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The Influence of American Theories on Judicial Review in Nordic Constitutional Law

by
Ragnhildur Helgadóttir

Martinus Nijhoff Publishers

THE INFLUENCE OF AMERICAN THEORIES OF JUDICIAL REVIEW ON NORDIC CONSTITUTIONAL LAW

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CONTENTS

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Note on citations to Norwegian, Danish and Icelandic court decisions.

In accordance with the custom in Norway, Denmark and Iceland, court decisions are cited by reference to the year the decision, followed by the page-number of the official report. Thus the decision of the Norwegian Supreme Court cited Rt. 1918.401, is found in *Retstidende* from 1918 on page 401. Similarly, Danish Court cases are cited to UfR, *Ugeskrift for Retsvæsen*, by year and page-number. Citations to more recent cases include one of the letters H, V and Ø, signifying that they are decisions of the Supreme Court (Højesteret), Vestre Landsret (The Western Appellate Court) and Østre Landsret (The Eastern Appellate Court) respectively. The decision is still found on the cited page. Icelandic court decisions are cited to Hrd., *Hæstaréttardómar*, by year and page-number, e.g. Hrd. 1943.237.

The earliest two or three Norwegian cases are cited by reference to UfL, which was a law review, since these cases predate the official reporter. They are then cited like any other material in legal periodicals. Icelandic cases before 1920 are cited to Lyrd., which was an official reporter of Icelandic High Court decisions and Danish Supreme Court decisions in these cases. Those citations are by volume and not by year, e.g. the decision referred to as Lyrd. VI.176, is published in volume VI, on page 176.

PART 1. INTRODUCTION

This study examines the influence of American law and theories of judicial review on the development, exercise and theorisation of judicial review in three countries in the north-western corner of Europe: Norway, Denmark and Iceland.[1] Most discussions of judicial review – the competence of courts to decide whether legislation conforms to the constitution – mention that this institution is a particularly American phenomenon, which has been adopted in various countries. It is often added that most European countries have adapted it so that constitutional courts are charged with this adjudication. Regular courts in Norway have exercised judicial review since the 1860s and courts in Iceland and Denmark from the 1900s and 1910s respectively,[2] and this was done in part based on the American model.

What will be discussed here is the intellectual history of judicial review in these Nordic countries. We will focus on the American thought that served as one of the role models, how it was adapted and changed, and how it emerged in Nordic jurisprudence. The focus will be on three periods. First, the decades between 1880 and 1920, when judicial review was being theorised in Norway and was exercised frequently there. During this same period, judicial review was adopted in Denmark and Iceland. The decades immediately following World War II form the second period. During this period, some of the changes that had occurred in American constitutional law immediately before and during World War II became apparent in Nordic law. The last period lasts from about 1970 to the present. The constitutional protection of civil rights has developed so fast and so decisively in this period that it should be considered a formative period in Nordic constitutional law.

It will be argued here that through the developments taking place in American law in the 1940s, major developments in American constitutional law concerning judicial review affected Nordic constitutional law. Sometimes, a considerable time passed before the effects were felt in Nordic law, and trends or developments often emerged in the Nordic countries in a modified form. In spite of that, the debt owed to American ideas was often clear. From around 1970, direct American influence has been much less important in Nordic constitutional law, although American law seems to have had some indirect influence.

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[1] Together, these countries will be designated as 'Nordic' even though that term is usually used to mean not only Denmark, Norway and Iceland but Finland and Sweden as well.

[2] It has been debated when the Norwegian Supreme Court first held that a law was unconstitutional. While cases from the 1820s and 1840s have been mentioned, the first clear example is the Supreme Court's decision of 1 November 1866 (UfL. VI, 165). The Icelandic courts applied the Constitution to invalidate a Royal decree in 1877 (Lyrd. I.249), explicitly acknowledged their power to exercise judicial review in 1900 (Lyrd. VI.176) and first invalidated a statutory provision in 1943 (Hrd. 1943.237). The Danish Supreme Court first clearly acknowledged its power of judicial review in a series of cases around 1920 (*See* UfR. 1921.148, UfR. 1921.153, UfR. 1921.168 and UfR. 1921.644) and did first invalidate a law in 1971 (UfR. 1971.299H).

PART 1

Examining the influence of American constitutional thought in these countries is interesting for a number of reasons. First of all, this is uncharted territory, so it is interesting to map out the intellectual history of judicial review in the Nordic countries and to see to what extent ideas and theories of judicial review in the Nordic countries are borrowed from the United States. American influences in Nordic constitutional law are also counterintuitive because the Nordic countries are, in name at least, civil law countries. Conversely, it is also interesting to see which ideas and theory from American constitutional law migrated to other jurisdictions, and to speculate why they were 'successful' in this sense, while others were not. At a more general level, is interesting to examine to what extent constitutional ideas are adapted to different circumstances when they migrate between jurisdictions, and to what extent there is question of wholesale adoption. The Nordic countries discussed here provide a good counterpoint to the U.S. for a number of reasons. Like the U.S., they are stable democracies in which there has been considerable constitutional continuity. This allows for a long period – 140 years in the case of Norway, which is the primary example – in which these developments and influences may be followed. These countries also adopted the institution of judicial review early compared to most of their European counterparts. In addition, they share a legal system which accepts sources of law that are not statutes or codified.

The influence of American law on the doctrine and theories of judicial review in these countries has received little attention.[3] To some degree, this is due to the fact

[3] Writings discussing American influence in this field in more than just a sentence or two are few: In the late 1940s, Danish professor Ernst Andersen wrote a treatise on judicial review and constitutional interpretation, comparing and contrasting the exercise of judicial review in Denmark and the U.S. and discussing, to some extent, the influence of American thought in Nordic constitutional law. In a 1993 treatise on judicial review in Norway, Eivind Smith compared constitutional jurisprudence in Norway and the U.S. around 1900 briefly. In 1997, Norwegian Supreme Court Justice Finn Backer wrote an article on American influence in Norwegian constitutional thought and in a speech given in 2000, Chief Justice Carsten Smith described Norwegian constitutional development in the context of American constitutional law. Also in 2000, this author published an article on the history of judicial review in Iceland. *See* E. Andersen, *Forfatning og sædvane – Studier over nogle af forfatningsrettens hovedspørgsmaal* [*Constitution and Customary Law – Studies of Some of the Fundamental Questions of Constitutional Law*] (Gad, Copenhagen, 1947); E. Smith, *Høyesterett og folkestyret* [*The Supreme Court and Democratic Government*] (Universitetsforlaget, Oslo, 1993); F. Backer, 'Den amerikanske høyesterett som påvirkningskilde – også hos oss? *[The American Supreme Court as a Source of Influence – Also for us?]*', in Hagstrøm et al. (eds.), *Ånd og rett – Festskrift til Birger Stuevold Lassen på 70-årsdagen 19. august 1997 [Spirit and Law – Liber Amicorum for Birger Stuevold Lassen on his 70 Birthday August 19, 1997]* (Universitetsforlaget, Oslo, 1997); C. Smith, *Judicial Review of Parliamentary Legislation: Norway as a European Pioneer*. The University of London Annual Coffin Memorial Lecture 3 April 2000, <www.hoyesterett.no/artikler/2694.asp>, visited on 4 August 2005; and R. Helgadóttir, 'Úrskurðarvald dómstóla um stjórnskipulegt gildi laga, [Judicial Review]', in D.Þ. Björgvinsson, G. Jörundsson, S.M. Stefánsson and T. Gunnarsson (eds.), *Afmælisrit – Þór Vilhjálmsson sjötugur 9. júní 2000* [*Liber Amicorum – Þór Vilhjálmsson Seventy June 9, 2000*] (Bókaútgáfa Orators, Reykjavík, 2000) p. 487.

that judicial review in American constitutional history has been viewed as having a chequered history.[4] Later commentators have mostly mentioned that American law may have influenced the adoption of judicial review in the Nordic countries without giving further details or discussing American influence on the exercise or theorisation of judicial review once the institution was in place. The intellectual history of judicial review in Iceland and Denmark has barely been mentioned in legal literature and judicial review in and of itself has not been fully theorised there.[5] It is therefore the story of American influence on Nordic constitutional law which will be told in the following three parts. Before going any further, the constitutional history and the outlines of the constitutional systems of the countries in question will be sketched briefly.

1.1. A BRIEF OVERVIEW OF THE CONSTITUTIONS OF NORWAY, DENMARK AND ICELAND

Amongst the Nordic countries, Norway has been the leader in adopting and adapting American constitutional theory. This may be due partly to historical reasons, but American constitutions, both the U.S. Constitution and various state constitutions, and the Declaration of Independence were amongst the documents that influenced the drafters of the Norwegian constitution.

In the European wars of the early 19th century, Denmark, which had ruled Norway and Iceland from the fourteenth century, sided with France and was subsequently forced to cede Norway to the Swedish throne in the Treaty of Kiel, signed in January 1814.[6] During a few months in early 1814, Norway resisted the

[4] In the 1930s, Nordic writers were at pains to distance judicial review as exercised in the Nordic countries from the perceived illegitimate judicial activism of the so-called 'Lochner court'. In the late 1950s, Finn Sollie compared judicial review in Norway and the U.S. and he, too, argued that the institution of judicial review had been less problematic in Norwegian than in American constitutional history. He focused on the Lochner era in the U.S. and on the lack of a corresponding period of activism in Norway. Finn Sollie, *Courts and Constitutions: A Comparative Study of Judicial Review in Norway and the United States* (Unpublished PhD dissertation, Johns Hopkins University) (1957). *See also* the discussion of *e.g.*, Ragnar Knoph's writings *infra* in part 3.

[5] On the lack of theories on judicial review in Denmark, *see infra* note 982. Until 2000, only two articles had been written on judicial review in Iceland, one by Ólafur Jóhannesson in 1953 and another by Jón E. Ragnarsson in 1962. Ó. Jóhannesson, 'Nogle ord om den stilling, islandsk ret tager til spörgsmålet om gyldigheden af forfatningsstridige love. [A Few Words on Icelandic Law's Position on the Question of Unconstitutional Laws' Validity]', 6:2 *Úlfljótur* (1953) pp. 3–17; J. E. Ragnarsson, 'Úrskurðarvald um stjórnskipulegt gildi laga eða íslenzkur reynsluréttur [Judicial review of legislation's constitutionality or an Icelandic right of review]', 15:3 *Úlfljótur* (1962) pp. 101-115. Since 2000, two conferences have dealt with this subject and the lectures have been published, so judicial review is currently an important topic in Icelandic constitutional law.

[6] A commentator has noted that the Treaty of Kiel itself laid the foundation for the changes that took place in 1814: "The terms firmly established that Norway was again to take its place among the independent states, in union with Sweden. In a subsequent proclamation from the

union with Sweden. A constitutional assembly convened at Eidsvoll, in the south of the country. A constitution was adopted on 17 May 1814 and a King was proclaimed. When drafting the constitution, the founding fathers at Eidsvoll had a wealth of materials at their disposal, some of it submitted by concerned citizens in Denmark and Norway.[7] The most important draft constitution, written by constitutional convention members Adler and Falsen,[8] was based in part on American constitutions.[9] Other drafts also relied on American developments.[10] The

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Swedish king Carl XIII, it was stated that Norway was to have the status of an independent state, with its own free constitution, national representation, its own government and the right to levy taxes." Tor Dagre, *The History of Norway available at* <http://odin.dep.no/odin/engelsk/norway/history/indexb-n-a.html>. Odin is the information website of the Norwegian Department of State.

[7] These thoughts and draft constitutions are published in Rigsforsamlingen paa Eidsvold, Finants-Committeen (ed.), *Riksforsamlingens forhandlinger 1* [*The Discussions at the Constitutional Convention* 1] (Grøndahl & Søns Boktrykkeri, Kristiania, 1914).

[8] *See e.g.,* P. Helset and B. Stordrange, *Norsk statsforfatningsrett [Norwegian Constitutional Law]* (Ad Notam, Gyldendal, 1998) p. 58 and N. Højer. *Norska Grundlagen och dess källor [The Norwegian Constitution and its Sources]* (Stockholm, 1882) p. 21.

[9] Højer discussed the similarities and differences between the Adler-Falsen draft and the U.S. and American state constitutions as well as other foreign sources, in considerable detail. Højer *supra* note 8, pp. 23–44. Højer did the same with other drafts and submissions, *Ibid.,* pp. 19–101. He noted that if one looked closely at Adler and Falsen's draft, "we find that most of the provisions in this draft which is so extremely important for the correct understanding of the Norwegian constitution … can be traced back to foreign sources." The most important of those are "the French monarchic constitution of Sept. 3, 1791, the Constitution of the French Republic of year III (August 22, 1795) and the 1798 Dutch constitution so heavily influenced by that one and especially the United States' constitution of 1787 as well as, finally, De Lolme's work 'Constitution de l'Angleterre' as far as the principles themselves are concerned". *Ibid.,* p. 23. He supported his conclusion about the influence of the American models by citations of diaries of people present at Eidsvoll, which noted that the draft took what was best "from the French as well as from the North American and English constitutions" and by citing Falsen when he later commented on a constitutional treatise. According to Højer, Falsen had said that "[t]o the extent the United States' Constitution is based on the British one, the author may be right to note that the Norwegian Constitution was modelled after the British Constitution, but in general we had, particularly concerning the organisation of the legislature (nationalrepresentationen) just about exclusively the American one in mind". *Ibid.,* citing C.M. Falsen in *Den Norske Tilskuer* [*The Norwegian Spectator*] II, No. 8-9, 60.

[10] For example, the Danish Count Holstein-Holsteinborg's *Thoughts for the Norwegians to consider at the meeting at Eidsvoll April 10, 1814*, relied to some extent on *The Constitution of England* by de Lolme, which was published in 1781 as well as German works on American law. *Ibid.,* p. 111, citing *Nordamerikanisches Magazin* by Hegewitsch & Ebeling, Vol. I, and Ebeling's *Nordamerika*. In general, Count Holstein-Holsteinborg simply referred to certain pages in the German works but in some instances, he translated anecdotes or examples. Based on David Ramsay's *History of the American Revolution*, he gave a detailed account of the Massachusetts Constitution's Bill of Rights and translated a great part of that document's preamble. *Ibid.,* pp. 137–138, citing David Ramsay, *Geschichte der Revolution von Amerika,*

1814 Constitution itself was therefore influenced by American as well as French constitutions.[11]

The constitutional system set out in the 1814 Constitution is characterized by a clear separation of powers, although the introduction of parliamentary government in the last decades of the 19th century considerably decreased its efficacy. The Constitution has a bill of rights and all in all, students of the U.S. Constitution would find many aspects of the Norwegian Constitution familiar.

In the summer of 1814, it became clear that the Swedish army would occupy Norway and a cease-fire agreement was signed, under which Norway entered into a personal union with the Swedish monarch, as decided in the Treaty of Kiel. Norwegian king Christian Frederik – later King Christian VIII of Denmark – abdicated, but Norway kept its constitution. The cease-fire agreement proved important for constitutional developments in Norway, for according to its terms the Swedish monarch was to negotiate changes to the Constitution with the Norwegian Parliament. However, it was clearly stated in the cease-fire agreement that he should not propose any amendments other than those necessary for the Union.[12] In other words, the Swedish crown accepted the Constitution of 17 May 1814 as Norway's constitution. This had two important consequences. First of all, it ensured that the Constitution remained in force and thus was a premise for the constitutional continuity already mentioned. Secondly, it affected constitutional interpretation. The fact that the Swedish crown had promised to respect the constitution was one of the reasons for what Norwegian commentators call 'constitutional conservatism'.[13] The Norwegian government was afraid that any attempt to amend the Constitution would be the opening of a can of worms, so even though it was immediately apparent that

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IV p. 69 and pp. 142–144 (This probably refers to David Ramsay, *Geschicter der Amerikanischen Revolution aus den Acten des Congresses der vereinigten Staaten: aus dem Englischen* (1794), a German translation of Ramsay's *The History of the American Revolution*, whose first volume was published in 1789.) Count Holstein-Holsteinborg's thoughts were addressed to the Regent, and in addition to setting out the fundamentals of written constitutions based on the writers of his age he discussed human rights in 18th century terms, mentioning the development of *habeas corpus* and various American state constitutions in that context. *Ibid.,* p. 136.

