and peacefully invoke the action of the judiciary to annul the act of legislative usurpation.[20]

The court could take judicial notice of the fact that the use of liquor was not necessarily harmful. Again, regulation was possible; prohibition unconstitutional.[21]

Judge Stuart concurred in the opinion but on the ground that the procedure accorded Beebe had been improper in the court below. On the constitutional issue, so far as the statute prohibited the sale of liquor, Stuart was in sharp dissent.[22] Obviously natural rights could be recognized and exercised only under the conditions and qualifications set by the legislature. To him the provisions of Section I of the Bill of Rights gave the people of Indiana only two guarantees: Property could not be affected in a manner prohibited by the *other more specific provisions* of the Constitution protecting property and specific pieces of property could not be taken from an owner. Certain limitations on legislative power might exist outside of the Constitution; but this doctrine involved "many curious questions lying all along the exterior boundary of the rights and duties of rulers and people in extreme cases,"[23] and would seldom, if ever, be decisive in a specific case. Having made these points, Judge Stuart adverted to the principal burden of his attack: an impassioned plea for judicial self-restraint. The court could not set aside a law because it was impolitic, inexpedient, odious or oppressive. The only

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20. *Id.* at 519.

21. In 1856 the New York Court of Appeals decided a liquor law case, Wynehamer v. People, 13 N. Y. 378 (1856), remarkably similar on its facts to Indiana's Beebe v. State. *Wynehamer,* regarded as the most important substantive due process-natural rights opinion before the Civil War, has been the subject of a substantial amount of comment. *See*: MOTT, DUE PROCESS OF LAW 317 (1926); HAINES, THE REVIVAL OF NATURAL LAW CONCEPTS 100, 115, 178 (1930); Corwin, *Due Process of Law Before the Civil War,* 24 HARV. L. REV. 366, 460 (1911); Corwin, *The Debt of American Constitutional Law to Natural Law Concepts,* 25 NOTRE DAME LAW. 258, 274 (1950).

22. Judge Stuart voted with Perkins and Davidson to hold the statute unconstitutional so far as it prohibited the manufacture of liquor. In his *Beebe* dissent discussed in the text above Stuart said:

> The inquiry here is confined to the sale; for the question arising on the other case for manufacture, admits of a very different solution. Having for reasons given in that case, come to the conclusion that the agency feature, and the several parts of the law relating to manufacture, were unconstitutional, the question on the sale arising on the other Beebe record alone remains.

Apparently no opinion was written in the other case of which Stuart spoke. At least none has been found. Because of a passage near the end of his dissent it is certain that Stuart's vote on the question of prohibiting the manufacture of liquor did not rest on a natural rights ground; "so much of the act as relates to the manufacture and agency are unconstitutional and void; but I do not put it on the ground assumed by judge (*sic*) Perkins." Beebe v. State, 6 Ind. 501, 538 (1855).

23. Beebe v. State, 6 Ind. 501, 526 (1855).

function of the Court as to burdensome laws was to alleviate their harshness by strict construction. Questions of justice and policy were for the legislature. Perkins's position had not the support of a single case in Indiana. "Courts are not to array their own reason against that of the legislature."[24] If an inquiry into the reason and justice of this law was permitted, where would the principle end? Stuart's insight was prophetic. If the Court could invalidate this liquor law, "We might look into the justice of a tax law, or any other enactment; and thus place the representatives of the people at the feet of the judiciary."[25] When the judiciary enters the arena to contest the expedience of legislation "it sinks in the public estimation into a detested council of revision."[26] In this particular case the Perkins opinion was doubly unfortunate because various liquor laws were extremely common throughout the history of the state and nation.

Judge Gookins echoed the plea for judicial self-restraint. The consequences of the Perkins opinion were disastrous in his view.

> There is no common arbiter, because we are the tribunal of last resort. The ballot-box is powerless, for that is but traveling in a circle. Even the reforming of the constitution can not supply a remedy, for rights of the nature claimed for these which are said to be invaded, natural, inherent and inalienable, can not be relinquished to or taken away by government. Revolution and anarchy seem to be the legitimate consequences of an unauthorized assumption of power on the part of this Court. I can not consent to take that step.[27]

The legislature had the right to declare traffic in intoxicating liquors a nuisance. The Court could not say whether such a judgment was without a basis in fact.

The third, and the most carefully worked out, presentation of Judge Perkins's views on natural rights is found in an 1856 case, *Madison and Indianapolis R. R. v. Whiteneck*,[28] involving a cow killed by a locomotive. A statute imposed liability on a railroad for any cattle killed by a locomotive regardless of the railroad's fault. Liability could be avoided only by the company's construction and proper maintenance of a fence. The law was attacked on several constitutional grounds, but Perkins concentrated on the particular assertion that the statute violated "private right." Sixteen pages of his opinion were devoted to an exposition of his political and judicial philosophy. The question, he said, was one of legislative power. What were the limits of the power of the legislature? Perkins no longer maintained that limitations

24. *Id.* at 530.
25. *Ibid.*
26. *Ibid.*
27. *Id.* at 543.
28. 8 Ind. 217 (1856)

might be imposed from a source other than the Constitution itself. The legislature was absolute where not restricted by the Constitution. What, then, did the broad phrases of the Bill of Rights mean? Did they direct the judiciary to pronounce a law unconstitutional only if it violated a specific provision of the Constitution, or did they allow the invalidation of a law by reference to limitations inferred from the document as a whole? The answer lay in a consideration of contemporary history. Turning to the background of the American and French revolutions, Perkins referred to the writings of such men as Paine, Lafayette, and Burke to establish the natural rights background of those revolutionary movements. Other state constitutions contained declarations of similar rights. These facts demonstrated the insistence of the people in this country that their natural rights be protected. Therefore the Constitution as a whole provided this protection even though no very specific definition of natural rights could be found. In addition, new rights could be recognized as they were discovered by human reason.

