Note: Footnotes have been deleted.

48. The Presumption of Liberty

The source of preexisting rights is the nature of Man himself found in natural law, which has a presumption of liberty described below. The purpose of law is to protect the rights of society, carefully tailored so that it does not restrict any preexisting rights further than necessary to remedy the perceived harm.

The presumption of constitutionality of legislative enactments is a doctrine made up by the Supreme Court in the *O'Gorman* case in 1931 which replaced the presumption of liberty, followed in 1938 in the *Carolene* case with a new system of judicial review having three distinct levels of scrutiny. The least restrictive on government, and the default level, is the *rational basis test* which examines if the law is rationally related to a legitimate government interest.

Compare this with the traditional requirements stated by the early writers of natural law, that law must not be arbitrary or unreasonable, and based upon "right reason" in agreement with nature; isn't this the same requirement as *rational basis* in use today? No it is not; the requirements and fruit from the two approaches are different. Right reason in agreement with nature would necessitate that laws be for the benefit of the people, tailored to protect God-given liberty, his nature. Liberty would be the presumption. *Rational basis* requires only that the law be rationally related to a legitimate government interest.

Look at the specific requirements of a law based on "right reason":

A non-arbitrary reasonable law must be *necessary* to protect society or third persons from *harm*, and *limited* to the extent required to remedy the perceived harm, using methods that *harmonize* diverse interests as much as possible (which is the way nature functions) with *minimal infringment* upon preexisting rights. This is the traditional method of applying the police powers, today known as strict scrutiny, the most stringent level of judicial review which is the level required when protecting fundamental rights, and should be the default applied to protect liberty, not just articulable rights. Some liberties may be found in a shadowy or gray area not articulable. This *presumption of liberty* was applied in our traditional court opinions:

> [N]o trade can be subjected to police regulation of any kind unless its prosecution involves some harm or injury to the public or third persons, and in any case the regulation cannot extend beyond the evil which is to be restrained.

Marymont v. Banking Board, 33 Nev. 333, 351-352 (Supreme Court of Nevada, 1910).

> [T]he constitutional right to use property without regulation is plain, unless the public welfare requires its regulation. If the public welfare does require it, the right must yield to the public exigency. And it is upon this question of necessity that the third question depends. All, then, seems to be embraced in the question of necessity. *People v. Smith*, 66 N.W. 382, 383 (1896).

> While there is no such thing as absolute freedom of contract and it is subject to a variety of restraints, they must not be arbitrary or unreasonable. Freedom is the general rule, and restraint the exception. The legislative authority to abridge can be justified only by exceptional circumstances. *Wolff Co. v. Industrial Court*, 262 U.S. 522, 534 (1922).

> "Our constitutions are founded upon individualism, and they make prominent the theory that to the individual should be granted all the rights consistent with public safety; and our development is chiefly attributable to the firm establishment and maintenance of those rights by an authorized resort to the courts for their protection against all hostile legislation which is not required by considerations of the public health or safety. In the absence of such considerations those rights are alike immutable; in their presence they must alike yield." *State v. Gravett*, 62 NE 325, 326 (1901).

The above case said "an authorized resort to the courts"; but the courts now rely on the legislature to determine the constitutionality of their law, and are reluctant to review that determination.

Del Vecchio wrote: "Substantially the goal of the school of Natural Law is to maintain the *non-arbitrariness* of the law."

All these requirements of law that protect our liberties are lost in the *rational basis* test which requires only that the law must be rationally related to a legitimate government interest. This gives rise to oppression and tyranny because necessity need not be proven by the legislature who itself determines the constitutionality of its law. The burden of proof is on the citizen to prove unconstitutionality, but the courts are reluctant to review the legislature's determination. Due to the difficulty of mounting a challenge ("you can't fight city hall"), with time we accumulate more and more oppressive laws. The universe of unenumerated rights protected by the Ninth Amendment are trampled by presumptively constitutional laws. *Liberty* itself, a traditional natural law right, is lost as judged by the widespread dissatisfaction with government.

There is another distinction between the presumptions of liberty and constitutionality: When government can be shown methods that harmonize diverse interests, the presumption of liberty requires that those methods be used; but with the presumption of constitutionality, methods that oppress are allowed to stand.

Because man has limited vision and does not have divine intelligence, he cannot see the full effects of the laws he passes; laws based on the presumption of liberty are least likely to encroach upon God-given liberty, making this the only legitimate approach.