[11] Helset and Stordrange discuss the importance of the Declaration of Independence and the French Declaration of Rights of Man and Citizen (Helset and Stordrange, *supra* note 8, p. 65). They add: "Finally, we believe foreign constitutional law influenced the founding fathers to a great degree. Here are three examples: First, the French Constitution of 1791 has been important. The provisions in art. 79, on the King's suspensive veto are taken from there. Secondly the U.S. Federal Constitution of 1787 was important. The provisions in art. 86 and 87, about the impeachment court are influenced by the 1787 constitution's rules about 'impeachment'. Thirdly, the Swedish Constitution of 1809 was important to the development of the rules of co-signature in art. 31."

[12] Helset and Stordrange 1998, *supra* note 8, p. 66.

[13] *See e.g.,* Helset and Stordrange 1998, *supra* note 8, pp. 67–68.

the constitution was incomplete, Parliament decided to preserve it.[14] This led to a more liberal interpretation of the Constitution than of other laws – it needed adapting to various circumstances almost from the start. Keeping the text intact but adapting it to differing circumstances was therefore a key tenet of the Norwegian constitutional tradition of the 19th century.

In 1905, Norway left the union with Sweden but the Constitution remained in force, and apart from the dissolution of the Union there was little constitutional change. The Constitution of 1814 remains in force to this date. Apart from the period of German occupation from 1940 to 1945, when the Constitution was effectively suspended, it has therefore been in force for 190 years.

Before the Napoleonic wars, Denmark reached from far beyond the polar circle to the Elbe. It included Norway and Iceland as well as parts of what is now Germany. The 19th century history of Denmark is inextricably linked to the struggle to keep the state together and, in particular, to the status of the German duchies, which were ultimately lost.

In 1848, Christian VIII died and his successor, Frederik VII, was willing to abandon the absolute monarchy. Consequently, he called a constitutional convention.[15] The constitution's main drafter, Monrad, modelled the draft mainly on the Belgian Constitution of 1830 and the Norwegian Constitution of 1814. Concerning the bill of rights in particular, he looked towards the Declaration of Independence and to American constitutions.[16] The 1849 Basic Law was thus modelled in part on the U.S. Constitution and on some American state constitutions; it was also modelled on the Norwegian constitution to a great degree and it clearly arose from the same ideological background as that constitution. The draft constitution was discussed at the constitutional convention for months,[17] and once it had been adopted, the King signed it and gave it to the people.

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[14] In the first part of the 19th century, the Swedish King periodically attempted to increase his power at the Norwegian Parliament's expense but these attempts were hindered by the Eidsvoll constitution. The Norwegian parliament therefore anticipated hard negotiations and refrained from engaging in them. *Ibid.*

[15] The constitutional convention's 150 members were chosen according to an election law decided by the King's advisers.

[16] Folketinget, 'Grundloven, historie og statstanker [The Constitution, History and Ideas of the State]', 9 December 2003, <www.ft.dk/?/samling/20031/MENU/00000004.htm>, visited on 13 February 2004. This is the official web site of Folketinget, the Danish Parliament. Jens Elo Rytter mentions the Belgian and Norwegian constitutions as sources for the Danish Basic Law of 1849, but notes that "the principles of the Constitution stem from the French Declaration of Rights of Man and Citizen of 1789 and the constitutions of the North American states". J. E. Rytter, *Grundrettigheder – Domstolenes fortolkning og kontrol med lovgivningsmagten [Basic Rights – The Courts Interpretation and Control of the Legislative Power]* (Forlaget Thomson, Copenhagen, 2000) p. 44.

[17] A provision expressly providing for judicial review was discussed at the convention but not included in the Basic Law. While there has been some disagreement between Danish scholars on the importance of this, most agree that these developments cannot be interpreted as either providing for or prohibiting judicial review. *See e.g.,* Andersen, *supra* note 3; and J. P.

INTRODUCTION

The Basic Law of 1849 was a relatively democratic and liberal constitution, which determined that the constitutional system should be based on the separation of powers and provided a bill of rights.[18] In the 19th century, there was much less conservatism concerning the Danish Constitution than its Norwegian counterpart; it was amended frequently and new constitutions were promulgated a number of times. This was also true of the first decades of the 20th century. In spite of those amendments – which were usually caused by changing situations with the German duchies – the basic structure set out in the current Constitution of 1953 is, to a great degree, similar to that set out in the 1849 Basic Law. A parliamentary system of government was introduced in 1901 and Parliament has been unicameral from 1953,[19] but apart from these changes, the constitutional system has remained fundamentally similar from 1848–1849, when the Basic Law was drafted. More than two thirds of the provisions of the current constitution are similar to provisions in the 1849 Basic Law.

Iceland was part of the Danish state until 1918, when it became an independent country united with Denmark in the person of the Danish monarch, much as Norway had been with Sweden from 1814 to 1905.

In 1874, however, King Christian IX gave Iceland a Constitution concerning the country's special affairs. It vested legislative power in those matters pertaining especially to Iceland in Parliament and the King.[20] Otherwise the Constitution was very similar to the 1866 Danish Constitution.[21] Constitutional changes have been

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Christensen, *Forfatningsretten og det levende liv [Constitutional Law and Real Life]* (Jurist- og Økonomforbundets Forlag, Copenhagen, 1990).

[18] The Constitution was amended in 1863 and the 1863 November Constitution was considerably less liberal than the so-called June Constitution of 1849. For a description of the 1863 constitution, *see e.g.,* Forfatningskommissionen af 1937, *Betænkning afgivet af forfatningskommissionen af 1937 [Report by the Constitutional Committee of 1937]* (Copenhagen, 1938) p. 10. Under the 1863 November Constitution, the King started appointing 18 of the members of the upper chamber and the right to participate in senate elections was circumscribed, so fewer were eligible to vote. In 1866, a new Constitution was adopted, and "[m]ost of the 1866 Constitution's provisions were substantively similar to the June Constitution". *Ibid.,* p. 11.

[19] In 1953, the political parties agreed to abolish the Upper Chamber of Parliament, Landstinget, and to add a provision on the parliamentary system of government to the Constitution. This was due in part to an aversion to having different electoral rules apply to Landstinget and to the Lower Chamber of Parliament and in part to historical reasons. Historically, Landstinget had been aristocratic and the electoral rules had ensured a conservative majority there. Until the adoption of a parliamentary system of government in 1901, the Lower Chamber clashed continuously with Landstinget and the cabinet.

[20] *See e.g.,* G. Karlsson, *A Brief History of Iceland* (Mál og menning, Reykjavík, 2000). pp. 41 and 48.

[21] *See e.g.,* Á. Þ. Árnason, 'stjórnarskrárfesta: grundvöllur lýðræðisins [Constitutionalism: The Foundation of Democracy]', 174 *Skírnir* (1999) pp. 467–468 and Ó. Jóhannesson, 'Yfirlit yfir stjórnskipunarsögu Íslands [An overview of Icelandic constitutional history]', in G. G. Schram (ed.), *Stjórnskipunarréttur [Constitutional Law]* (Háskólaútgáfan, Reykjavík, 1999) p. 638.

frequent in Iceland since 1874, but many of them were stepping-stones to greater independence and did not change the constitutional structure.[22] A parliamentary system of government was introduced in 1903 and Parliament became unicameral in 1991.[23] In spite of these changes, the Icelandic constitution is still based on the Danish Basic Law of 1849 and is, like the current Danish Constitution, quite similar to that document.[24]

In sum, the three Nordic countries discussed here have constitutional systems that stem from the early and mid-1800s. Their histories differ and so do their current constitutions. However, there are important similarities. First of all, the constitutional order is fundamentally similar; these are liberal democracies with written constitutions, a unitary system of government, general electoral franchise, separation of powers, a largely ceremonial head of state, a parliamentary system of government, independent courts which exercise judicial review, a strong welfare system and generally a good record concerning the protection of civil rights. The constitutions of the three countries are obviously closely related, especially the Danish and Icelandic ones, which have developed from the same 1849 Basic Law. The 1849 Basic Law was in turn based in part on the 1814 Norwegian constitution, and all three are based on the same constitutional ideas.

In addition to the similarities in the constitutional structure and constitutional ideology, the three Nordic countries have – along with Sweden and Finland – a tradition of trading legal ideas. Partly, this is because shared history and background and, in some cases, similar languages made it easy to confer with colleagues in the other states and to read their works or opinions. There has also been a large number of Nordic conferences and considerable formal cooperation in law-making and in solving new legal and constitutional problems. Thirdly, due to these other factors, Nordic court opinions have been generally accepted in each of these countries as a logical starting point when a previously undecided issue comes before a court, particularly in the field of constitutional and administrative law.

Due to this, the Nordic countries will to some degree be discussed as one here. This should not obscure the fact that these are three distinct jurisdictions, whose law

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[22] In 1903, for instance, when home rule was instituted, the change entailed that the minister for Iceland should live in Reykjavik and be accountable to the Althing. Parliamentary government was not introduced in Denmark until 1901, so the accountability to the legislature was a new development there too. So the change, as it was, concerned where the minister should live and to which legislature he should be responsible – his duties and his competence were unchanged. The 1874 Constitution was frequently amended: in 1903 it was amended to provide for home rule, in 1915 to enlarge the franchise and in 1920 – in order to reflect the change in the status of the country – a new Constitution of Iceland was promulgated. That was also frequently amended. When Iceland gained full independence from Denmark in 1944, no changes were made except those absolutely necessary to change from a monarchy to a republic. Árnason, *supra* note 21, p. 468.

[23] Act. No. 56/1991. This change was enacted because all the political parties agreed that the procedure mandated by bicameralism was too burdensome and time-consuming.

[24] Árnason, *supra* note 21, p. 468.

has of course developed autonomously, and that most of the materials concern Norwegian law, which led the way in the development of this field.

1.2. WHAT FOLLOWS

In what follows, it will be discussed how judicial review in Norway was, from the very first, theorised in important part on the basis of arguments and ideas borrowed from American constitutional law. In the second part, it will also be examined how late 19th and early 20th century Nordic lawyers thought about rights and the relation between the state and its citizens, and how deeply American thought and theories of judicial review in particular had influenced Nordic thought on these matters.

Part 3 discusses the changes in jurisprudence and constitutional doctrine that happened between the two World Wars and in the years following World War II. There is no doubt that American constitutional law in the 1950s differed from American constitutional law in the 1890s in important ways. This part will focus on how the changes that took place in American constitutional law in the early 20th century were described in the Nordic countries and how some of the ideas and theories which became dominant in U.S. constitutional theory in the decades around World War II were assimilated into Nordic jurisprudence and theory.

Part 4 discusses the influence of American law in Nordic constitutional thought after 1970. During this period, American law essentially disappeared from Nordic court opinions. There was also a sharp decline in the discussion of American law in Nordic theory. It will be argued that in spite of this, American law influenced Nordic constitutional law – and vice versa – albeit indirectly, through the European Human Rights system.

Finally, conclusions will be drawn from the whole story and possible reasons for these developments explored.

PART 2. CONSTITUTIONAL JURISPRUDENCE IN THE NORDIC COUNTRIES AND IN THE U.S. AROUND THE TURN OF THE TWENTIETH CENTURY

2.1. INTRODUCTION

It is common knowledge in Nordic constitutional law that the period from 1885 to 1935 was one in which the Norwegian Supreme Court – unlike its Danish and Icelandic counterparts – struck down a number of laws which unconstitutionally interfered with property or economic liberty. This period of perceived activism has often been compared to the Lochner era in American constitutional jurisprudence, in that "in both systems there was a period when [judicial review] was used by an essentially conservative Supreme Court to block social and economic reforms . . . "[25] Conversely, this period has been viewed as distinguishing the Norwegian Supreme Court from the Danish and Icelandic Courts.

The view of the courts around 1900 as proponents of *laissez-faire* and social Darwinism has been revised by legal historians in the U.S. and to a degree by historians in Norway. Based on that work, the theory here is that Norwegian courts borrowed and used concepts and constructions of the constitutional ideals of liberty and separation of powers that had evolved in the U.S. over the previous century. These concepts and constructions concerned the goals and ideals of democratic governance and informed judicial decisions and set the terms of constitutional debate for decades. It is clear from court decisions that this was the case until the mid-thirties at least, in some cases until after World War II. The clearest examples are the emphases on judicial enforcement of constitutional limitations on the legislature and on the doctrine of vested rights. This influence was also felt in Denmark and Iceland, but to a lesser degree and perhaps more haphazardly.

In the following chapters, the constitutional theory that underlay the jurisprudence of the American courts in the second half of the 19th century and the first decades of the 20th century will be described briefly. Then, it will be described how the theory crossed the Atlantic, but American doctrine influenced Nordic doctrine mostly through the influence of American treatises on Norwegian treatises. Finally, American jurisprudence and its influence on various strands of Nordic jurisprudence and constitutional doctrine will be described.

2.2. OVERVIEW OF 19TH CENTURY AMERICAN LEGAL THOUGHT.

Most historians now consider American jurisprudence in the 60 years or so from 1870 to 1930 to have been a continuation of the jurisprudence and principles

[25] U. Torgersen, 'The Role of the Supreme Court in the Norwegian Political System', in G. Schubert (ed.), *Judicial decision-making* (International Yearbook of Political Behavior Research, Vol. 4) (Free Press of Glencoe, New York, 1963) p. 221.

established during the earlier part of the 19th century and not a break with it.[26] In the following chapter, the origins and development of some of the 19th century principles and concepts that formed the basis of what has variously been called *laissez-faire* constitutionalism and Lochner era jurisprudence will be described. The next two chapters will then describe how these ideas fared in Nordic law and legal theory. These doctrines were all interconnected and they were all intended to check and limit state power, in the words of one commentator, to work towards the ideal of "a neutral state".[27]

2.2.1. Antipathy towards Special Legislation

Fear of factions – what we would presumably call interest groups – has been part of American constitutional theory at least since the founding of the Republic. Madison discussed the problem of factions in Federalist No. 10, noting that "the most common and durable source of factions has been the various and unequal distribution of property".[28] He went on to describe how the proposed constitution would control the effects of faction. One commentator has noted, based on this, that "[t]he Constitution set up a political structure specifically designed to nurture and protect the social relations produced by capitalism by preventing the state from taking sides in the disputes arising among or between competing classes".[29]

Antipathy towards special or class legislation – legislation benefiting one group at the expense of another or of society in general– is related to the distrust of faction.[30] This antipathy has a distinguished pedigree in American thought. It has roots in the idea of commonwealth in Whig constitutional theory which again sprang from English politics in the 16th and 17th centuries. It also has roots in American

[26] *See e.g.* B. Cushman, *Rethinking the New Deal Court – The Structure of a Constitutional Revolution* (Oxford University Press, New York, 1998); H. Gillman, The Constitution Besieged – The Rise and Demise of Lochner Era Police Powers Jurisprudence (Duke University Press, Durham, 1993); M. L. Benedict, 'Laissez Faire and Liberty: A Re-Evaluation of the Meaning and Origins of Laissez-Faire Constitutionalism', 3 *Law and History Review* (1985) p. 293; C. W. McCurdy, 'Justice Field and the Jurisprudence of Government-Business Relations: Some Parameters of Laissez-Faire Constitutionalism, 1863–1897', in Friedman and Scheiber (eds.) *American Law and the Constitutional Order – Historical Perspectives* (Harvard University Press, Cambridge, 1978) p. 246.

[27] *See e.g.,* M. J. Horwitz, *The Transformation of American Law 1870–1960 – The Crisis of Legal Orthodoxy* (Oxford University Press, New York, 1992) pp. 19–20.