> the framers of our constitution . . . . designed . . . . the first section of it as a fundamental provision, binding up the supreme power. It was necessarily general. They could not look down the stream of time and see all the cases wherein it would be proper for a state government to exert legislative power, specify them and exclude all others, thus protecting the rights reserved; nor could they anticipate all the various attempts that might be made to invade these rights, and expressly prohibit them. They did specially prohibit such as they had experienced. But naming such attempts did not exclude the prohibition of others by the general fundamental provision.[29]

Having thus determined the meaning of the Bill of Rights and Section I in particular, it was the duty of the Court to give effect to it. The Court should "declare void a law in violation of this fundamental principle of the constitution—a law in violation of the natural rights of man."[30] The Judge attempted a partial listing of the natural rights based in part on the work of the German-American political theorist, Francis Lieber:

> The natural rights of which we have spoken, let it be observed, are not rights of vagrancy; but they inhere in man as a necessity of his nature; they belong to him because he is a man, and because he would not exist as such without their exercise. Life was the gift of his Creator; but life is not in man self-sustaining. It must be prolonged by nourishment and protection of the body. Hence, man must have food and clothing. The demand of nature is absolute. God has given him the earth and the abundance thereof whereby to supply this necessity; and limbs, and intellect, and ingenuity, by the use of which food, raiment, property, may be obtained upon and out of this earth, and in no other manner. These are the gifts and the necessities of nature, and belong to man as man. God has also made

29. *Id.* at 227-28.
30. *Id.* at 229.

> men moral beings, accountable directly to Him in respect to their mutual relations. Hence, no human authority can step between this accountability and man's Maker and final Judge; and, hence, man's natural, necessary right—duty even, to worship his Maker in such a manner as he will be willing to be accountable for. The race of man is perpetuated by a communion of the sexes, and parental care of offspring. The sexes are about equal in number. Every man, therefore, has the natural right to one wife and no more—monogamy is the law of nature. We thus discover that the idea of unlimited sovereignty in one man, or any number of men, over another, is unjust, unreasonable, violative of his moral nature, unwarrantable tyranny. In this manner are man's natural rights ascertained, defined, limited, rendered as certain as any other facts.[31]

The exercise of natural rights could not be prohibited although the legislature could regulate it. Proper regulations related to time, place, manner or occasion. Who would determine whether such a regulation was incompatible with the guaranteed rights? The judiciary. The conclusion of Perkins's philosophic excursion was anti-climactic: he found the regulation in this particular case reasonable and necessary.

Judge Stuart concurred in the result of the case "without approving or dissenting from the general course of discussion."[32] Judge Gookins, who decided the case on a ground not related to the question of natural rights, objected to the turn which Perkins had taken in his discussion. "However entertaining a discussion upon the subject [of the extent of legislative power] might be, I shall defer it until some occasion may arise which shall legitimately call it forth."[33]

Judge Perkins, never able to command the assent of the Court's majority in a natural rights opinion, rounded out his theory in lone dissent. In *Noel v. Ewing*,[34] the Court was asked to invalidate an Indiana act which gave widows a one-third fee in all real property held during coverture in lieu of dower. The majority of the Court not only recognized the legislative power to enact the law, but also held it could be constitutionally applied to marriages contracted before the statute's enactment. For Judge Perkins, the act as applied to existing interests was unconstitutional and void. The natural right to property included the right to convey without substantial restrictions. The law, by depriving a husband of the power to convey one-third of his interests in realty without his wife's concurring, took away one-third of that property's vendable quality.

Moreover, the right to dispose of property by testamentary means was becoming a natural right. Here Judge Perkins drew upon his position in

31. *Id.* at 232.
32. *Id.* at 237.
33. *Id.* at 238.
34. 9 Ind. 37 (1857).

the *Whiteneck* case: the catalog of natural rights could grow as reason discovered them. Perkins quoted several European tract writers, Rutherford, Burlamaqui, Vattel and the American, Chancellor Kent, all of whom had asserted that the right to make a will was a natural right. Therefore, a judge might recognize that the right of disposing under a will was among the Indiana constitutional guarantees. "If, then, the doctrine is established, that the right to dispose of property by will is a natural right, incident to property, it follows that the right is protected by the constitution."[35]

Judge Perkins was unable to convince a majority of the court which sat with him in these cases. The *Herman* case was Judge Perkins's individual opinion. In the *Beebe* case, Judge Davidson agreed with his opinion but Stuart and Gookins, it will be recalled, were in dissent on the constitutional issue. In *Madison v. Whiteneck,* Davidson again agreed with Perkins, Stuart concurred without approval of the opinion and Gookins once more wrote a separate opinion. Perkins's *Ewing* opinion was a dissent.

During the latter part of 1857, Judge Stuart and Judge Gookins resigned their position on the court because of the low salary paid to the judges: $1200.[36] Their places were taken by Judge James L. Worden and Judge James M. Hanna, two well-known figures from the ranks of the Democratic party in Indiana. The views of these new judges on the question of the natural rights clause were never made explicit. But it may be inferred from their concurrence in the invalidation of the liquor law of 1855 that their point of view was substantially that of Judge Perkins.

The liquor act of 1855 had not been declared unconstitutional by the divided court in the *Beebe* case. The status of the law was in doubt until the May term, 1858, after the new appointments had been made. In a per curiam opinion, *Howe v. State,*[37] which merely recorded, "this is the unanimous opinion of the Court," the statute was finally held void. Judge Perkins, in a later case involving another question, explained that

> [The law of 1855] was not annulled by the decision in *Beebe v. State*. . . . The Court, in that case, was equally divided. . . . The law was not annulled till the new Court came upon the bench, when, in the case of *Howe v. State* . . . the Court unanimously pronounced the law void.[38]

Thus in the single instance of the *Howe* case the entire Court finally subscribed to the Perkins position. But the victory was short-lived and did not directly produce permanent effects on the constitutional law of the state.