[28] *The Federalist No. 10* (Madison) (1787), reprinted in Wootton (ed.), *The Essential Federalist and Anti-Federalist Papers* (Hackett Pub. Co., Indianapolis, 2003) p. 169.

[29] Gillman, *supra* note 26, p. 33.

[30] Benedict describes "'class', or 'special' legislation" as "using the power of government for the benefit of a particular group at the expense of the rest of society." Benedict, *supra* note 26, p. 305.

resistance to royal grants of special privileges, and in the decisions of common law courts concerning monopolies.[31] Finally, it is related to ideas of natural rights.

Both Jeffersonian Republicans and Jacksonian Democrats built on this antipathy, which, along with hostility to special privileges, came to be viewed as particularly characteristic of Jacksonian democracy. Amongst the influential lawyers of the late 19th century who were active Jacksonians was Justice Stephen Field,[32] who has been credited with laying the cornerstone for *laissez-faire* constitutionalism, and Michigan judge Thomas M. Cooley, whose 1868 treatise on *Constitutional Limitations*[33] was immensely influential, especially in the state courts.[34] Field's dislike of special legislation and special privilege is evident in his dissent in the *Slaughterhouse cases* in 1873, where he wrote that "grants of exclusive privileges . . . are opposed to the whole theory of free government, and it requires no aid from any bill of rights to make them void. That only is a free government, in the American sense of the term, under which the inalienable right of every citizen to pursue his happiness is unrestrained, except by just, equal and impartial laws."[35] He would therefore, contrary to the majority of the Court, have

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[31] *See* Benedict, *supra* note 26, pp. 314–317. *See also* the discussion of English common law concerning monopolies in the *Slaughterhouse cases*, 83 U.S. (16 Wall.) 36 (1873).

[32] Benedict, *supra* note 26, p. 319.

[33] T. M. Cooley, *A Treatise on the Constitutional Limitations Which Rest upon the Legislative Power of the States of the American Union* (Little, Brown, Boston, 1868) (hereinafter *Constitutional Limitations*).

[34] The next chapter will illustrate that Cooley's treatise was also influential in Nordic theory. Gillman describes how recent research shows "that Cooley's jurisprudence stressed not market liberty per se but rather a Jacksonian ethos that emphasised equal rights and the dangers of legislating special privileges for particular groups and classes". *See* Gillman, *supra* note 26, p. 7 and the sources referred to therein.

[35] *Slaughterhouse Cases*, 83 U.S. (16 Wall.) 36, 111 (1873). While Horwitz characterises Field's and Bradley's dissents in this case as "classical Jacksonian polemics on the evils of monopoly" (Horwitz, *supra* note 27, p. 24), McCurdy discusses the dissent in terms of the distinction between public and private entities (McCurdy, *supra* note 26, pp. 249–250). Jacobs discusses Field's dissent in the *Slaughterhouse cases* in terms of its (intended or unintended) consequences, stating that Field's reference to Wealth of Nations "set forth at least two ideas which became a part of the judicial stock in trade in due-process litigation" namely relating liberty and property so that the right to pursue a calling is not only liberty but also property and the "identification of the interests of the employee with those of the employer". C. E. Jacobs, *Law Writers and the Courts; The Influence of Thomas M. Cooley, Christopher G. Tiedeman and John F. Dillon upon American Constitutional Law* (University of California Press, Berkeley, 1954) p. 37. *See also Loan Ass'n*. v. *Topeka*, 87 U.S. (20 Wall.) 655 (1874). In a passage replete with natural law references, references to the distinction between public and private and to the antipathy towards special legislation, Justice Miller, speaking for the majority, stated that "[t]here are limitations on [governmental] power which grow out of the essential nature of all free governments. Implied reservations of individual rights, without which the social compact could not exist, and which are respected by all governments entitled to the name. No court, for instance, would hesitate to declare void a statute which enacted that A. and B. who were husband and wife to each other should be so

invalidated the law at issue, which established a corporation with exclusive rights to run a slaughterhouse in New Orleans, thereby depriving butchers who were not part of the corporation of their livelihood.[36]

Both Field and Cooley were part of the American legal mainstream and their hostility towards special legislation and special privilege was illustrative of legal thought at the time. One commentator has noted that "antebellum American law was suffused with the principle that special legislation was illegitimate".[37] Some of the leading cases of this period were decided against at least a background of such ideas, which are also evident in many more cases.[38]

By the late 19th century, special legislation, monopolies and special privileges were thus already widely condemned in American legal thought and had been linked to the idea that no one should be deprived of property except by due process of law.[39] It was considered dangerous to allow legislatures to indulge in favouritism – legislation should be enacted for the public good and not the benefit of special groups. Together, these tendencies – to limit faction and to avoid special privilege and special legislation – formed an ideal of "a neutral state, a state that could avoid

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no longer, but that A. should thereafter be the husband of C., and B. the wife of D. Or which should enact that the homestead now owned by A. should no longer be his, but should henceforth be the property of B . . . This power [the taxing power] can as readily be employed against one class of individuals and in favor of another, so as to ruin the one class and give unlimited wealth and prosperity to the other, if there is no implied limitation of the uses for which the power may be exercised. To lay with one hand the power of the government on the property of the citizen, and with the other to bestow it upon favored individuals to aid private enterprises and build up private fortunes, is none the less a robbery because it is done under the forms of law and is called taxation. This is not legislation. It is a decree under legislative forms." *Ibid.,* pp. 663–664.

[36] McCurdy contends that "[i]n 1886 the major components of Field's *Slaughterhouse Cases* dissent received the approbation of the court", referring to *Yick Wo* v. *Hopkins*, 118 U.S. 356 (1886). McCurdy, *supra* note 26, p. 250.

[37] Benedict, *supra* note 26, p. 326. Benedict attributes the success of "laissez-faire notions of liberty . . . to the fact that its major thrust, hostility to 'special' and 'class' legislation, was already ingrained in American law and political theory". *Ibid.,* p. 314.

[38] *See* Gillman, *supra* note 26.

[39] *See also* Jacobs, *supra* note 35, p. 162: "Field and, to a lesser extent, Bradley emphasised the privileges-and-immunities clause of the Fourteenth Amendment as the guarantee of economic liberty. Their efforts in this direction did not succeed. Rather it was the due-process clause – the provision which Cooley regarded as the major limitation on legislative power – under which the right to choose and follow a lawful calling was eventually subsumed." Jacobs links three issues here: Field's jurisprudence on what is public and what is private; the protection of economic liberty which was later based partly on Field's *Slaughterhouse cases* dicta and the due process clause. Jacobs finds it illustrative of the 19th century law writers' influence that the private callings Field discussed in the *Slaughterhouse cases* were later viewed as protected by the due process clauses and not by the privileges and immunities clause. *See also* G. E. White, *The American Judicial Tradition – Profiles of Leading American Judges* (Oxford University Press, Oxford, New York, 1988) p. 119.

taking sides in conflicts between religions, social classes or interest groups",[40] which alone would be able to protect liberty.

2.2.2. Private and Public Spheres

Another doctrine that served to attain or preserve the ideal of a neutral state was the distinction drawn between that which is public and that which is private. This distinction was considered important in keeping the state's redistributive tendencies in check and generally in preventing a tyranny of the majority,[41] and it was extremely influential in 19th century American legal thought.

It has already been mentioned that Justice Field may have laid the cornerstone of *laissez-faire* constitutionalism.[42] It has been argued – and convincingly so – that drawing a line between public and private spheres was a *leitmotif* in his jurisprudence.[43] True to the legal methodology of the time, which required symmetry and consistency but also bright line demarcations between categories,[44] Field's aim was to draw a line between acceptable and unconstitutional police power regulations of business. He sought to do so by applying concepts from the law of eminent domain and taxation;[45] namely public purpose, inalienability and just

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[40] Horwitz, *supra* note 27, p. 19.

[41] M. J. Horwitz, 'The History of the Public/Private Distinction', 130 *U. Pa. L. Rev.* (1982) pp. 1423, 1425.

[42] *See* McCurdy, *supra* note 26, p. 247.

[43] *See* McCurdy, *supra* note 26.

[44] *See* on 19th century legal thought in general Horwitz, *supra* note 27; W. M. Wiecek*, The lost world of classical legal thought: law and ideology in America 1886–1937* (Oxford University Press, New York, 1998); D. Kennedy, 'Toward an historical understanding of legal consciousness: The case of classical legal thought in America, 1850–1940', 3 *Research in Law and Sociology* (1980) p. 3.

[45] Concerning taxation, *see Loan Ass'n.* v. *Topeka*, 87 U.S. (20 Wall.) 655 (1874). The majority of the Court invalidated a law permitting taxation of the citizens of Topeka, needed to pay off bonds issued to entice a manufacturer of iron bridges to set up shop in the city. Speaking for the Court, Justice Miller stated that: "We have established, we think, beyond cavil that there can be no lawful tax which is not laid for a public purpose." *Ibid.,* p. 664. Since the Court found that "there is no difficulty in holding that this is not such a public purpose as we have been considering. If it be said that a benefit results to the local public of a town by establishing manufactures, the same may be said of any other business or pursuit which employs capital or labor. The merchant, the mechanic, the innkeeper, the banker, the builder, the steamboat owner are equally promoters of the public good, and equally deserving the aid of the citizens by forced contributions. No line can be drawn in favor of the manufacturer which would not open the coffers of the public treasury to the importunities of two-thirds of the business men of the city or town." *Ibid.,* p. 665. *See also* C. G. Haines, 'Judicial Review of Legislation in the United States and the Doctrines of Vested Rights and of Implied Limitations on Legislatures', 2 *Tex. L. Rev*. (1924) pp. 257–290 and 387–421. A continuation of the article was published in 3 *Tex. L. Rev.* (1924) pp. 1–43. Haines noted that "the courts . . . gradually added refinements and distinctions which made of public purpose

compensation, and thus to attain symmetry in the jurisprudence concerning the "trinity of high powers" – the power of taxation,[46] the power of eminent domain and the police power. By drawing the line between constitutional and unconstitutional regulation by dividing entities into those private and those public, Field also aimed for consistency in that those who could wield public power (often railroad companies, which had been permitted to exercise the power of eminent domain) or had received public money could be regulated while those whose business needed no government grant or concession, who wielded no government power and received no public money, could not.[47] Hence his dissent in the *Slaughterhouse cases*, mentioned above. Superimposed on this, of course, was the scope of the police power, which will be discussed later. Valid police power regulations applied to private entities as well as public ones.

Field was not by any means alone in his attempts to draw a clear line between public and private. Indeed, it has been said that after the Civil War "Americans became 'obsessed . . . with the necessity for making the distinction between public and private spheres of action'".[48] This distinction informed most American law but was later to prove especially important in the substantive due process and commerce clause fields.[49] In the substantive due process area, this distinction was key in the "closely related areas of price regulation, regulation of hours of work, and wage regulation".[50] It was not until 1934 that the categories created by this distinction for the purposes of substantive due process foundered, as the Supreme Court declared in *Nebbia* v. *NY* that "that there is no closed class or category of businesses affected with a public interest",[51] which was understood as opening the door to regulation of private businesses outside the narrow class of businesses affected with a public interest.

It is important in this context to note that the distinction between public and private – while it was key in certain areas of jurisprudence - was pervasive in 19th century American legal thought and was viewed as one of the key elements in

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with respect to taxation one of the most effective implied limitations on legislative powers." Haines, 2 *Tex. L. Rev*. p. 387 at p. 413.

[46]H. N. Scheiber, 'The Road to *Munn*: Eminent Domain and the Concept of Public Purpose in the State Courts' in Fleming and Bailyn (eds.), *Law in American History* (Charles Warren Center for Studies in American History, Harvard University, Cambridge, 1971) (Perspectives in American History V, 1971) p. 329 at p. 400.

[47] *See* McCurdy, *supra* note 26, pp. 250 and 264.

[48] *See* O. and M. Handlin, *The Dimensions of Liberty* (Belknap Press of Harvard University Press, Cambridge,1961) p. 99. To take a concrete example in addition to Justice Field, Scheiber notes that "[i]n Cooley's view, there was an abstract (and inviolable) line that separated public-sector from private-sector activities – a line which distinguished between 'the public conveniences which it is the business of the government to provide,' on the one side, and 'those which private interest and competition will supply whenever the demand is sufficient,' on the other side." Scheiber, *supra* note 46, p. 389.

[49] *See in general* Cushman, *supra*.

[50] *Ibid.,* p. 48.

[51] *Nebbia* v. *New York*, 291 U.S. 502 (1934), 536.

protecting liberty and the rights of the political minority at any given time.[52] In a sense, it had an effect similar to the one achieved by the illegitimacy of special legislation; it lowered the stakes concerning who is in government by staking out a private sphere, wherein the government had no say.

It is also important to recall that the trains of thought described here were all interconnected. The public purpose requirement in eminent domain law, for instance, can be understood as an expression of the hostility towards special legislation; private property can only be taken for public purposes because to do so for a private purpose would be taking property from one and giving it to another – the most despised kind of special legislation.[53] The public purpose requirement was then extended from the law of eminent domain to taxation[54] and the police power,[55] affecting its scope – which will be discussed later. The distinction between public and private, and for that matter the abhorrence of special privileges and special legislation, also played an important supporting role in the doctrine of vested rights.

2.2.3. Vested Rights

The doctrine of vested rights was immensely important in 19th century American legal thought.[56] The fundamental tenet of the doctrine, that legislation which impaired vested rights was void, had its roots in natural rights considerations; that there were certain rights that lay beyond legislative reach.[57] This link was particularly clear in *Calder* v. *Bull*,[58] decided in 1798. The question was whether the

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[52] *See* Cushman, *supra* note 26, p. 47: "The tendrils of the public/private distinction permeated everything from nuisance law to contracts clause jurisprudence, from the law of civil rights to the law of riparian rights" and the sources referred to therein.

[53] Benedict, *supra* note 26, pp. 324–5 notes that "courts agreed that 'the right of eminent domain does not . . . imply a right in the sovereign power to take the property of one citizen and transfer it to another, even for a full compensation, where the public interest will be in no way promoted by such transfer'." Citing *Beekman* v. *Saratoga & Schenectady Rr. Co*., 3 Paige 45, 73. (NY. 1831). Similarly, McCurdy notes that even though "eminent domain law was primarily a state matter" in the 19th century, the U.S. Supreme Court did "often reiterate that private property could only be expropriated 'in execution of works in which the public is interested'". McCurdy, *supra* note 26, p. 248, citing *Boom Co.* v. *Patterson*, 98 U.S. (8 Otto) 403, 406 (1878).

[54] Horwitz, *supra* note 27, pp. 11 and 22–4 and *Loan Ass'n* v. *Topeka*, 87 U.S. (20 Wall.) 655 (1874).

[55] McCurdy, *supra* note 26, pp. 263–4 and *Chicago, Milwaukee & St. Paul Ry. Co.* v. *Minnesota*, 134 U.S. 418 (1890). On the public purpose requirement prior to *Munn*, *see* Scheiber, *supra* note 46.

[56] E. S. Corwin, 'The Basic Doctrine of American Constitutional Law', 12 *Mich. L. Rev*. (1914) p. 247 at pp. 247 and 275–6. The doctrine of vested rights was also to prove very important in Norwegian constitutional law. Those developments will be discussed in the next two chapters.

[57] *See* A. H. Kelly *et al.*, *The American Constitution – Its Origins and Development* (6th ed.) (Norton, New York, 1983) p. 193 and Haines, *supra* note 45 p. 286.

[58] *Calder* v. *Bull*, 3 U.S. (3 Dall.) 386 (1798).