After the *Howe* decision, no case provided the new judges with an

35. *Id.* at 62.
36. Thornton, *The Supreme Court of Indiana,* 4 THE GREEN BAG 207, 231 (1892).
37. 10 Ind. 492 (1858).
38. Ingersoll v. State, 11 Ind. 464, 465 (1859).

opportunity either to write extended opinions on the question of natural rights or to concur in a natural rights opinion by Judge Perkins. To be sure, Judge Perkins continued to insert expressions in his opinions which reflect his point of view, but they were not necessary to the decision of the cases. For example, in deciding that a city could invest in a railroad corporation, Perkins said: "we mean in no manner to be understood that a city could engage in trade and traffic in those articles. Such pursuits belong to the individual citizens, and private corporations."[39] And in another case Perkins, without the question being before him for decision, asked whether the legislature could prohibit work on Sunday. Although agreeing that perhaps the legislature might prevent an employer from hiring a workman to work on Sunday, Perkins doubted that the legislature could prohibit the employer from laboring for himself on that day. "We express no fixed opinion on the point here, as the case does not require it. Does it not involve the patriarchal theory of government?"[40] Again in 1863, Perkins, while admitting that the legislature could restrict a woman's right to dispose of her property, nevertheless asserted: "the state might not possess such power as to a person not regarded as under disabilities."[41]

The closing days of the Civil War brought to an abrupt end Perkins's efforts to make the Court an agency for the general supervision of the legislature under the natural rights clause. All the members of the Court at that time were Democrats, and indeed, Democrats not generally considered in sympathy with the position of the national government during the war. Perkins, for example, was responsible for writing an opinion holding military arrests illegal when the regular courts were open.[42] Supporters of the war took this as evidence of Democratic disloyalty. Perkins's views on natural rights died, for a time at least, on election day in November, 1864, when the entire Democratic slate of judges was defeated at the polls. From that day until 1903, no Indiana statute regulating economic activity was held to violate the natural rights clause of the Constitution.

II.

In 1865 the new members of the Court, Elliott, Ray, Gregory and Frazer, all Republicans, unanimously set out in a long dictum their conception of the

39. City of Aurora v. West, 9 Ind. 74, 81 (1857).
40. Thomasson v. State, 15 Ind. 449, 454 (1860).
41. Cox's Adm'r v. Wood, 20 Ind. 54, 59 (1863).
42. Griffin v. Wilcox, 21 Ind. 370 (1863). Perkins also wrote an opinion holding the war-financing Legal Tender Acts unconstitutional. This decision was placed in part on the authority of passages taken from the Holy Bible. Thayer v. Hedges, 22 Ind. 282 (1864). The judge's conciliatory attitude toward the South is also seen in two pamphlets found in the main library at Indiana University, neither of which bears a title. The first contains an address and several contributions to a newspaper written during 1860-61. The second is a reprint of a Perkins speech delivered July 4, 1863, at Anderson, Indiana.

proper judicial function when the constitutionality of a statute was questioned. The spirit of that dictum, exceedingly unlike the ideas which moved Judge Perkins, set the tone for the Indiana Supreme Court throughout a forty-year period:

> The constitution is paramount to any statute, and whenever the two are in conflict the latter must be held void. But where it is not clear that such conflict exists, the court must not undertake to annul the statute. This rule is well settled, and it is founded in unquestionable wisdom. The apprehension sometimes, though rarely, expressed, that this rule is vicious, and constantly tends toward the destruction of popular liberty, by gradually destroying the constitutional limitations of legislative power, results from a failure to comprehend the character of our forms of government, and the fundamental basis upon which they rest. The legislature is peculiarly under the control of the popular will. It is liable to be changed, at short intervals, by elections. Its errors can, therefore, be quickly cured. The courts are more remote from the reach of the people. If we, by following our doubts, in the absence of clear convictions, shall abridge the just authority of the legislature, there is no remedy for six years. Thus, to whatever extent this court might err, in denying the rightful authority of the law-making department, we would chain that authority, for a long period, at our feet. It is better and safer, therefore, that the judiciary, if err it must, should not err in that direction. If either department of the government may slightly overstep the limits of its constitutional powers, it should be that one whose official life shall soonest end. It has the least motive to usurp power not given, and the people can sooner relieve themselves of its mistakes. Herein is a sufficient reason that the courts should never strike down a statute, unless its conflict with the constitution is clear. Then, too, the judiciary ought to accord to the legislature as much purity of purpose as it would claim for itself; as honest a desire to obey the constitution, and, also, a high capacity to judge of its meaning. Hence, its action is entitled to a respect which should beget caution in attempting to set it aside. This, with that corresponding caution of the legislature, in the exercise of doubtful powers, which the oath of office naturally excites in conscientious men, would render the judicial sentence of nullity upon legislative action as rare a thing as it ought to be, and secure that harmonious cooperation of the two departments, and that independence of both, which are essential to good government.[43]

This new Court, like the older Court, had to determine the constitutionality of various liquor laws, which were challenged frequently throughout the period. The opinions in these later cases stand in marked contrast to the earlier work of the Indiana Court. In 1869, an attack on a statute prohibiting the sale of liquor on Sunday was dismissed with: "The objections . . . . are without foundation."[44] One year later the Court upheld a statute depriving

43. Brown v. Buzan, 24 Ind. 194, 196-97 (1865). The *Buzan* case was not concerned with natural rights.

44. Schlict v. State, 31 Ind. 246, 248 (1869).

an habitual drunkard of the right to make a contract or to dispose of his property.[45] Later, when the claim was made that a municipal ordinance had set the fee for a liquor license so high as to prohibit the business, the Court answered with a refusal to take judicial notice of the ordinance's probable effect.[46] The Court, without extended argument, upheld a statute imposing liability on the sellers of intoxicants for injuries resulting from the acts of an intoxicated person.[47] The legislature was held to have the power to license places selling liquor by the drink.[48]

Yet the results in these liquor cases are not inconsistent with the natural rights theory evolved by Judge Perkins. Perkins, it will be remembered, would have permitted "regulation," but balked at outright prohibition. The difference in attitude between Perkins and the later Court can be seen only in the opinions themselves. Of the post-Civil War Court's liquor law opinions, *Hedderich v. State*[49] is most explicit. There a statute prohibiting the sale of liquor between the hours of 11 p. m. and 5 a. m. was upheld because no provision of the Constitution forbade that kind of prohibition. The natural rights clause was not a catch-all in which any desired legislative limitation might be found. In the absence of a specific constitutional provision expressly reserving certain legislative powers, the legislative enactments were not subject to review by the Court.

> . . . no provision of the Constitution has been pointed out which denied to the Legislature the power exercised in the enactment of this statute. In an argument of signal ability counsel contend that in the enactment of the statute the Legislature transcended its constitutional powers, because the statute encroaches upon the natural rights of the citizen. The argument finds no support from authority and has none in principle. Whether a statute is or is not a reasonable one, is a legislative, and not a judicial, question. Whether a statute does, or does not, unjustly deprive the citizen of natural rights, is a question for the Legislature, and not for the courts. There is no certain standard for determining what are, or are not, the natural rights of the citizen. The Legislature is just as capable of determining the question as the courts. Men's opinions as to what constitute natural rights greatly differ, and if courts should assume the function of revising the acts of the Legislature on the ground that they invaded natural rights, a conflict would arise which could never end, for there is no standard by which the question could be finally determined. But there can be no such unseemly conflict, for there is only one standard for determining the validity of statutes, and that is supplied by the Constitution.[50]

45. Devin v. Scott, 34 Ind. 67 (1870).
46. Wiley v. Owens, 39 Ind. 429 (1872).
47. Horning v. Wendell, 57 Ind. 171 (1877).
48. Haggart v. Stehlin, 137 Ind. 43, 35 N. E. 997 (1893).
49. 101 Ind. 564, 1 N. E. 47 (1884).
50. *Id.* at 566, 47-48.

When other legislation was called into question, familiar constitutional arguments were again presented, but in no case did the Court invalidate the legislation.[51] The practice of medicine and dentistry could be licensed.[52] The legislative judgment that the public interest required control of these professions by the state was "probably conclusive." The Constitution contained no provision under which those statutes might be struck down. Selling goods by peddling could be made subject to licensing because again no specific constitutional provision was violated.[53] Many of the leading cases which evidenced this judicial self-restraint during the period from the Civil War to the turn of the Century upheld statutes regulating contractual transactions. Even price fixing was permitted. An act of 1875 which fixed the price of privately published Indiana Supreme Court Reports at three dollars per volume was upheld by the Court as not violating any specific provision of the Constitution. This opinion, in *Welling v. Merrill*,[54] relied heavily on a Pennsylvania case which, in its language, refused to void a statute merely because it "impairs any of those rights which it is the object of a free government to protect."[54a] In another price-fixing statute the legislature set the rental price of telephones at three dollars per month. This act, too, was upheld by the Court in the November Term, 1885.[55]

Except for the dictum of the *Heddrich* case, perhaps the statement of natural rights most frequently cited during the entire period was taken from *Churchman v. Martin*.[56] The statute questioned in *Churchman* barred any agreement to pay attorney's fees upon a condition set forth in a promissory note. The Court upheld the statute because it did not believe any provision of the state or federal constitution had been violated. Although the constitu-

51. In addition to the business regulations giving rise to the cases discussed in the text there were, of course, many others which were tested under the Constitution. It was held early that the legislature had power to control the time and mode of taking fish from streams, Gentile v. State, 29 Ind. 409 (1868). Foreign insurance companies might transact business in the state only upon the terms laid down by the legislature. Whether the conditions were just or reasonable was solely a legislative question. Phenix Ins. Co. v. Burdett, 112 Ind. 204, 13 N. E. 712 (1887). Horse racing could be prohibited during the winter as well as at other specified times, State v. Roby, 142 Ind. 168, 41 N. E. 145 (1895) and professional baseball could be banned on Sunday, State v. Hogreiver, 152 Ind. 652, 53 N. E. 921 (1899).

52. Eastman v. State, 109 Ind. 278, 10 N. E. 97 (1886); State v. Green, 112 Ind. 462, 14 N. E. 352 (1887) (medicine); State v. Webster, 150 Ind. 607, 50 N. E. 750 (1898) (medicine); Wilkins v. State, 113 Ind. 514, 16 N. E. 192 (1887) (dentistry); Femer v. State, 151 Ind. 247, 51 N. E. 360 (1898) (dentistry). On page 282 of its opinion the Court, in *Eastman*, relying on the language quoted above from the *Hedderich* case, said, "Whether the statute is a wise one or not is purely a legislative question, and so is the question whether it is reasonable or unreasonable."

53. Huntington v. Cheesebro, 57 Ind. 74 (1877).

54. 52 Ind. 350 (1876). *See also*, Black v. Merrill, 51 Ind. 32 (1875).

54a. Sharpless v. Mayor of Philadelphia, 21 Penn. St. 147, 161 (1853).