Constitution's prohibition of *ex post facto* laws prevented the decision of Connecticut's legislature to grant a new hearing concerning the validity of a will – a hearing that resulted in the legatee under the rules of intestate succession losing the property to a person named in a will which had previously been held invalid. The references to the social compact in Justice Chase's opinion are famous. He wrote:

> "An ACT of the Legislature (for I cannot call it a law) contrary to the great first principles of the social compact, cannot be considered a rightful exercise of legislative authority. The obligation of a law in governments established on express compact, and on republican principles, must be determined by the nature of the power, on which it is founded. A few instances will suffice to explain what I mean . . . a law that destroys, or impairs, the lawful private contracts of citizens . . . or a law that takes property from A and gives it to B: It is against all reason and justice, for a people to entrust a Legislature with SUCH powers; and, therefore, it cannot be presumed that they have done it. The genius, the nature, and the spirit, of our State Governments, amount to a prohibition of such acts of legislation; and the general principles of law and reason forbid them. The Legislature may enjoin, permit, forbid, and punish . . . but they cannot change innocence into guilt; or punish innocence as a crime; or violate the right of an antecedent lawful private contract; or the right of private property."[59]

The Court came to the conclusion that the *ex post facto* clause "was to secure the person of the subject from injury, or punishment, in consequence of such law" and not "to secure the citizen in his private rights, of either property, or contracts".[60] However, Justice Chase added that "[e]very law that takes away, or impairs, rights vested, agreeably to existing laws, is retrospective, and is generally unjust, and may be oppressive; and it is a good general rule, that a law should have no retrospect…"[61]

This view that it was "generally unjust" and possibly oppressive to impair vested rights with legislation, was based partly on ideas related to the hostility towards special legislation; that legislatures should not be able to take property that had vested in one person and transfer it to another.[62] In part, it was also based on these laws' similarity to bills of attainder and *ex post facto* laws – laws that made actions criminal after the fact, often to a stiff penalty, or inflicted criminal punishment without trial and which had been used in many European states for political persecutions.[63] One commentator has also noted that at least before the Civil War, the doctrine gained considerable support from the doctrine of separation of powers; a strict construction or observation of the separation of legislative and judicial power resulted in a convincing argument that legislatures were encroaching

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[59] *Ibid.,* p. 388.
[60] *Ibid*., p. 390.
[61] *Ibid*., p. 391.
[62] Benedict, *supra* note 26, p. 323 and Corwin, *supra* note 56, pp. 258–9, citing *Holden* v. *James*, 11 Mass. 396 (1814) and *Vanzant* v. *Waddel*, 10 Tenn. 260 (1829), which both stipulated that laws (suspension of laws and laws respectively) should be of general application.
[63] *See* concerning England, the discussion in *Calder* v. *Bull*, 3 U.S. (3 Dall.) 386, 389 (1798).

on judicial power when they disturbed vested rights. That could constitutionally be done only by the courts in a criminal suit or in a civil suit in which someone showed better title.[64]

It was clear from *Calder* v. *Bull* that the Constitution's prohibition of *ex post facto* laws did not hinder legislation impairing vested rights. In *Fletcher* v. *Peck*, decided in 1810, the Supreme Court referred to the contracts clause of the Constitution,[65] and then asked "this very interesting question . . . what is a contract? Is a grant a contract?"[66] Chief Justice Marshall, speaking for the Court, answered the question in the affirmative, finding that a legislative "grant is a contract executed" and therefore can not be changed or revoked by the legislature. [67] This applied to all grants, so the state could not revoke privileges once granted, whether they concerned land,[68] tax exemptions[69] or corporate charters.[70] The contracts clause of the

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[64] Corwin, *supra* note 56, pp. 259–261. *See also* J. Harrison, 'substantive Due Process and the Constitutional Text', 83 *Va. L. Rev*. (1997) p. 493, discussing *inter alia* the reading of the due process clauses "claiming that judicial procedure is not simply an example of due process of law but is its definition" (*ibid.,* p. 506), and arguing that under this reading, due process protected vested rights based on considerations of government structure. Harrison argues that this reading "almost certainly underlies the Court's vested rights due process cases starting with Dred Scott and lasting until at least 1880". *Ibid.,* p. 513 (footnote omitted). *See also* W. Mendelson, 'A Missing Link in the Evolution of Due Process'*,* 10 *Vand. L. Rev*. (1956) p. 125 arguing that separation of powers was "a vital link in the evolution of due process". Mendelson argues that while 19th century courts were not yet willing to accept a substantive due process concept, cases were argued – and won – on the argument that when laws were not general or when they were retroactive, the legislature was in fact usurping judicial power and that the deprivation of life, liberty or property effectuated by the legislation was not according to due process of law, because that included only judicial process.

[65] Art. I, section 10, stating in relevant part that "[n]o State shall . . . pass any . . . Law impairing the Obligation of Contracts".

[66] *Fletcher* v. *Peck*, 10 U.S. (6 Cranch) 87, 136 (1810).

[67] *Ibid.,* p. 137.

[68] *See Terrett* v. *Taylor*, 13 U.S. (9 Cranch) 43, 50–51 (1815): "If the legislature possessed the authority to make such a grant and confirmation, it is very clear to our minds that it vested an indefeasible and irrevocable title. We have no knowledge of any authority or principle which could support the doctrine that a legislative grant is revocable in its own nature, and held only *durante bene placito*. Such a doctrine would uproot the very foundations of almost all the land titles in Virginia, and is utterly inconsistent with a great and fundamental principle of a republican government, the right of the citizens to the free enjoyment of their property legally acquired."

[69] *New Jersey* v. *Wilson*, 11 U.S. (7 Cranch) 164 (1812).

[70] The position concerning corporate charters was soon modified. Justice Story hinted at the possibility of valid reservation clauses in the *Dartmouth College* case. *See Trustees of Dartmouth College* v. *Woodward*, 17 U.S. (4 Wheat.) 518 (1819). It was then established in *Proprietors of Charles River Bridge* v. *Proprietors of Warren Bridge*, 36 U.S. 420 (1837) that corporate charters should be strictly construed. On this development, *see* McCurdy, *supra* note 26, pp. 255–256. On *Dartmouth College, see* F. N. Stites*, Private Interest and Public Gain; The Darthmouth College Case, 1819* (University of Massachusetts Press, Amherst, 1972).

Constitution thus became the main vehicle for claims that vested rights had been impaired and was therefore "by far the signal constitutional limitation on legislative abuse of private rights" in the antebellum period.[71]

Which rights were protected by the doctrine of vested rights changed with time. Corwin stated that "[v]ested rights are rights vested in specific individuals in accordance with the law in what the law recognizes as *property"*, [72] although tax exemptions and rights derived from a corporate charter were also viewed as vested rights, as mentioned above. The concept of property underwent a profound change in the 19th century. The right of property was broken up into its components, for instance the right of utilisation, and each of those was accepted as a property right.[73] Over the course of the century property changed from referring mainly to land to referring to the exchange or market value of whatever was at issue.[74]

This led to changes in the relationship between regulation and the doctrine of vested rights. For how is it possible, once property is based on market value, to "avoid the conclusion that any governmental activity that changes expectations and hence lowers the value of property constitutes a taking"?[75] This was worked out after the Civil War, as plaintiffs started to challenge regulatory legislation on the basis of the doctrine of vested rights. In cases concerning laws that made it illegal to hold certain property that was legal when acquired, the courts generally rejected vested rights claims.[76] Prohibition laws were the stereotypical example of such laws,

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[71] McCurdy, *supra* note 26, p. 255.

[72] Corwin, *supra* note 56, p. 271.

[73] Corwin noted that "So far as the courts liberalised the legal notion of the property right it was chiefly by analysing it into its constituent elements, the right of use, the right of sale . . . and so on, which were sometimes recognised as property rights even when inhering in another than the legal owner." *Ibid.,* p. 272.

[74] Horwitz refers to this change as "the abstraction of property" (Horwitz, *supra* note 27, p. 149). The change is evident in the law of eminent domain. Prior to *Pumpelly* v. *Green Bay Co*., 80 U.S. (13 Wall.) 166 (1871), a taking was conditional on title being taken (*see e.g.,* Scheiber, *supra* note 46, p. 383) but in that case the Supreme Court awarded compensation for land that had been flooded by a dam, for "[i]t would be a very curious and unsatisfactory result, if in construing a provision of constitutional law, always understood to have been adopted for protection and security to the rights of the individual as against the government, and which has received the commendation of jurists, statesmen, and commentators as placing the just principles of the common law on that subject beyond the power of ordinary legislation to change or control them, it shall be held that if the government refrains from the absolute conversion of real property to the uses of the public it can destroy its value entirely, can inflict irreparable and permanent injury to any extent, can, in effect, subject it to total destruction without making any compensation, because, in the narrowest sense of that word, it is not *taken* for the public use". (*Pumpelly,* pp. 177–8). On the change in the conceptualisation of property in the 19th century, *see* Horwitz, *supra* note 27, pp. 145–167; Corwin, *supra* note 56, pp. 271–273 and Scheiber, *supra* note 46.

[75] Horwitz, *supra* note 27, p. 149.

[76] *See Mugler* v. *Kansas*, 123 U.S. 623 (1887) and *Beer Co.* v. *Massachusetts*, 97 U.S. 25 (1877). In *Mugler*, a Kansas prohibition law was upheld against, *inter alia*, the challenge that it was inconsistent with the due process clause because the breweries at issue lost most of

and Benedict points out that they were upheld in the vast majority of the states.[77] Rate regulation was another example of such regulation.[78] Horwitz comments on this period that

> "as the definition of a property right became divorced from concrete physical objects with bright-line boundaries and came to turn more and more on abstract ideas of individual expectations of stable market values, the very conception of property became infinitely expandable. The result was that during the 1880s and 1890s a variety of new property interests for the first time received recognition by American courts. These property interests were endowed with what, by traditional standards, can only be called extravagantly expanded prerogatives. During this period, American courts came as close as they ever had to saying that one had a property right in an unchanging world."[79]

As the 19th century wore on, it therefore became clearer that a great many important cases, such as those concerning rate regulations and hour- and wage regulations, were going to involve the considerations behind the vested right doctrine on the one hand and the police power on the other. "The boundary of the police power beyond which its exercise becomes an invasion of the guaranty of liberty under the Fifth and Fourteenth Amendments to the Constitution is not easy to mark", lamented Chief Justice Taft in *Adkins*, decided in 1923, adding that "[o]ur Court has been laboriously engaged in pricking out a line in successive cases".[80] That is exactly what was going on in much of the Supreme Court's jurisprudence around the turn of the 20th century. A great part of the jurisprudence can best be explained, not by reference to economic or social bias or by subservience to business interests, but instead by reference to the intellectual legacy of American law which has been partly described above and some factors that have not been discussed here, such as the influence of abolitionist ideology.[81] The people involved viewed themselves not only as engaged in drawing this line, but as engaged in preserving liberty. They inherited a legal world-view in which it was key to limit state power; the state was not viewed as a guarantor of liberty but as a threat to it. It was against, and because

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their value. The case was argued on vested rights grounds. In the *Boston Beer case* (*Beer Co.* v. *Mass.*) prohibition was not viewed as inconsistent with the Boston Beer Co's constitutional rights, even though it had been granted a right – in its charter – to manufacture and sell alcohol.

[77] Benedict, *supra* note 26, p. 327, writes that only in New York and Indiana were such laws struck down and cites *Wynehamer* v. *New York* (13 N.Y. 378 (1856)) and *Beebe* v. *State*, (6 Ind. 401 (1855)). Scholars differ in their interpretation of *Wynehamer*, compare Horwitz, *supra* note 27, p. 29, note 120. *See also* Haines, *supra* note 45, p. 288 citing cases upholding prohibition.

[78] *See* McCurdy, *supra* note 26, pp. 262–264 and Horwitz, *supra* note 27, pp. 160–165.

[79] Horwitz, *supra* note 27, p. 151.

[80] *Adkins* v. *Children's Hospital*, 261 U.S. 525, 562 (1923) (Taft, C. J., dissenting).

[81] *See* C. W. McCurdy, 'The Roots of 'Liberty of Contract' Reconsidered: Major Premises in the Law of Employment 1867-1937', 1984 *Y.B. Supreme Court Historical Society* p. 20.

of, this world-view that the doctrine of liberty of contract flourished and the decisions subsumed under the rubric of "*Lochner* era jurisprudence" were made. Some of the ideas that were influential in forming this jurisprudence by suggesting why state power should be constrained, many of which appear clearly in the doctrine of vested rights, have already been examined. Let us now look at the development and scope of the police power.

2.2.4. The scope of the Police Power

In 1914, Edward Corwin remarked that the doctrine of vested rights predated the doctrine of the police power.[82] In any case, it is clear that in the context of economic regulation – or government-business relations – the police power was the most important state power. In the second half of the 19th century, the police power was conceptualised as an extension of the common law power of the state to abate nuisances.[83] The common law principle that each should use his own so as not to injure another (*sic utere tuo, ut alieum non laedas*), was thus the basis upon which police power regulation was sustained; since an owner had no property right to use his property as a nuisance, abatement of a nuisance was not a taking.[84]

The line between the police power and the power of eminent domain was an important one. Valid exercises of the police power were not viewed as takings.[85] Even when they had the effect of drastically diminishing the value of property, the courts afforded no relief because, [86] as stated in the *Boston Beer* case: "If the public

[82] Corwin, *supra* note 56, p. 247.

[83] This is in accord with what has been described above concerning the neutral state. Horwitz mentions this conceptualisation of the police power as an example of the emphasis on private law in classical legal thought and of regulation drawing its validity from accepted doctrines of private law. Horwitz, *supra* note 27, pp. 27–8. On the relation between common law and justifications for state power and the judicial function, *see ibid.,* p. 112.

[84] *See Commonwealth* v. *Alger*, 61 Mass. 53, 86 (1851): "Nor does the prohibition of such noxious use of property, a prohibition imposed because such use would be injurious to the public, although it may diminish the profits of the owner, make it an appropriation to a public use, so as to entitle the owner to compensation . . . If a landlord could let his buildings for a smallpox hospital, or a slaughter-house, he might obtain an increased rent. But he is restrained; not because the public have occasion to make the like use, or to make any use of the property, or to take any benefit or profit to themselves from it; but because it would be a noxious use, contrary to the maxim, *sic utere tuo, ut alienum non laedas*. It is not an appropriation of the property to a public use, but the restraint of an injurious private use by the owner, and is therefore not within the principle of property taken under the right of eminent domain." *See also* Horwitz, *supra* note 27, pp. 28–29.

[85] *See Commonwealth* v. *Alger*, 61 Mass. p. 86.

[86] *See Mugler*, 123 U.S. 623 (1887). The Court stated "No one may rightfully do that which the law-making power, upon reasonable grounds, declares to be prejudicial to the general welfare . . . [I]t is contended that . . . their respective breweries were erected when it was lawful to engage in the manufacture of beer for every purpose; [that they] will become of no value as property, or, at least, will be materially diminished in value, if not employed in the manufacture of beer for every purpose; the prohibition upon their being so employed is, in

safety or the public morals require the discontinuance of any manufacture or traffic, the hand of the legislature cannot be stayed from providing for its discontinuance, by any incidental inconvenience which individuals or corporations may suffer. All rights are held subject to the police power of the State."[87] This applied equally to rights under corporate charters and property rights, although it was argued in cases concerning both that the rights had vested and could therefore not be impaired by police power regulations – or any other regulations for that matter.[88]

Drawing the line was made easier at first by the conceptualisation of the police power as the power to abate nuisances, since the list of nuisances at common law was relatively clear; "[u]nwholesome trades, slaughter-houses, operations offensive to the senses, the deposit of powder, the application of steam power to propel cars, the building with combustible materials, and the burial of the dead" are cited from Kent's *Commentaries* in the *Slaughterhouse cases* as trades that may "be interdicted by law, in the midst of dense masses of population, on the general and rational principle, that every person ought so to use his property as not to injure his neighbours; and that private interests must be made subservient to the general interests of the community".[89] A type of *quid pro quo* argument supported this doctrine; burdens associated with regulations for the public benefit could be imposed on some but not others because the owner – like everyone else – benefited from the regulations, which were of course expected to be for the general good and not only for the good of a particular group or class.[90] Once again, it is clear how interconnected the different trains of thought described here are.