55. Hockett v. State, 105 Ind. 250, 5 N. E. 178 (1885).

56. 54 Ind. 380 (1876).

tions of state and nation provided that no state should impair the obligation of contracts, prohibiting the making of certain contracts did not come within these bans. For the Indiana Court of 1876 freedom of contract was an unknown constitutional doctrine. The Court in its frequently repeated language stated:

> By the constitution of the state the legislative authority is vested in the general assembly. When, therefore, an act of the general assembly is passed, which violates no provision of the federal or state Constitution, the judicial department cannot hold it to be void on the ground that it is wrong, or unjust, or violates the spirit of our institutions, or *impairs natural rights.*[57]

Two years after the *Churchman* opinion, the Court refused to overturn a statute forbidding anyone other than railroad agents to sell railroad tickets unless the seller had purchased the ticket with a *bona fide* intention to use it.[58] The wisdom and justice of the statute was for legislative consideration. The law did not clearly conflict with an express provision of the Constitution (a conclusion not adhered to in the 1949 ticket scalper's case, *Kirtley v. State.*)[59]

Although from the Civil War to 1903 the Court found no statute regulating economic affairs a violation of Article I, Section I of the Constitution, it would be misleading to assume that the Court believed there were no general bounds on the legislative power to regulate the economy. The price-fixing cases show the Court really hesitant to acknowledge a general power to fix prices. The decision sustaining the constitutionality of the statute fixing the price of the Supreme Court Reporter was in part placed on the ground that the legislature owned a kind of copyright in the opinions and therefore could control the price at which the volumes containing the opinions were sold. The charges of the telephone company could be legislatively set because the company's property had been dedicated to a public use. Apparently, the Court felt the necessity of classifying the telephone as a public utility. In another case the Court, without deciding the question, expressed doubt whether the legislature had power to give an exclusive franchise to a natural gas company.[60]

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57. *Id.* at 383-84 (Italics supplied).

58. Fry v. State, 63 Ind. 552 (1878).

59. Discussed p. 146, *infra.*

60. Citizens' Gas and Mining Co. v. Elwood, 114 Ind. 332, 333, 16 N. E. 624 (1887):
> There is, we know, much conflict among the authorities upon the question of the power of the Legislature to grant an exclusive right to a gas company to use the highways of a municipal corporation; and, under our Constitution, it is very doubtful whether the Legislature possesses such authority.

Still other statutes were upheld on the limited ground that in those instances the legislature had acted within the confines of the "police power."[61]

Moreover, the legal tool to attack legislation of which the Court disapproved still lay at hand. While the entire Court agreed that it would void only that legislation which violated a specific section of the Constitution, yet the natural rights clause was still in the Constitution. As Judge Perkins foresaw, if the natural rights were made specific by decision they would bind the legislature as firmly as if they were spelled out in the document itself. The Court's refusal to upset legislation under the natural rights clause merely evidenced a point of view, an attitude toward the legislature's province, different from that of the pre-Civil War Judge. Doctrine, however, was not fundamentally affected. Whenever the Court would be willing to recognize an inalienable right, any law which abridged the right would violate one of the specific provisions of the written Constitution.

III.

Having lain dormant since the pre-Civil War period, the natural rights clause was suddenly given new life in two cases decided during the spring of 1903. The first, *Street v. Varney Electrical Supply Co.*,[62] involved the constitutionality of a statute regulating the rate of wages to be paid laborers employed on any public work of the state or of a municipal corporation. The act required employers contracting for public projects to pay workers a minimum of twenty cents per hour.

The Indiana Court plainly was shocked. Without question the legislature could not set the rate of all wages. General price-fixing legislation would be so outrageous that no express constitutional provision need be found under which to strike it down:

> it would be void for the reason that the authority to fix by contract the prices to be paid for property, including human labor, is not ordinarily within the domain of legislation.[63]

But Judge Dowling did not make an appeal to principles outside the Constitution. Courts might void unreasonable legislative interferences with liberty of contracting, property rights or the right to engage in "lawful" business by invoking Article I, Section I of the state Constitution. This

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61. The cases collected in notes 51-52 *supra* speak frequently of the police power. The opinion in State v. Hogreiver, 152 Ind. 652, 53 N. E. 921 (1899) upholding the prohibition of Sunday professional baseball, shows, at 659, how timeless some of the problems of providing for the public safety may be. "The contests between the players are often close and exciting, and the decisions of umpires unsatisfactory. Tumults, riots, and breaches of the peace at the games, are not uncommon."

62. 160 Ind. 338, 66 N. E. 895 (1903).

63. *Id.* at 341, 896

section could contain the guarantee of economic liberty necessary to a free enterprise society.

In the eyes of the Court even the limited wage-setting statute before it would "confiscate the property of the citizens and taxpayers."[64] The statute was of a type which is repugnant to "every reasonable mind." Even if upheld, the legislation was certain to fail in its purpose:

> In the very nature and constitution of things, legislation which interferes with the operation of natural and economic laws defeats its own object, and furnishes to those whom it professes to favor few of the advantages expected from its provisions.[65]

An oppressive act, productive of no public good, the statute violated the natural rights clause.

A statute of 1901 required employers engaged in certain businesses to make weekly cash payments of wages in the absence of other contractual arrangements approved by the state labor commissioners. This act gave rise to the second opinion rejuvenating natural rights, *Republic Steel v. State*,[66] decided one week after the *Street* case. To the Court the question presented was whether the act's interference with liberty of contract could be justified. While the legislature had great discretion to determine what the public welfare required, when its power was used to regulate a "lawful" business or employment, "it becomes the duty of the court . . . to decide whether the particular regulation is just and reasonable and in harmony with the constitutional guaranties."[67] Liberty of contracting was one of the most cherished rights of free men. The limitation on the right imposed by the statute served no legitimate public purpose. The workman might wish to save part of his wages by leaving them on deposit with his employer. By forbidding such an arrangement, the statute discouraged thrift and economy. Whether the laborer deposits with a bank or his employer "involves no public interest, and affects no public concern."[68] For the state to require official approval of contracts other than those expressly permitted by the statute tended to degrade employers and employees and placed the latter, in particular, under "quasi-guardianship." The statute was "paternalism, pure and simple, and in violent conflict with the liberty and equality theory of our institutions."[69] It was unconstitutional as a violation of both Article I, Section I of the

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64. *Id.* at 342, 896.
65. *Id.* at 346, 898.
66. 160 Ind. 379, 66 N. E. 1005 (1903). International Text Book Co. v. Weissinger, 160 Ind. 349, 65 N. E. 521 (1903) uses an analysis similar to *Street* and *Republic* but finds the statute in that case constitutional.
67. *Id.* at 385-86, 1007.
68. *Id.* at 388, 1008.
69. *Id.* at 389, 1008.