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effect, a taking of property for public use without compensation, and depriving the citizen of his property without due process of law. In other words, although the State, in the exercise of her police powers, may lawfully prohibit the manufacture and sale, within her limits, of intoxicating liquors to be used as a beverage, legislation having that object in view cannot be enforced against those who, at the time, happen to own property, the chief value of which consists in its fitness for such manufacturing purposes, unless compensation is first made for the diminution in the value of their property, resulting from such prohibitory enactments. [/] This interpretation of the Fourteenth Amendment is inadmissible." *Ibid.,* pp. 663–4.

[87] *Boston Beer*, 97 U.S. 25, 32 (1877).

[88] *Ibid., See also Stone* v. *Mississippi*, 101 U.S. 814 (1880) and *Mugler*, 123 U.S. 623 (1887). The inalienability of the powers of the state was the rationale behind rejecting contracts clause challenges to regulation like the one at issue in *Boston Beer*.

[89] *Slaughterhouse* Cases, 83 U.S. (16 Wall.) 36, 62 (1873), citing Kent's *Commentaries 2*, p. 340.

[90] *Barbier* v. *Connolly*, 113 U.S. 27 (1885). When upholding regulations of business hours in laundries in San Francisco, Justice Field wrote "Special burdens are often necessary for general benefits – for supplying water, preventing fires, lighting districts, cleaning streets, opening parks, and many other objects. Regulations for these purposes may press with more or less weight upon one than upon another, but they are designed, not to impose unequal or unnecessary restrictions upon any one, but to promote, with as little individual inconvenience as possible, the general good. Though, in many respects, necessarily special in their character, they do not furnish just ground of complaint if they operate alike upon all persons and property under the same circumstances and conditions. Class legislation, discriminating against some and favoring others, is prohibited, but legislation which, in carrying out a public

One commentator has noted that although many legal writers distinguished between the exercise of eminent domain and an exercise of the police power on the basis of *a priori* categories, many others "more persuasively" conceived of the two as on a continuum differing only in the extent of the interference with the property right.[91] It seems likely that what is being described is a generational split. Justice Holmes and late 20th century commentators are proponents of the second view.[92] On the other hand, it is clear from *Boston Beer*, *Commonwealth* v. *Alger* and *Mugler* that lawyers and judges in the period from 1850 to 1880 did view these state powers as categorically separate. Such a development in drawing the line between the power of eminent domain and the police power also fits the general model of changing legal thought in this period – the ascendence and then decline of categories that did, in the meantime, become ever more abstracted and general.[93]

2.2.5. Summary

There was considerable emphasis on separating law and politics in late 19th century legal thought, intended to avoid majority tyranny.[94] At first, this separation took the form of judges staying true to the common law and vindicating natural rights, while emphatically not making policy. The idea of custom justifying legislation and coercion by the state emerged concurrently with this.

The legal thought and the jurisprudence that arose out of this concern have been described as formalistic and conceptualistic.[95] Legal thought was certainly more categorical than we are used to.[96] Thinking in terms of bright-line distinctions of kind and not in shades of grey or in terms of balancing tests did influence the

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purpose, is limited in its application, if within the sphere of its operation it affects alike all persons similarly situated, is not within the [Fourteenth] amendment." *Ibid.,* pp. 31–32. A year later, the Court made good on this promise by invalidating the conviction in *Yick Wo*– where there had been clear discrimination. *See Yick Wo* v. *Hopkins*, 118 U.S. 356 (1886). *See also* McCurdy, *supra* note 26 p. 251. On the influence of the *quid pro quo* principle in the doctrine of vested rights, *see e.g*., Corwin, *supra* note 56. *See* Scheiber, *supra* note 46, p. 375, for a citation referring to such considerations in a police power context.

[91] *See* Scheiber, *supra* note 46, and J. L. Sax, 'Takings and the Police Power', 74 *Yale L. J.* 37, 41 (1964): "Holmes saw no qualitative difference between traditional takings and traditional exercises of the police power, but only a continuum in which established property interests were asked to yield more or less to the pressures of public demands . . . The specific point on which Holmes seems to have chosen to focus the constitutional question was the extensiveness of the economic harm inflicted by the regulation."

[92] As an example of an opinion by Justice Holmes in this field, *see Pennsylvania Coal Co.* v. *Mahon*, 260 U.S. 393 (1922), discussed *infra* note 275.

[93] *See* Horwitz, *supra* note 27; Kennedy, *supra* note 44 and Horwitz, *supra* note 41.

[94] *See* Horwitz, *supra* note 27, pp. 9 and 193.

[95] *Ibid*., p. 16.

[96] This is true of domestic law. In most jurisdictions, we seem to retain a very categorical style of thought concerning international law; making sharp distinctions between economical and non-economical rights and between the rights of individuals and those of groups.

doctrine and the jurisprudence.[97] One commentator has noted that very abstract doctrines were perceived as having more binding effect during this period than during many others.[98]

It is therefore clear, and it matters for what follows, that the thoughts of late 19th and early 20th century lawyers or legal thinkers ran, at least in part, on different tracks from ours. Besides the methodological difference, the key issues to keep in mind are the emphasis on the neutral state and on law being apolitical, the influence of natural law, the protection of liberty, the distinction between public and private, and the hostility towards special legislation and special privilege. It must also be remembered that legal doctrine and legal thought changed considerably during the seventy or so years described here, and that the trains of thought described here were not all at the same level of generality; in other words, some of those doctrines had roots in others or were less abstract versions of them. Finally, it is necessary to note that all of these doctrines were interconnected.

2.3. AMERICAN LAW IN NORDIC THEORY

In this section, the influence of American legal thought on Nordic constitutional law treatises will be documented. Treatises were extremely important in late 19th century legal thought – on both sides of the Atlantic – and were widely viewed as authoritative.

It will be argued that in the 19th and early 20th centuries, American law influenced Nordic constitutional law mainly through legal writings. The main focus will be on a Norwegian treatise from the 1880s, *Norges nuværende statsforfatning - The Present Constitution of Norway,*[99] because it was the seminal text in Norwegian constitutional law during this period and proved immensely influential in Denmark and Iceland. It will be argued that the general jurisprudential ideas that underlay the treatise were in great part inspired by American legal thought. The main theory in this chapter is that, inspired by American legal literature, this treatise focused on constitutional limitations of legislative power to a novel degree. Most importantly, the treatise's very influential sections on judicial review were closely modelled on the sections on judicial review in Cooley's *Constitutional Limitations*.[100] The treatise's emphases on stable expectations and the protection of property and vested rights were also inspired by American constitutional law. It will be described how American law influenced the discussion of substantive areas of the law, such as the law of eminent domain and taxation, and how the Norwegian doctrine of vested

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[97] *See e.g.*, McCurdy, *supra* note 26.
[98] Kennedy, *supra* note 44, p. 21.
[99] T.H. Aschehoug, *Norges nuværende statsforfatning* [*The Present Constitution of Norway*] (Christiania, 1875-1885*).*The lectures that formed the foundation of the treatise were published in the 1860s. What follows will mostly be based on the 2nd edition of this treatise, published in 1891–3, because that was the edition cited by other writers and by Norwegian courts.
[100] *Constitutional Limitations, supra* note 33.

rights was to a great extent based on American contracts clause jurisprudence and theory.

In addition to this treatise, the constitutional theory of three younger Norwegian constitutional scholars, writing from 1900 to the 1920s, will be examined briefly. Their writings illustrate how the further development of the theory set out in *The Present Constitution of Norway* and later, the response to it, were all based to some extent on American law. The main emphasis in this section will be on legal developments in Norway, since Danish and Icelandic theory on judicial review built, to a great degree, on Norwegian theory. Danish and Icelandic theory will therefore be discussed only briefly.

2.3.1. The Role of Treatises in 19th Century Constitutional Law

By the 1860s, Norwegian debates and writings concerning judicial review referred frequently to American law.[101] In spite of this awareness of American judicial review, American cases were rarely discussed. The references to American law were usually very generalised and abstract, and until the 1920s even scholars who relied heavily on American legal thought referred to writers and commentators rather than cases.[102]

This may have been due, in part, to the inaccessibility of American court opinions, but treatises in general carried great authority in Nordic law at the time. That was due to a number of factors, including the fact that Danish and Norwegian Supreme Court opinions were not published until late in the 19th century, the opinions' inaccessibility and, perhaps, remnants of the distrust of precedent that characterised the absolute monarchy.[103] The authority of treatises is clear from

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[101] *See e.g.,* R. Slagstad, 'Den norske Høyesteretts prøvingsrett i perioden 1850–1920' [Judicial Review in the Norwegian Supreme Court from 1850-1920] in Nygren (ed.), *Högsta domsmakten i Sverige under 200 år* [*The Highest Judicial Power in Sweden for 200 Years*] (Lund, 1990) p. 149, in general and p. 168 (hereinafter Slagstad, Judicial review); R. Slagstad, 'The Breakthrough of Judicial Review in the Norwegian System', in Smith (ed.), *Constitutional Justice Under Old Constitutions* (Kluwer, The Hague, 1995) p. 81. Already in an 1862 article, it was stated that "[t]he judicial authority thus occupies in our constitutional system the same place as in the American, as a state power beside the legislative and executive powers". *Ibid.,* p. 86, citing Andresen, 'Om den dømmende Magt' [On the Judicial Power], published in *UfL. II*, p. 358.

[102] This is especially true of T.H. Aschehoug, who wrote *Norges nuværende statsforfatning.* Aschehoug will be discussed in more detail later, but he frequently cited American treatises and commentaries as well as state constitutional provisions but only rarely American cases. By contrast, Lie, writing in 1923, referred to individual cases. *See* M. H. Lie, *Domstolene og grunnloven* [*The Courts and the Constitution*] (Kristiania, 1923), and the discussion *infra* in chapter 2.3.5. The Influence of American Court-critics – Mikael Lie

[103] A law was passed in 1856, mandating that the Danish Supreme Court explain its decisions in writing. The opinions were then published, starting in 1857. Dissents, on the other hand, were not published until after 1937. D. Tamm, 'Danmarks Højesteret under den liberale retsstat 1850–1920' [The Danish Supreme Court under the Liberal State 1850-1920] in Nygren (ed.), *Högsta domsmakten i Sverige under 200 år* [*The Highest Judicial Power in*

contemporary jurisprudential writings and from the frequent citations to treatises found in Norwegian Supreme Court cases. Treatise writers and legal commentators also carried great weight in the U.S. during this period.[104]

Norwegian lawyers in search of information on American law thus looked to American treatises. In turn, the Norwegian treatises became authoritative in Norway and influential in the other Nordic countries. So even though the doctrines advanced in the Norwegian treatises did not all make their way to case law, one must in the first instance look at them to analyse the impact of American legal thought on Nordic constitutional law.

2.3.2. "The Present Constitution of Norway"

One of the fundamental works of Norwegian constitutional law, T.H. Aschehoug's *Norges nuværende statsforfatning* (*The Present Constitution of Norway*) was published between 1866 and 1885.[105] It was frequently cited in Supreme Court cases and it hugely influenced Norwegian jurisprudence in the decades around 1900. Frequently, the commentary set the terms for the debate, so legal disputes centred on which party correctly interpreted the text of the treatise.[106] Even after Aschehoug's successor at the University of Oslo, Bredo Morgenstierne, published a constitutional law treatise in 1900, Aschehoug's treatise was frequently cited in court opinions.[107]

Sweden for 200 Years] (Lund, 1990) p. 136 at p. 140. The opinions of the Norwegian Supreme Court were secret until 1863 and the opinions written before that time have not been published in their entirety even though they can now be found by going through the protocols of the Supreme Court. Therefore, not all cases pre-dating 1863 are known. *See* Smith, *supra* note 3, p. 120.

[104] Jacobs notes that "[d]uring this period the text writers, Cooley and Tiedeman, acquired tremendous prestige, and their works were widely quoted by lawyers and judges." Jacobs, *supra* note 35, p. 64. *See also* White, *supra* note 39, p. 46: "their synopses in a sense became modest exercises in making law. [/] This was the central function of the celebrated treatises . . ."

[105] On the basis of this treatise, Smith refers to Aschehoug as "the first constitutional law writer in Norway". Smith, *supra* note 3, p. 179.

[106] In quite a few cases, the debate between the parties and between the different factions of the Court centered on the correct interpretation of Aschehoug – his commentary was rarely challenged. *See e.g.,* Rt. 1924.12, where both the majority and the minority of the lower court cited Aschehoug. The Supreme Court endorsed the lower Court's opinion, arguing that when the dissenter in the lower Court "refers to Aschehoug's *Norges nuværende statsforfatning III*, p. 254, to support his decision, he is misunderstanding Aschehoug's comment…" *Ibid., p.* 14. This case was overruled in Rt. 1924.18, and the majority opinion in that case cited Aschehoug as well. Cooley's influence in American law has been described as similar, *see* Jacobs, *supra* note 35, p. 30.

[107] This may be because Morgenstierne was seen as standing in Aschehoug's shadow. *See* on the other hand R. Slagstad, *Rett og Politikk – Et Liberalt Tema med Variasjoner* [*Law and Politics – A Liberal Theme with Variations*] (Universitetsforlaget, Oslo, 1987) pp. 54–5 and Lie, *supra* note 102, pp. 51–53, where Lie discussed Morgenstierne's views as distinct from

Norges nuværende statsforfatning also influenced Danish writers in the late 19th century and Icelandic law in the first decades of the 20th century.[108] This was true concerning the focus and structure of the treatise, the discussion of judicial review, and the discussion of constitutional rights more generally.

In Norway, the influence of *Norges nuværende statsforfatning* was especially marked in the areas of judicial review and constitutional protection of vested rights. In a 1918 landmark opinion in which the Supreme Court discussed its power of judicial review, the treatise was cited in four of the six opinions published. Justice Backer, writing for the majority, stated that

> "the constitution puts legal limitations on the legislature's competence to make decisions and the Court has a right and a duty to review whether these limitations are respected or overstepped. I believe it sufficient in this context to refer to the developments described in Aschehoug's [Norges nuværende statsforfatning], to the essay by Morgenstierne in Rt. 1913.449 and to the cases described by those authors . . . I will just note that I agree with Aschehoug's comment in Ch. 63, art. 20 in fine; that the courts need to be especially careful to set a law aside when the legislature has debated the law's constitutionality specifically when enacting it and come to the conclusion that the law is constitutional."[109]

Partly because of the treatise's influential discussion of judicial review, Norwegian constitutional history has paid much attention to *Norges nuværende statsforfatning*. Its third volume, dealing with judicial review and limitations upon state power, was published in 1885 amid a raging controversy over the King's veto power, which culminated in the impeachment of the cabinet and contributed to the adoption of a parliamentary system of government and a corresponding loss of power in the executive.[110] Partly because Aschehoug was a conservative politician, it has been argued that

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Aschehoug's and perhaps going further in the direction of vesting the power of judicial review in the courts.

[108] *See* discussion *infra*, 2.3.6. Danish and Icelandic Writings

[109] Rt. 1918.401, 404–5. Norwegian constitutional law scholars have emphasised Aschehoug's influence in this field. Castberg commented *e.g.* that it "has been especially important for development in this area that Aschehoug, influenced by American theory and practice, so forcefully advanced the theory that the courts could set aside unconstitutional laws". F. Castberg, *Norges statsforfatning II* [*The Constitutional Law of Norway II*], (3rd ed.) (Universitetsforlaget, Oslo, 1964) p. 168. *See also* F. Hiorthøy, 'Domstolene og forfatningsutviklingen' [The Courts and Constitutional Developments] in *Den dømmende makt: Domstolene og rettsutviklingen 1814–1964* [*The Judicial Power: Courts and Legal Developments 1814–1964*] (Universitetsforlaget, Oslo, 1967) p. 69 at pp. 120–121 and 151 and T. Eckhoff, 'Noen Refleksjoner om Domstolenes Uavhængighet' [Some Reflections on the Independence of the Courts] in *Juss, moral og politikk* [*Law, Morals and Politics*] (Universitetsforlaget, Oslo, 1989) p. 221. Eckhoff emphasises Aschehoug's knowledge of American law and the influence of Cooley's *Constitutional Limitations* on Aschehoug's thought.