Indiana Constitution and the Fourteenth Amendment to the Constitution of the United States.

When these opinions, unsurpassed in the violence of their assertions, are examined for the authorities on which the assertions rest, a striking fact is evident. The two 1903 essays on natural rights, which might well have been written by Perkins himself, did not purport to rest upon the pre-Civil War opinions of the Indiana Judge. Instead reliance was placed upon late Nineteenth Century state constitutional cases in California, Illinois, Michigan, Missouri, Washington, and especially New York, as well as dicta of the United States Supreme Court. Though the ideas of the Civil War judge are triumphant through to the present day, his work has been passed over in silence.

These Indiana cases were two of many state cases which, under state constitutions, invalidated regulatory legislation in the 1890's and early 1900's before business enterprise and property rights found protection under the Due Process Clause of the Fourteenth Amendment.[70] State court judges found portions of their respective state constitutions suitable for reading supposedly fundamental economic postulates into the state's basic law. The constitutional provisions used were of great variety. Due process, law of the land, privileges and immunities, equal protection, and natural rights clauses all played important roles. Though the judges started with different verbal formulas the basic issues remained the same. The ultimate question for

70. For a discussion of these state cases and their ultimate national importance, see TWISS, LAWYERS AND THE CONSTITUTION, Ch. VI (1942); Pound, *Liberty of Contract*, 18 YALE L. J. 454 (1909). Many of the state cases including those of Indiana relied on a text, TEIDEMAN, POLICE POWER (1868). Teideman's conservative purpose in working out court protection of property rights is clear from a section of the Preface to his work:

> But the political pendulum is again swinging in the opposite direction, and the doctrine of governmental inactivity in economical matters is attacked daily with increasing vehemence. Governmental interference is proclaimed and demanded everywhere as a sufficient panacea for every social evil which threaten the prosperity of society. Socialism, Communism, and Anarchism are rampant throughout the civilized world. The State is called on to protect the weak against the shrewdness of the stronger, to determine what wages a workman shall receive for his labor, and how many hours daily he shall labor. Many trades and occupations are being prohibited because some are damaged incidentally by their prosecution, and many ordinary pursuits are made government monopolies. The demands of the Socialists and Communists vary in degree and in detail, and the most extreme of them insist upon the assumption by government of the paternal character altogether, abolishing all private property in land, and making the State the sole possessor of the working capital of the nation.
>
> Contemplating these extraordinary demands of the great army of discontents, and their apparent power, with the growth and development of universal suffrage, to enforce their views of civil polity upon the civilized world, the conservative classes stand in constant fear of the advent of an absolutism more tyrannical and more unreasoning than any before experienced by man, the absolutism of a democratic majority.

judicial decision was whether the legislature might properly act to achieve a given objective or whether the means chosen were reasonably related to an end admittedly within legislative power. The legislature was limited by a judicially determined rule of reason.

While the *Street* and *Republic Steel* cases established the natural rights clause as a protection of liberty to contract, of the right to hold, dispose and use property, and of the right to pursue a "lawful" business, a principle was needed against which the Court could judge the reasonableness of a statute. Recognizing that every act of the legislature in some way limited the liberty of a citizen, the judges found the needed standard in the police power doctrine. This relationship between natural rights and the police power was described in two sentences in *Weisenberger v. State*:[71]

> [the] constitutional personal liberty clause, or the right to pursue any proper vocation, is regarded as an inalienable right, and a privilege not to be restricted except for good cause. . . . .
>
> The authority of the Legislature . . . must be sustained, if at all, as a proper exercise of the police power for the promotion of peace, safety, health or welfare of the public.[72]

While many statutes were called into question under the Indiana natural rights clause during the period following 1903, the Indiana Supreme Court tested other state acts under the Federal Due Process Clause.[73] Beginning with the 1905 case, *Lochner v. New York*,[74] the United States Supreme Court afforded protection to property and business rights under the Federal Constitution similar to that which the Indiana Court stood ready to provide

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71. 202 Ind. 424, 175 N. E. 238 (1931).

72. *Id.* at 428, 240. In Indiana the most often cited passage describing the duty of the courts to review the substance of legislation is found in Beach v. Blue, 155 Ind. 121, 131, 56 N. E. 89, 93 (1900):

> As a general proposition, whatever laws or regulations are necessary to protect the public health and secure public comfort is a legislative question, and appropriate measures, intended and calculated to accomplish these ends, are not subject to judicial review. But, nevertheless, such measures or means must have some relation to the end in view, for, under the mere guise of the police power, personal rights and those pertaining to private property will not be permitted to be arbitrarily invaded by the legislative department; and consequently its determination, under such circumstances, is not final, but is open to review by the courts. If the legislature, in the interests of the public health, enacts a law, and thereby interferes with the personal rights of an individual, destroys or impairs his liberty or property, it then, under such circumstances, becomes the duty of the courts to review such legislation, and determine whether it in reality relates to and is appropriate to secure the object in view; and in such an examination the court will look to the substance of the thing involved, and will not be controlled by mere forms.

73. *See e.g.*, Parks v. State, 159 Ind. 211, 64 N. E. 862 (1902); State v. Martin, 193 Ind. 120, 139 N. E. 282 (1923).