[110] *See e.g.,* Helset & Stordrange, *supra* note 8, pp. 93–96 and G. Astrup Hoel, 'Vetospørsmålet i 1880-årene' [The Conflicts concerning the King's Veto in the 1880s] in

> "[t]he Norwegian cabinet had, in the conservative political theory of the 1870s and 1880s, been elevated to the status of a kind of second chamber, which had the job of protecting the interest of the 'minority' from an overpowering majority of Parliament. After the impeachment proceedings [in 1885], the idea arose that the veto which the cabinet had lost could be reclaimed in the Supreme Court, in the form of a right to review whether a law was legal . . . It was Aschehoug, in the 3rd part of his constitutional law [treatise] in 1885, who established judicial review as an integral part of Norwegian constitutional law. He forcefully pressed the available precedents, so that he could establish a rule of constitutional custom. Supported by 'custom' he could break away from older constitutional theory."[111]

Much of the constitutional debate in the 1960s focused on whether Aschehoug broke "with older theory and practice when he supplied judicial review with . . . 'certain acceptance' in his book from 1885 . . . Did he pick a flower or water a seed?"[112] The view of Aschehoug as primarily a political strategist who broke with legal tradition to further his political goals has been at least partially revised. Legal historians have documented that the Supreme Court consistently exercised judicial review at least from the 1860s, and that acceptance of judicial review was the dominant opinion in Norwegian constitutional law when Aschehoug first put forth his theory of judicial review in the 1860s.[113] Similarly, attributing the development of judicial review to external – political – circumstances has also been criticised:

Legal Essays – A Tribute to Frede Castberg on the Occasion of his 70th Birthday 4 July 1963 (Universitetsforlaget, Oslo, 1963) p. 431.

[111] J. A. Seip, 'Den Norske Høyesterett som Politisk Organ' [The Norwegian Supreme Court as a Political Body], *Lov og Rett* (1965) p. 1 at p. 7–8 [hereinafter Seip, 'supreme Court']. Aschehoug's role was thus seen as providing the doctrinal justification for what amounted in fact to a coup. The conclusion was that "judicial review was made in order to be used in the political game. Its inception and its first effects were of a politically reactionary and clearly antiparliamentarian nature. It was a spoke willfully stuck in the wheel of democracy, a last act of the dethroned ruling class, performed behind Parliament's back." J. A. Seip, 'Jus og Politikk: Teorien om Domstolenes 'Prøvingsrett', Politisk Tolket' [Law and Politics: The Theory of 'Judicial Review', Politically Interpreted], in *Tanke og Handling i Norsk Historie – artikler og avhandlinger* [*Thought and Action in Norwegian History- Articles and Essays*] (Gyldendal, Oslo, 1968) p. 118 at p. 120. A more tempered version of this theory is in T. Eckhoff, 'Impartiality, Separation of Powers, and Judicial Independence', 9 *Scandinavian Studies in Law* (1965) p. 11 at p. 27–8 [hereinafter Eckhoff, 'Impartiality'] – which again exists in a more critical Norwegian version in T. Eckhoff, 'Noen Refleksjoner om Domstolenes Uavhængighet' [Some Reflections on the Independence of the Courts] which was originally published in *Festskrift tillägnad professor, juris doktor Karl Olivecrona vid hans avgång från professorämbetet den 30 juni 1964* [*Liber Amicorum for professor, juris doktor Karl Olivecrona ...*] (Norstedt, Stockholm, 1964) p. 109.

[112] J. A. Seip, 'Jus og Politikk' [Law and Politics], *Lov og Rett 1965*, p. 396 at p. 408.

[113] Slagstad, Judicial review*, supra* note 101, pp. 163–166 and Smith, *supra* note 3, p. 175. Even though Aschehoug started to develop his theory of judicial review in lectures in the 1860s, long before *Norges nuværende statsforfatning* was published in 1893, that treatise will be the focus here, because it is in that form that Aschehoug's theories were cited in court opinions and influenced other writers. The view that the roots of Aschehoug's theory of

> "Considerations of the balance of power in the political system may, in and of themselves, have influenced Aschehoug's involvement in these matters. But the narrow political perspective underlying the idea of judicial review as a part of 'the fight against parliamentarism' is at best exaggerated; there is no basis for stating that judicial review was 'devised while the Impeachment Court was sitting.' To that extent, Slagstad is right when he speaks sharply of a 'noteworthy example of a conspiratorial theory of a historical non-event.'"[114]

This debate will largely be sidestepped here. Instead, the focus will be on the influence of American thought in *Norges nuværende statsforfatning*, which is important because of the treatise's eminence in Norwegian law in this period. First, this influence will be examined in the context of Aschehoug's discussion of judicial review, and then in Aschehoug's constitutional doctrine more generally.

2.3.2.1. "Aschehoug, influenced by American theory and practice . . ." - Jurisprudence and theories of judicial review in *Norges nuværende statsforfatning*

Aschehoug's general jurisprudential stance was clearly expressed in a chapter introducing the discussion of constitutional limitations upon state power.[115] He wrote:

> "No individual shall be treated only as means by which the state can achieve its goals. Each individual has his or her own real and independent value . . . The state has the goal of insuring the human development of its current and future members and thus to advance their, and humankind's, happiness. Every time something that could be done for this purpose is left undone is a mistake and any unjustified interference with even one individual's freedom of action is an injustice. Every form of government is measured against this stick. The individual is thus not without rights vis-à-vis the state. He has a natural sphere of freedom, in which the state shall not interfere and at least many of the rights the individual has vested are such that the state cannot deprive him of them."[116]

Noting that "this doctrine started gaining acceptance after the reformation, in the Anglo-Saxon world, in public life at first and then in the literature", Aschehoug

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judicial review lie in conservative ideology has been challenged and his work linked to ideals of natural rights and to classical liberalism. *See* Slagstad, *supra* note 107, pp. 49–54. *See also* J. A. Seip, *Utsikt over Norges historie 2: Tidsrommet ca. 1850–1884* [*An Overview of Norway's History: The Period from about 1850–1884*] (Gyldendal, Oslo, 1981) p. 227 and A.-L. Seip, *Vitenskap og virkelighet – Sosiale, ökonomiske og politiske teorier hos T.H. Aschehoug 1845–1882* [*Science and reality – Social, Economic and Political Theories of T.H. Aschehoug 1845–1882*] (Avhandling, Universitetet i Oslo, 1973).

[114] Smith, *supra* note 3, pp. 174–5, citing J. A. Seip, 'Utsikt over Norges historie (Overview of Norway's History) p. 230 and R. Slagstad's Prøvingsretten i det norske system [Judicial Review in the Norwegian system]', 4 Nytt Norsk Tidsskrift (1989) p. 333 at p. 347.

[115] On Aschehoug's political and philosophical stance *see in general* A.-L. Seip, *supra* note 113, and Slagstad *supra* note 107, pp. 49–54.

[116] T.H. Aschehoug, *Norges nuværende statsforfatning III* [*The Present Constitution of Norway III*] (2nd ed. Malling, Christiania, 1893) pp. 2–3.

explains that the individual's rights did not receive "any particular constitutional protection against violations from the legislature" in England. He continues:

> "Not so in North America. There, one distinguishes between the constitution and general laws. The constituting authority, the real sovereignty, resides in the people and is exercised by the people or by whomever the people give special authority to do so. Neither the cabinet nor the legislature have any authority beyond what the constitution vests in them and consequently, it is their duty to act in accord with the limitations set out in the Constitution. The North American system makes it possible, by using the Constitution, to determine the rights of the individual and to prevent the authorities from violating them."[117]

In accordance with this view, which used American legal thought as a point of reference, the emphasis in *Norges nuværende statsforfatning* was on limitations of state power. The bulk of the treatise's third volume is a chapter titled "Limitations on the power of the authorities of the state", which centred on the constitutional provisions that were to prove relevant in business-government relations – the takings clause and the non-retroactivity clause.[118] Aschehoug's focus on eminent domain, the protection of vested rights, and judicial policing of the limitations on state power is similar to emphases in mid to late 19th century American constitutional law.[119] An obvious example of this focus in American law is Cooley's treatise, *Constitutional Limitations*, which is frequently cited in Aschehoug's work. This emphasis was, on the other hand, a novelty in Nordic law.[120] It is therefore likely that American law inspired the focus of the treatise.

Judicial review was discussed much more exhaustively in *Norges nuværende statsforfatning* than in older writings on Nordic constitutional law. In order to introduce the topic, Aschehoug gave a brief overview of foreign law,[121] noting that

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[117] *Ibid.,* p. 3.

[118] Aschehoug emphasised art. 97 of the constitution – the non-retroactivity clause – in particular and spent about 200 pages discussing its protection of vested rights. *Ibid.,* pp. 83–288. The fact that the scope of art. 97 and the protection of vested rights are coextensive was made particularly clear when Aschehoug, having explained that he preferred referring to vested rights as "unassailable rights," stated that the non-retroactivity clause "protects only rights that are by nature unassailable and only to the extent they have vested before the law takes effect". *Ibid*., pp. 107 and 113.

[119] *See* discussion *supra* chapter 2.2. and *e.g.,* Jacobs, *supra* note 35, pp. 29–30, explaining the "unprecedented popularity" of Cooley's treatise partly by reference to the fact that "the treatise, as its title indicates, emphasised limitations upon power rather than power itself," commenting that this "made it readily compatible with prevailing economic and political ideas of the time".

[120] This is clear from a comparison of *Norges nuværende statsforfatning* and Friederich Stang's *Systematisk Fremstilling af Kongeriget Norges constitutionelle eller grundlovbestemte ret* [*A systematic presentation of the Kingdom of Norway's constitutional law*] from 1833.

[121] Along with English and American law, Aschehoug discussed continental European law, Swedish and finally Danish and older Norwegian law. Aschehoug, *supra* note 116, pp. 315–349.

> "judicial review is, in the North American opinion, a foregone conclusion. It was accepted in theory and exercised by state courts before the federal constitution even entered into force. When the federal constitution was drafted, it was assumed that such a power would inhere in the courts without it being stipulated in the text. The federal constitution's art. III, section 2 and art. VI are based on this understanding. The authority inheres not only in the federal courts but also in the state courts. This principle applies without exception . . ."[122]

The reader was then referred to chapters and sections in Kent's *Commentaries*, Pomeroy's *An Introduction to the Constitutional Law of the United States*, *The Federalist* No. 48, Story's *Commentaries of the Constitution* and Cooley's *Constitutional Limitations* for further information.

In the section on judicial review, Aschehoug discussed various doctrinal arguments for and against judicial review, referring a number of times to Cooley's *Constitutional Limitations* and once or twice to other American writers.[123] He tried to address the faults with the institution pointed out by "European lawyers". Concerning abuses by the judiciary, for instance, he wrote that

> "such abuses will be rare occurrences. Here, the experience from North America is conclusive. Judicial review has been in effect there for about a hundred years and in this period, it has been frequently exercised. Overall, people seem pleased with this. There are no examples of constitutional amendments enforcing a constitutional interpretation different from the one advanced by the courts, and only two examples of judges being prosecuted for invalidating laws. In both cases, they were acquitted."

This is backed up by a reference to *Constitutional Limitations*.[124] Aschehoug then concluded that "[t]he experience from North America proves that the authority of

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[122] *Ibid.,* p. 322.

[123] Cooley is cited as authority for the point that unconstitutional legislation is often just due to an oversight or misunderstanding in the legislature. *Ibid.,* p. 363, citing *Constitutional Limitations,* 45, note 1. Cooley is also cited as authority for the proposition that in the U.S., any deviation from constitutionally mandated procedure when legislation is enacted causes the law to be invalid. *Ibid.,* p. 372, citing *Constitutional Limitations*, p. 177. He is then cited on the issue of constitutionally mandated procedure, when Aschehoug argues that "the procedure when a provision is enacted can be sufficient to have certain legal consequences but insufficient to have others. The provision is then partly constitutional and partly unconstitutional. It must be enforced in the aspects or parts that are not affected by the mistake." This is footnoted with Cooley's treatise. *Ibid.,* p. 375, citing *Constitutional Limitations* pp. 177–181. Finally, Sedgwick's *Statutory and Constitutional Law* and Rüttimann's *Nordamerikanisches Staats- und Bundesrecht* are cited as authorities for the fact that, just as in Norwegian law, the courts are bound by the other branches' interpretation of international treaties. In that context the supremacy clause was also mentioned briefly. *Ibid.,* p. 378, citing Sedgwick*, Statutory and Constitutional Law*, pp. 384–387 and Rüttimann, *Nordamerikanisches Staats- und Bundesrecht*, pp. 253–254.

[124] *Ibid.,* p. 365, citing *Constitutional Limitations* p. 160, note 3. The statement is wrong as far as constitutional amendments are concerned; by the 1880s this had happened on two occasions; the Eleventh amendment overruled *Chisholm* v. *Georgia*, 2 U.S. (2 Dall.) 419

the courts to review whether laws are constitutional, far from causing the confusion and disturbance feared by many European lawyers, is on the contrary, one of the best guarantees of the legal system, even though it is not always completely sufficient".[125] In addition, Aschehoug repeated a fundamental argument of *Marbury* v. *Madison* without citing his source. He argued that permitting the legislature to ignore the Constitution would

> "make it sovereign. But that is exactly what it is not, under a Constitution that limits its power . . . For under a Constitution, which can only be amended if a certain form is followed and after a certain period, the temporary majority is not sovereign . . . The duty of the courts to apply the Constitution rather than any law, be it younger or older, flows with such necessity from the Constitution's nature as the supreme law of the land, that no one would deny it were it not for their fright of the practical consequences."[126]

Having discussed the institution of judicial review in general, Aschehoug turned to the standards of review which should be used by the courts. He concluded that "when the question of the constitutionality of a law has been thoroughly discussed by the [legislature and the executive], it must carry great weight if they agree on a positive answer. The courts should then refrain from setting the law aside, if they find the constitutionality questionable, just as they should always be cautious to do so." A footnote added to this sentence reads: "What was just said is substantially in accord with the theory and various statements of the courts in North America, see Cooley . . . In order to fully understand the jurisprudence of American courts it must be noted that every so often, they set aside legislation whose constitutionality is disputed even within the court itself." Cooley is here cited as authority for the proposition that the courts should use a low standard of review.[127]

Taken together, the citations to *Constitutional Limitations* indicate that the general chapter on judicial review in *Norges nuværende statsforfatning* is, to a great degree, based on a similar chapter in *Constitutional Limitations*.[128] It will be described later how the courts relied on Aschehoug's discussion of judicial review. For now, the key point is that American law played an important part in Aschehoug's argument that the courts should exercise judicial review and that the two treatises are closely linked. This is true even though Aschehoug also relied on Norwegian precedents. It is also important to note that chapters of Cooley's work were cited as authority for important propositions, notably that courts should be

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(1793) and the Fourteenth amendment overruled *Dred Scott* v. *Sandford*, 60 U.S. (19 How.) 393 (1857).

[125] *Ibid.*

[126] *Ibid.,* pp. 363–4.

[127] *Ibid.,* p. 368, citing *Constitutional Limitations* pp. 164–176. The influence of this passage in Norwegian jurisprudence, as well as Cooley's comments on this topic, are described in chapter 2.4.1., *infra*.

[128] In the space of ten pages of a continuous chapter on judicial review in Aschehoug's treatise, seventeen consecutive pages in Cooley's treatise are cited in four different instances.

cautious to strike laws at all, and particularly cautious when striking laws whose constitutionality has been discussed by the other branches of government.