74. 198 U. S. 45 (1905). For the story of the federal development, see Hamilton, *The Path of Due Process*, THE CONSTITUTION RECONSIDERED (Read ed. 1938).

under the state natural rights clause. As a result, state courts, bound by the federal as well as the state constitutions, could invalidate statutes repugnant to the judiciary on either state or federal grounds. The choice permitted is illustrated by a portion of an opinion by Indiana's Judge Gillet:

> We have little doubt that the act is in violation of our state Constitution, but, as we are persuaded that it contravenes the Fourteenth Amendment to the Federal Constitution, we prefer to consider the case from that viewpoint.[75]

Actually from 1903 until 1942 the Court did not invalidate any statute under the natural rights clause. Some acts regulating business were upheld because of the nature of the enterprise regulated. To engage in a certain few pursuits such as junk dealer,[76] liquor manufacturer,[77] distributor of handbills[78] and attorney at law[79] was not regarded as an inalienable but as a permissive right. In other cases the police power justified the enactment in question. Thus, licensing transient merchants,[80] requiring coal operators to erect and maintain washhouses for employees,[81] or regulating milk producers[82] was permitted as reasonably related to the public welfare. Under the police power the legislature could also prohibit the assignment of wages by a married man without written consent of his wife,[83] could make contracts in restraint of trade illegal,[84] and could impose a penalty for an employer's failure to pay his employee semi-monthly wages,[85] even though in each instance the General Assembly had limited some supposedly inalienable right.

Although statutes have been infrequently invalidated since the 1903 cases, the natural rights doctrine has defined the terms for legal argument in constitutional cases. The logic of constitutional lawyers' disputes has been keyed to the terms "natural rights," "property," "inalienable rights," "liberty to contract" and "police power." The guarantee of natural rights, curtailed only to the extent which the promotion of the public peace, safety, health or welfare requires, has become the basic doctrine of Indiana constitutional law for the twentieth century.

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75. McKinster v. Sages, 163 Ind. 671, 674, 72 N. E. 854, 855-6 (1904).
76. Grossman v. City of Indianapolis, 173 Ind. 157, 88 N. E. 945 (1909).
77. Sopher v. State, 169 Ind. 177, 81 N. E. 913 (1907).
78. Goldblatt Bros. Corp. v. East Chicago, 211 Ind. 621, 6 N. E.2d 331 (1937).
79. Beamer v. Waddell, 221 Ind. 232, 45 N. E.2d 1020 (1943).
80. Levy v. State, 161 Ind. 251, 68 N. E. 172 (1903).
81. Booth v. State, 179 Ind. 405, 100 N. E. 563 (1913).
82. Albert v. Milk Control Board of Ind., 210 Ind. 283, 200 N. E. 688 (1936).
83. Cleveland R. R. Co. v. Marshall, 182 Ind. 280, 105 N. E. 570 (1914).
84. Knight & Jillsen v. Miller, 172 Ind. 27, 87 N. E. 823 (1909).
85. Seelyville Coal Co. v. McGlosson, 166 Ind. 561, 77 N. E. 1044 (1906).

IV.

Since 1942 the Indiana Court has voided statutes under the natural rights clause on four different occasions. Three cases are sufficiently important for discussion,[86] each making a significant contribution to the natural rights doctrine as it stands in Indiana today.

The first, *State Board of Barber Examiners v. Cloud,*[87] invalidated an act which gave the state Board of Barber Examiners the power, after a proper investigation, to fix minimum prices and opening and closing hours for barber shops. The statute contained a legislative declaration that its passage would be in the interest of the public health, safety and welfare. Barbering was declared to be affected with the public interest. As in an earlier day, when Judge Perkins refused to concede the finality of a legislative declaration of a nuisance, Judge Richman in 1942 reserved for the Court the power to decide what was in fact in the public interest, declaring "legislative supremacy . . . is at variance with fundamental principles of American constitutional government."[88] The liberty to work and to contract for the price of services was guaranteed by the natural rights clause. He could see no reasonable relationship between price fixing and promoting the sanitation conducive to the public health. "Cleanliness . . . [is] inexpensive."[89] While shorter hours might promote the health of the barbers themselves, the statute purported to authorize only the setting of shop hours, not the hours of labor for individual barbers.

The barbers had placed considerable reliance on the 1941 United States Supreme Court case, *Olsen v. Nebraska,*[90] which had upheld a state price-fixing statute under the Fourteenth Amendment. In that opinion Mr. Justice Douglas had spoken of the "drift" of the modern cases toward sustaining price-fixing legislation. Judge Richman did not find the *Olsen* case persuasive. The cases constituting the "drift" Mr. Justice Douglas had referred to involved statutes which were "economic measures" and which

86. Needham v. Proffitt, 220 Ind. 265, 41 N. E.2d 606 (1942) is not treated in the text. The statute in question prohibited printed advertising of funeral directors' prices. The Court treated the case as one involving a statute which made an unreasonable classification.

> We are unable to conceive of any possible reason for prohibiting licensed funeral directors and embalmers from advertising their prices in newspapers or by handbills and at the same time permitting them to broadcast the same facts to the public by radio.

An unreasonable legislative classification violates Art. I, § 23, of the State Constitution but sometimes as in the *Needham* case the Court holds that limitations placed upon rights protected by Art. I, § 1, cannot be sustained if those limitations involve a discriminatory classification.

87. 220 Ind. 552, 44 N. E.2d 972 (1942).

88. *Id.* at 566, 978.

89. *Id.* at 563, 977.