2.3.2.2. Aschehoug – substantive rules for the protection of individual rights

It has been mentioned above that the emphasis on constitutional limitations of legislative power was a relative novelty in Nordic constitutional law. The limitations that Aschehoug focused on were the doctrine of vested rights, limitations on the taxing power, and limitations on the power of eminent domain. These emphases are similar to the emphases evident in mid-19th century American legal treatises, not least Cooley's *Constitutional Limitations*. Given the strong link between judicial review and these limitations, it comes as no surprise that he referred frequently to American law and American writers in the part of the treatise dealing with constitutional limitations on state power. In spite of some differences in ideas underlying the constitutional theory,[129] Aschehoug's emphasis was similar to that of his American counterparts. These similarities in constitutional doctrine will be examined more closely in this section.

Aschehoug's treatise paid considerable attention to the power of eminent domain, attempting to draw lines between takings and taxes, and takings and permissible regulation.[130] Aschehoug noted that the distinction between taxes and takings was usually clear because taxes were generally money while it was normally real estate that was taken under the power of eminent domain.[131] This was not conclusive however, because

[129] For instance, Aschehoug apparently did not share the ideals of equality and antipathy towards special legislation and special privilege of his American colleagues. His fundamental theory concerning privileges, for instance, was that monopolies and privileges for the privileged person's lifetime were fine, except in business, where the freedom of enterprise entailed that no monopoly could be granted which prevented others from carrying out the same trade. So Aschehoug was clearly not working within a tradition of free access to "ordinary trades" or in a context of Jacksonian antipathy towards special privilege. *See ibid.,* pp. 26–7. This is also clear from his discussion of the taxing power and retroactive tax laws, in which he discusses "class taxes" *e.g.* "a class tax on servants" without expressing any qualms as to their constitutionality – noting only that "this doctrine will most likely be of practical importance concerning taxes on real estate". *Ibid*., p. 253. Aschehoug's equal protection doctrine was significantly modified by the Courts. In Rt. 1934.444, which was the first case to address art. 101 (the freedom of enterprise clause) directly, the lower Court, whose opinion was endorsed by the Supreme Court, stated: "The Constitution's art. 101 . . . is not believed to prevent interferences with the freedom of enterprise, if the interference does not benefit any one individual or organisation. That is not the case here. The regulatory interference must be viewed as necessary and based on economic considerations." Rt. 1934.444, 449. This is very unlike Aschehoug's theory.

[130] The takings clause of the Norwegian Constitution, art. 105, reads: "[i]f the welfare of the State requires that any person shall surrender his movable or immovable property for the public use, he shall receive full compensation from the Treasury".

[131] Although Aschehoug acknowledged that "tax-payers receive payment for the taxes they pay through the protection and services provided to them by the state" that is not full

> "the state could not defend any extortion . . . by claiming it as an exercise of the taxing power. The aim of taxes is to procure enough funds for public expenses from contributions either from every member of society, as far as possible, or of individual classes, who enjoy particular benefits from public arrangements. These contributions, however, must be determined by laws of general application. Taxes or fees levied on one or very few persons or that are aimed at them are takings."[132]

Like many American writers in the late 19th century, Aschehoug thus found that there was an implied public purpose limitation on the taxing power as well as a requirement that laws be general.[133]

Aschehoug was more ambivalent towards a public purpose limitation on the power of eminent domain than on the taxing power.[134] He wrote that art. 105

> "has not established any exhaustive rule on the conditions for exercising the power of eminent domain. If the opposite were assumed, the legislature would not be able to order a taking for the benefit of a private entity . . . But the Constitution has never been thus understood and it cannot reasonably be read that way . . . One cannot say either, that the Constitution allows the use of the power of eminent domain only when the taking is necessary for a project for the common weal . . . for this reason, it is impossible here, as is done in North America, for the courts to determine whether the right of eminent domain, when vested in a private person, is based on the common weal to the degree that it becomes consistent with the Constitution."[135]

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compensation under the takings clause and therefore, a line needs to be drawn. Aschehoug, *supra* note 116, p. 40.

[132] *Ibid.,* p. 41.

[133] *See* the discussion in part 2, *supra*. *See also* McCurdy, *supra* note 26, pp. 251–254 on the "reconsideration of 'public purpose' in taxation law". *Ibid.*, p. 251. The fact that the influence of American thought concerning public purpose and special legislation which is clearly visible in Aschehoug's writings on this point did not appear this clearly in Supreme Court jurisprudence will be discussed in chapter IV, *infra.*

[134] This is true in spite of the wording of art. 105 of the Norwegian constitution, *see supra* note 130.

[135] Aschehoug, *supra* note 116, pp. 42–4. G. Edward White has explained that Kent's "conception of property rights translated itself into four legal propositions: first, the powerlessness of legislatures to disturb previously vested contract rights; second, the requirement that if a legislature took private property for public purposes it must compensate fully all those whose property was either appropriated or damaged . . . ; third, a power in legislatures to regulate the use of property in accordance with the safety or health of the community, subject to judicial approval; fourth, a power in the courts to define what constituted 'public purposes,' to determine the amounts required by full compensation, and to ascertain in which kinds of case the regulation of property use was permissible". White, *supra* note 39, p. 49. This description could – with the sole exception of the justiciability of the question of general good – just as well apply to Aschehoug. In another context, however, Aschehoug based his discussion on the fundamental assumption that "if the legislature grants . . . the great privilege of taking others' property for just compensation, that is only due to the benefits this is expected to bring the public." Aschehoug, *supra* note 116, p. 65. Based on this view and *quid pro quo* considerations, he concluded that such general gains should not be deducted from the compensation paid.

Once again, it is clear from the substance of his comments and from his references to American law, that Aschehoug was familiar with American treatises and relied on them in drawing and supporting his conclusions.

In what was perhaps his most influential move, Aschehoug linked the takings clause of the Norwegian constitution and its art. 97, which prohibits retroactive laws, setting forth a doctrine of vested rights.[136] He wrote:

> "Legislation can conceivably interfere with the economic rights of the individual in many other ways than those discussed already, e.g. when it . . . prohibits fulfilling obligations under a certain kind of economic contracts, revokes certain economic rights or limits economic rights without depriving their owners of them . . . The principle expressed [in the takings clause] entails that such provisions can always be enacted if compensation is paid, even though the legislature interferes with the constitutional rights of the individual . . . Conversely, the clause gives little or no direction in answering the question to which degree the legislature can, without compensation, destroy legally vested economic rights. In countries whose Constitutions have no protection for such rights other than the principle of [the takings clause] one has tried to stretch its application quite far in this direction. Here, this protection is inherent in the Constitution's art. 97, which also applies to other kinds of rights."[137]

This link between the takings and the non-retroactivity clauses was immensely influential in practice. Much of the work done in 19th and early 20th century American law by the takings and contracts clauses and later by the due process clause was done, in Norway, by the takings and retroactivity clauses in tandem. Up to the Second World War, most cases in which the constitutionality of legislation was challenged revolved around these two clauses, and usually both of them were argued at once.[138]

In the context of the protection of vested rights, Aschehoug mentioned that in the U.S. "the courts are quite ready to strike down laws that seriously impair a vested right, even though it is acknowledged that they cannot unconditionally strike every retroactive law". He elaborated:

> "The U.S. constitution, art. I, section 9, forbids the federal Congress as well as the state legislatures to give acts of attainder and ex post facto laws, i.e. after the usage in English and American law of retroactive criminal laws only. The state legislatures – but not Congress – are also barred from passing legislation that

[136] *See supra* note 118. Art. 97 of the Norwegian Constitution states that "[n]o law must be given retroactive effect."

[137] Aschehoug, *supra* note 116, pp. 81–82, citing *inter alia Constitutional Limitations* pp. 356–358.

[138] It was frequently argued that because a law interfered with vested rights, compensation should be paid. In a famous 1909 case, the Supreme Court wrote that "[i]f the legislature wants a new law applied to older circumstances in such a way that it violates the principle of the Constitution's art. 97, it must be viewed as a taking and full compensation must be paid under the Constitution's art. 105." Rt. 1909.417, 418. *See also* Lie, *supra* note 102, p. 62: "Usually, both provisions are invoked at once without any attempt to draw clear boundaries."

> impairs duties undertaken by contract. There is no general prohibition against retroactive laws [other than criminal laws] in the federal constitution. Conversely, there is such a prohibition in many state constitutions."[139]

Aschehoug seemed to be arguing, based on American law, that even in states without a clear non-retroactivity clause, interference with vested rights could be viewed as unconstitutional, thus strengthening the argument for his vested rights doctrine.

Aschehoug discussed the application of art. 97 to various circumstances in some detail, because he believed that "the true content of the prohibition of retroactive laws cannot be developed through . . . abstract phrases but only by looking at the prohibition's application to different circumstances".[140] He started with contractual obligations, which he believed to be "amongst those, which can least tolerate influence by later laws". As far as contracts were concerned, Aschehoug stated categorically, "[a] valid contract cannot by revoked or amended by a later law".[141] It was no great matter whether laws impairing contractual rights were general or not – they were unconstitutional in any case.[142] Along with contractual rights, Aschehoug discussed changes in the law of property, the law of trusts and estates, family law, criminal laws, rules of procedure, tax laws and laws on legal tender – citing *Hepburn* v. *Griswold* and the *Legal Tender Cases*.[143]

Just as it did in the U.S., the protection of vested rights raised the issue of the corresponding scope of regulatory power; and just as he drew a line between takings and taxes, Aschehoug attempted to draw a line between exercises of the power of eminent domain and permissible regulation. He believed there could be no question of a taking when property lost some or even all value due to regulations. Sedgwick's *Constitutional and Statutory Law* was cited as proof that this was true in the U.S. as well.[144] Aschehoug's main principle on this point was that the legislature cannot

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[139] Aschehoug, *supra* note 116, p. 85. In a footnote he referred the reader to section in American treatises dealing with this: "This doctrine is discussed *inter alia* in Kent, *Commentaries on American Law I*, pp. 413–425 and 455–459; Story, *Commentaries on the Constitution of the United States*, Ch. 34; Cooley, *Constitutional Limitations*, pp. 369–389 and other places; Sedgwick, *Statutory and Constitutional law* . . . ; most closely in Pomeroy, *Constitutional Law*, pp. 319–413 and Rüttimann, *Das Nordamerikanische Bundesstaatsrecht, II*." *Ibid.,* p. 86.

[140] *Ibid.,* p. 133.

[141] *Ibid*., p. 135. Aschehoug acknowledged that this led to "legislative sovereignty over the aspects of an existing legal relation [being] different depending on whether these are instituted by a contract of the parties or otherwise". *Ibid*., pp. 140–141. This was later an issue in Rt. 1909.417, which concerned leased logging rights, *see* note 340, *infra*, and accompanying text.

[142] This is suggested by his comment that the provision's "aim is precisely to protect the individual against such interferences with his rights and the individual is hit just as hard whether he's hit alone or along with others who have similar rights". *Ibid.,* p. 105.

[143] *Ibid*., p. 245, citing *Hepburn* v. *Griswold*, 75 U.S. (8 Wall.) 603 (1870) and the *Legal Tender Cases*, 79 U.S. (12 Wall.) 457 (1871).

[144] Aschehoug*, supra* note 116, pp. 79–81, citing Sedgwick's *Statutory and Constitutional Law* p. 438 and on. In addition to what has already been described, it is worth noting that

"unconditionally prohibit an action that cannot be anything except an exercise of a previously vested, unassailable right", but that it may "limit the freedom of action that has been enjoyed by the people . . . or that has been enjoyed by certain classes, as long as it has not been granted to them as a special right".[145] He absolutely refused to accept that laws passed for the common good could affect vested rights, noting that this argument's

> "real idea is to argue for the freedom of the authorities to ignore the right of the individual where they think it necessary because of state interests. But that position is contrary to that chosen by our Constitution . . . nothing is clearer than the fact that the Constitution's art. 97 is aimed at protecting the individual from interference with his rights, even when they hinder society's interests. That these interests could suffer is just what the Constitution's art. 97 intended."[146]

Unlike American writers in the decades after 1850, however, Aschehoug suggested that it was a taking when the state required that a thing be destroyed: "By its own words, the Constitution's art. 105 is applicable only when someone must relinquish his property for public use, not when the authorities destroy a privately owned thing in order to execute a law. There is considerable likeness between these two situations; the authorities take the thing from its owner. Why the state does so, in order to use the thing or destroy it, is of no importance to him. It is therefore the main principle that the state must usually pay compensation in both cases."[147] However, there were exceptions to this "main principle" that threatened to swallow the rule. For example, the state did not have to pay compensation when the thing in question was produced in violation of a law prescribing the destruction of similar things, or when it posed a threat to the public, as was the case with spoiled food and contaminated things.[148]

American treatises are frequently cited on compensation; on consequential damages (*see ibid.,* pp. 53–5, citing Redfield's *The Law of Railways* and Sedgwick's *Constitutional and Statutory Law*); on deducting estimated gains from the compensation paid (*ibid.,* p. 59 citing the constitutions of Alabama, Iowa and Ohio and *Ibid.,* p. 62, citing Sedgwick's *Constitutional and Statutory Law*); and on the right to compensation in times of war (*Ibid.,* p. 78, citing Pomeroy's *Constitutional Law* pp. 161–164).

[145] *Ibid.,* pp. 120-121. This was true irrespective of whether the liberty in question was specifically granted in a general law or not and whether it had been taken advantage of. *Ibid.,* pp. 120–123.

[146] *Ibid*., pp. 97–98. Aschehoug also wrote that "[t]his would . . . make the whole prohibition useless as a means of limiting arbitrariness on part of the state. No legislative power and least of all a representative assembly would acknowledge enacting a law for any purpose other than the general good . . . [The general good] can certainly require changes in older legal situations but on the other hand it usually requires legal situations and relations already entered into to be excepted from the influence of the new legislation." *Ibid.*

[147] *See ibid.,* pp. 76–7. *Compare* McCurdy, *supra* note 26, p. 251 on the importance of this distinction in the jurisprudence of Justice Field.

[148] *See* Aschehoug, *supra* note 116, p. 77.This rule was also in effect in the U.S. *See Bowditch* v. *Boston*, 101 U.S. 16 (1879) (holding that the state was within its police power when it

Privileges granted by the state and to what degree they could be revoked or regulated was another, more specific, question. In that field, Aschehoug relied heavily on American contracts clause doctrine. He viewed a "privilege granted by law, valid authorisation or permission" as "a vested right and as such protected by art. 97 and 105".[149] After describing canonical, French, and Belgian law on that point, he stated:

> "In North America, whose federal Constitution protects contractual obligations against interference from the state legislatures, the courts have, on many occasions, determined that the protection also applies to rights granted by the state, *public grants.* Those are e.g. tax exemptions, monopoly rights to maintain a bridge or ferry over a river or a railroad between two places. The shared English-American doctrine is expressed thus by Kent: 'Another class of incorporeal hereditaments are *franchises*, being certain privileges, conferred by grant from government, and vested in individuals . . . They contain an implied covenant on the part of the government not to invade the rights vested and on the part of the grantees to execute the conditions and duties prescribed in the grant. The government cannot resume them at pleasure, or do any act to impair the grant, without a breach of contract.'"[150]

To Aschehoug, the key to drawing the line between acceptable and unconstitutional limitations of a privilege once granted was that "the holder of the privilege can in such cases be deprived of no important part of the right, although he can be bound by new regulations concerning how the business shall be run, even when they limit his options in a way that cost him money or decrease his gain".[151] The Norwegian courts later elaborated on this distinction in a number of cases.

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legislated on conditions for compensation when a house was destroyed in order to stop the spread of fire).

[149] Aschehoug, *supra* note 116 p. 254, where he also referred to Chapter 39, section 6 of the treatise.