90. 313 U. S. 236 (1941).

had nothing to do with the public health. The barbers' statute was not enacted for the economic welfare of the whole state. In the first place the act would be economically hurtful to the community. Secondly, barbers were only a very small portion of the community. The law was in all likelihood passed at the insistence of a small pressure group for its own financial advantage. This second reason for distinguishing *Olsen* should be underlined. Although the Court, speaking through Judge Richman, held the barber law unconstitutional, the opinion seemed to indicate a willingness to sanction a price-fixing law enacted for some state-wide economic purpose. Judicial objection to state-conferred economic favors upon a small minority was the heart of the *Cloud* opinion.

The second important recent case, *Department of Insurance v. Schoonover*,[91] upset a portion of the Indiana insurance law which restricted the business of selling casualty insurance to agents selling on a commission basis. Little new was added when the Court could find no relationship between the regulation and the police power, yet the opinion contains two important developments. First, it refused to permit the introduction of evidence on the question whether the statute was actually related to the public welfare. The only facts available to the court when it decided the question of reasonableness were those subject to judicial notice. Judge Starr, it should be noted, did not merely say that the Court believed such evidence was unnecessary when it decided a natural rights-police power case. He held that extrinsic evidence on the constitutional issue could not be admitted at all. On this question Judge Starr's position seems thoroughly unsound. The importance of extrinsic facts to a considered constitutional judgment can be readily perceived. When speaking of the statute in the *Schoonover* case the court stated:

> Appellants argue that an agent working on a commission gives better service to those who happen to be insured through him. *It seems to us this contention is fanciful and cannot be established.*[92]

Contentions which seem fanciful may reflect stubborn reality when facts are adduced to support them. There may be a great deal of relevant information about the insurance business and its salesmen which could convert fancy into the solid ground for judgment. If information of this sort can be produced by a party it should be heard. If the *Schoonover* prohibition against extrinsic evidence is to stand, lawyers can only insert such facts as they have in their briefs and hope the court will take judicial notice.

In its second important aspect *Schoonover* made a clear separation between the protection afforded by the natural rights clause of the state

91. 225 Ind 187, 72 N. E.2d 747 (1947).

92. *Id.* at 193, 750. (Italics supplied.) The *Schoonover* case and the problem of admitting extrinsic evidence in cases arising under the Indiana Constitution are discussed in a Note, 23 IND. L. J. 176 (1948).

constitution and that given by the Federal Due Process Clause. In contrast to Judge Richman in the *Cloud* case, Judge Starr did not distinguish the federal cases. The Indiana Court could give meaning to its natural rights clause regardless of what the New Deal Court chose to do with the Federal Constitution. The Court would not follow the lead of the United States Supreme Court under the Due Process Clause and refuse to upset legislation regulating economic activity. Judge Starr found no federal case in point, but even if he had, "Such a decision would only be persuasive."[93] Article I, Section I again was to have its own distinct history.

Kirtley v. State,[94] the third and most recent pronouncement on the question of natural rights, dealt with an Indiana statute making it unlawful for any person to sell any ticket of admission at a price different from that at which such tickets might be procured at regularly authorized places of sale. An enthusiastic follower of Indiana high school basketball was arrested and convicted of violating the statute by selling a ticket to the finals of the state basketball tournament for twenty-five dollars instead of the regular three dollars. In securing the reversal of his conviction upon appeal, the basketball fan found that he had not only made a nice profit on his athletic enthusiasm, but had also exercised his constitutional right, under the Indiana Constitution, to contract freely without state interference. Judge Gilkison followed the *Schoonover* pattern both in stating that extrinsic evidence would not be considered and in refusing to follow the trend of the modern federal cases.[95] *Kirtley,* however, differs significantly from *Cloud* and *Schoonover* in two respects. Those cases passed on statutes which were designed to give economic protection to a relatively small group. The ticket case dealt with an act purporting to benefit a large and indefinite number of the general public. Here the legislature's judgment was disregarded even though the General Assembly obviously was not trying to favor a small, selfish group of the politically powerful. Secondly the opinion hints that an emergency of some sort may properly be the occasion for economic regulation otherwise not permitted.[96] Judge Gilkison, however, was not specific as to what state of affairs would constitute an emergency nor as to how its existence would affect the constitutional power.

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93. *Id.* at 194, 750.

94. 84 N. E.2d 712 (Ind. 1949).

95. Judge Gilkison pointed out that the enactment did not regulate but sought to prevent resale, a position reminiscent of Judge Perkins's insistence that only regulation, not prohibition, of a natural right was possible.

96. Kirtley v. State, 84 N. E.2d 712, 715 (1949):

> We continue to follow the general rule that our legislature in the exercise of the police power of the state may enact laws to protect the public health, morals, safety, and welfare and for no other purpose, *except possibly in emergencies.* (Italics supplied.)

A long and partly forgotten history lies behind the present constitutional guarantees of the legal postulates accompanying a free enterprise system. The recent cases stem directly from state decisions rendered at the turn of the century and not from the work of the pre-Civil War Court nor from the federal substantive due process cases. Yet the present Indiana Court, using concepts akin to those of Judge Perkins, no longer shows the reluctance to interfere with the judgment of the General Assembly which characterized the natural rights opinions during the period after the Civil War. The Judiciary has defined the "unalienable" rights of which Section I speaks to include the right to own property, to employ property in any "lawful" enterprise and the right to make contracts. They can be abridged only if the curtailment is related, in the eyes of the judges, to the police power, or perhaps if it is required by some state emergency.

Since the United States Supreme Court has, for the moment, virtually abandoned its supervision of state legislation under the Fourteenth Amendment, state constitutions have assumed a new importance as legal materials for the use of lawyers and judges.[97] The natural rights clause, historically the chief instrument for writing the dominant economic premises of the community into the state Constitution of Indiana, has become the chief instrument of those who wish to attack state economic regulation by an appeal from the legislature to the courts.

97. The recent state cases and the present position of the United States Supreme Court are surveyed in Paulsen, *The Persistence of Substantive Due Process in the States,* 34 MINN. L. REV. 91 (1950).