[150] *Ibid.,* p. 257. The italics are Aschehoug's. The text from the *Commentaries* is here taken from Kent, *Commentaries V* (12th ed., Little, Brown & Co, Boston, 1896) pp. 457–8. In addition to citing the *Commentaries* thus in the main text, Aschehoug referred to volume I of Kent's *Commentaries* pp. 413–418 and volume III p. 458; to Cooley's *Constitutional Limitations* pp. 278–281; to Pomeroy's *Constitutional Law* pp. 352–382; Sedgwick's *Constitutional and Statutory Law* pp. 590–600, and Story's *Commentaries on the Constitution of the United States*, section 1385. Aschehoug added, in a footnote, that "[t]his protection does not apply to the permissions whose legal name is not *grants* but *licences,* like permissions to sell liquor . . . In accepted terminology, the term *licence* implies clearly enough that the permission can be revoked." Aschehoug, *supra* note 116, pp. 256–257.

[151] Aschehoug, *supra* note 116, p. 280. He also noted that "[i]f the circumstances are regulated by private law and purely economic, the assumption must be that the right is completely unassailable". *Ibid.,* He elaborated that "[w]ithout doubt, the legislature can enact regulations binding those who have a privilege or licence to run a certain business as to how the business shall be run, which tools shall be used . . . opening or working hours [etc.]". *Ibid*., p. 282. Aschehoug seems to view the rules as somewhat different depending on whether the privilege in question is a grant to run a business or a tax exemption. *Compare ibid.,* pp. 283–5 and *ibid.,* p. 271.

This sketch of Aschehoug's constitutional theory shows that many key aspects of his doctrine were quite similar to American doctrine. Based on the frequent references and citations to American legal writings in his treatise, this does not seem to have been a coincidence. It is clear that Aschehoug was knowledgeable about and admired American law, so based on the doctrinal similarities and the references it may safely be assumed that it influenced his constitutional theory.

Let us now turn to other Nordic writers of this period. We will look at three other Norwegian writers: Morgenstierne, who was Aschehoug's successor; Castberg, who wrote a thesis on art. 97 in 1920; and Lie, who introduced many arguments from American court-critics into Norwegian law in an essay written for the Ministry of Justice in 1923. Of these, Lie is probably the most important, since his work, like Aschehoug's before him, shaped the discussion of judicial review in Norwegian legal circles for decades. Then, the focus will turn to Danish and Icelandic writers. At this time there was less theory on the topic discussed here in Denmark and Iceland than in Norway, but there too, Aschehoug was extremely influential. Until the late 1920s, the constitutional law written and taught in Denmark and Iceland discussed judicial review in the terms he set out in his treatise of 1893.

2.3.3. American History as a Response to Those Suspicious towards Judicial Review – Bredo Morgenstierne

Bredo Morgenstierne succeeded Aschehoug as professor of constitutional law at the Royal Frederik University (now the University of Oslo) and served as its president from 1912 to 1918. Like Aschehoug, he was also a conservative politician.

As a constitutional scholar, Morgenstierne built on Aschehoug's work and has frequently been viewed as standing in his shadow. However, he also added considerably to Norwegian theory of judicial review. In his treatise, *Lærebog i norsk statsforfatningsrett*, [*A Textbook in Norwegian Constitutional Law*], Morgenstierne most notably broke with the older theory of Aschehoug and Cooley on the issue of standards of review. Aschehoug had written, citing Cooley, that the Courts should be cautious in all cases but especially if the other two branches agreed on the constitutionality of an Act. By contrast, Morgenstierne wrote that

> "It cannot be assumed that the fact that the King and Parliament have agreed on a particular interpretation of the Constitution, according to which an Act is constitutional, frees a court from following the interpretation that it believes to be right one. If the court comes to the conclusion that an Act is inconsistent with the Constitution, then it will be forced to disregard either the Constitution or the Act in its decision and it seems clear that it is the general Act which must yield, since the legislature is not endowed by the constitution to authentically interpret it."[152]

[152] B. Morgenstierne, *Lærebog i den norske statsforfatningsret,* [*A Textbook in the Constitutional Law of Norway*] (T. Steen, Kristiania, 1900) p. 408.

Morgenstierne was thus clearly willing to accept less deference towards the legislature on the parts of the courts than his predecessor.[153]

Morgenstierne's main works concerning judicial review are two: His treatise, which was first published in 1900,[154] and a 1913 law review article on "The Supreme Court's Authority to Set Legislative Provisions Aside as Unconstitutional", which was referred to a number of times by the Supreme Court.[155] In both of those, Morgenstierne referred frequently to American law.

In the 1913 article, Morgenstierne explained that he found it necessary to publish an overview of the main principles concerning judicial review because the "excitement with which we wait for a Supreme Court decision on the constitutionality of some laws of great social importance [has led] various groups to advance the most exotic theories".[156] He continued:

> "While people in the United States, where the same system is in force as here, view the courts' and especially the federal Supreme Court's authority to strike unconstitutional laws as the best protection of civil rights, a true democratic guarantee of right, which one would not want to dispense with under any circumstances, people here have started to think that there is, in such a theory and jurisprudence, something disloyal, a lack of obedience of the law, an undemocratic lack of respect for the will of the people, etc. This is undoubtedly linked to other political developments, notably the development of parliamentary sovereignty, which has gone to the head of some, and due to which the expression of opinions different from that of the majority of Parliament is viewed as a *crimen læse majestatis*. From such quarters, we have seen arguments that . . . it must be a misunderstanding that such an authority should be vested in the courts in America, the land of liberty."[157]

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[153] E. Smith notes that "[t]he theory has a different political flavour than Aschehoug's . . . Therefore it is Morgenstierne, not Aschehoug, who is the first key author who introduces a marked novelty into the literature concerning the level of scrutiny." Smith, *supra* note 3, p. 184.

[154] *See* Morgenstierne, *supra* note 152.

[155] B. Morgenstierne, 'Høiesterets Adgang til at tilsidesætte Lovbestemmelser som grundlovstridige' [The Supreme Court's Authority to Set Legislative Provisions Aside as Unconstitutional], *N.Rt.* (1913) p. 449. [Hereinafter Morgenstierne, The Supreme Court's Authority]. This article was referred to in the *Waterfalls case,* Rt. 1918.401 p. 404. *See* discussion *infra* in chapter 2.4. Morgenstierne also wrote on comparative constitutional law: B. Morgenstierne, 'stater og statsforbindelser: Et afsnit af forelæsninger over komparativ statsret' [States and Federations: Parts of Lectures on Comparative Constitutional Law], *Tidsskrift for rettsvidenskap (TfR)* (1896) p. 1.

[156] Morgenstierne, The Supreme Court's Authority, *supra* note 155, p. 450.

[157] *Ibid*., pp. 450–451. Morgenstierne was clearly taking digs at his political adversaries. This essay was frequently used to support the theory that the emergence of judicial review was linked to the emergence of a parliamentary system of government. J. A. Seip wrote for instance: "When Morgenstierne wrote his constitutional law a few years later, the new system had had its effects. It was clear that the cabinet's independent right to review legislation had been destroyed: its power had been swallowed and digested by Parliament. Morgenstierne

Morgenstierne's main argument was that the principles that the constitution was based on -- a written constitution which is a superior law, the separation of powers and a written Bill of Rights – "must lead to the conclusion that the courts have a right and a duty to review the constitutionality of laws at issue in a case". As he continued his arguments, they became ever more similar to those advanced in *Marbury* v. *Madison*[158] as well as to older Norwegian precedents:[159]

> "For what would it mean that the constitution is a superior law, if the latter should not give way to the first when there is disagreement between the two? And what would be the purpose of the special, onerous, requirements for constitutional amendments, if one could ignore the constitution in a general law and thus, in reality, amend the constitution? Or what would happen to the separation of powers between co-equal branches of government and, especially, to the independence of the courts if one branch, the legislative, was not bound to respect the delegation inherent in the constitution and if the courts were obliged to make unconstitutional decisions at the call of the legislature? And finally, what would become of the constitutional protection supposedly afforded to the liberty and unassailable rights of the individual, if the citizens had no recourse when the legislature violates these rights? [/] It therefore seemed self-evident and a necessary consequence of the Constitution, that the individual could seek the protection of the courts against unconstitutional laws."[160]

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grabbed the guarantee against popular rule that the Supreme Court seemed to be able to offer, with both hands. In his constitutional law, judicial review was introduced in all its power and all its scope: He saw the Supreme Court striking the excesses of party politics, not only based on the constitution, but also on its 'principles.'" J. A. Seip, 'Den norske høyesterett som politisk organ' [The Norwegian Supreme Court as a Political body] in *Tanke og Handling i Norsk Historie – artikler og avhandlinger* [*Thought and Action in Norwegian History – Articles and Essays*] (Gyldendal, Oslo, 1968) p. 90 at p. 99.

[158] *Marbury* v. *Madison*, 5. U.S 137 (1803).

[159] In the 1866 case, which was the only one until 1918 in which the Supreme Court discussed its power of judicial review, the majority opinion stated only that "when the legislative power, which may, like any human power, make mistakes, ignores that one cannot increase the duties of a civil servant without paying compensation, the Courts have a right to intervene". This was believed to apply "only in clear cases, but this is such a case". UfL. VI, 168, here taken from Smith, *supra* note 3, p. 146. C. J. Lasson said in a concurrence that the solution to the problem in this case "clearly" depended "only on the question of constitutional law: What is the Supreme Court to do when the Constitution and a statute both apply? . . . It has, to the extent I am knowledgeable about constitutional law, generally been accepted that insofar as one cannot expect the Courts to apply simultaneously both laws, they must prioritise the Constitution and if they, in addition, do this in the most discreet and indirect way possible, so that the law is not invalidated, then this way seems to me much more natural and appropriate than the sanctity in which the Solicitor General has wanted to cloak the legislative power." UfL. VI, 172. Here taken from Smith, *supra* note 3, pp. 146–7.

[160] Morgenstierne, The Supreme Court's Authority, *supra* note 155, p. 452. This argument was borrowed almost verbatim by E. Arnórsson in the late 1920s. *See* E. Arnórsson, *Ágrip af íslenzkri stjórnlagafræði* [*An overview of Icelandic Constitutional Law*] (Reykjavík, 1927) pp. 49–50.

Morgenstierne then noted that the treatise of American law most recently published in Europe, Ernst Freund's *Das öffentlige Recht der Vereinigten Staaten von Amerika,* [The Public Law of the U.S.A.] rationalised judicial review

> "according to American law – just like in Norwegian law – by saying that it is the duty of the courts when a law is to be applied, to compare it to all other relevant laws in force, especially the Constitution as the law which is superior to other laws, and if there is an inconsistency between the two, then to use the superior law and to set aside the subordinate law. 'If then, the courts are to regard the constitution, and the constitution is superior to any ordinary act of the legislature, the constitution and not such an ordinary act, must govern the case to which they both apply.'"[161]

In addition, Morgenstierne referred to comments by American lawyers on the necessity and importance of judicial review and described the general trends in American jurisprudence, noting that the standard of review was sometimes quite strict before concluding that "[i]t is obvious that this theory could not have broken through [in the U.S.] and had such huge impact, were the public opinion, which views it as an indispensable protection for civil rights and vested rights, not its staunchest supporter".[162] In a footnote, Morgenstierne notes that Theodore "Roosevelt's proposal of a referendum when laws are set aside as unconstitutional seems to have only a minute chance of gaining acceptance".[163]

In sum, Morgenstierne not only followed in Aschehoug's footsteps by using ideas from American law to argue for the existence of judicial review, he also borrowed ideas from American law in order to address the criticism directed at the institution of judicial review by his contemporaries. He also used arguments about the American experience of judicial review for that purpose. Compared to Aschehoug, Morgenstierne discussed American law more in the main text of his 1913 article and he actually cited *Marbury*, first summing up the arguments and then citing the case itself. However, he cited his sources only rarely, and the comments on American law in his work can therefore, with the exception of *Marbury* and Freund's book, not be traced directly to American sources. He generalised much more than Aschehoug, so some of his comments, for example about the general understanding of and satisfaction with the institution of judicial review in the U.S. during the Roosevelt, Taft and Wilson administrations, were simplified to the point of being wrong.[164] In the period discussed here, this was the exception rather than the rule, for most references to American law in legal commentary were reasonably

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[161] Morgenstierne, The Supreme Court's Authority, *supra* note 155, pp. 452–3, citing E. Freund's *Das öffentliche Recht der Vereinigten Staaten von Amerika* from 1911. (This book was vol. 12 of *Das öffentlige Recht der Gegenwart*), and citing *Marbury*, 5. U.S 137 (1803).
[162] Morgenstierne, The Supreme Court's Authority, *supra* note 155, p. 453.
[163] *Ibid.,* This is a questionable argument. There was substantial dissatisfaction with judicial review in the U.S. at the time this essay was written and before that. *See* W. G. Ross, *A Muted Fury: Populists, Progressives, and Labor Unions Confront the Courts, 1890–1937* (Princeton University Press, Princeton, 1994).
[164] *See e.g.,* Ross, *supra* note 163.

accurate restatements of American theory.[165] However, this makes Morgenstierne's work less interesting for our purposes than Aschehoug's, even though he added to Norwegian theory and used American law in his theories and to gain support for his arguments.

2.3.4. Constructing a Theory – Frede Castberg

In 1920, Frede Castberg published his dissertation on *Grunnlovens forbud mot å gi lover tilbakevirkende kraft* [The Constitution's Prohibition on Retroactive Laws].[166] Castberg later published articles on American constitutional developments in the 1930s, and was professor of public law in the University of Oslo as well as president of the university.

Castberg noted that the constitution's prohibition on retroactive laws had been "discussed very thoroughly in Aschehoug's book on the Constitution of Norway. In his book, Aschehoug has looked at the scope of this provision [art. 97] in almost all areas of the law." In spite of this, Castberg had decided to publish his work for the following reasons: "Firstly, that since the publication of Aschehoug's work, the Supreme Court has made various decisions concerning art. 97 . . . Secondly, my goal is different from Aschehoug's and my approach is very different. It was the solution of innumerable concrete problems that primarily interested him . . . What I am attempting is to construct a theory."[167]

True to his word, Castberg synthesised earlier writings and jurisprudence and German, French and American theory on vested rights and set forth a general theory concerning the application of art. 97.[168] In many respects, Aschehoug's treatise served as a starting point for that theory. It is therefore not surprising that there were many references to American law in Castberg's work, just as there were in

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[165] American historians have commented that the writings of the treatise writers in the 19th century, especially Kent and Story, became authoritative. *See* White, *supra* note 39, p. 46. Due to this, I will not go into the difference between what was good law in the U.S. and how U.S. law was described in Norwegian literature except as called for on particular topics. The difference between what "was" the law in the U.S. and U.S. law as described by Norwegian authors shouldn't be much more problematic than the difference between the law and the description of it by American authors – as long as the Norwegian authors were faithful to their American counterparts. The fact that Court opinions were not easily available to the Norwegian authors did, however, result in an increased risk of misunderstanding or distortions.

[166] F. Castberg, *Grunnlovens forbud mot å gi lover tilbakevirkende kraft* [*The Constitution's Prohibition on Retroactive Laws*] (J. W. Cappelen, Kristiania, 1920).

[167] *Ibid*., p. iii. Seip commented on this thesis that "amongst the younger jurists, F. Castberg tried in continuation of Morgenstierne's theories to save the 'vested rights' through a 'constructive' route". Seip, *supra* note 157, p. 102. In spite of the generational difference – Aschehoug was born in 1822, Morgenstierne in 1851 and Castberg in 1893 – Seip categorised Castberg's writings with Aschehoug's and Morgenstierne's.

[168] His theories on various points will be discussed in the context of the case law, since he discussed individual cases in some detail.

Aschehoug's treatise. The interesting point, for our purposes, is to note which American theory was the basis of Castberg's doctrine. Perhaps unsurprisingly, he cited the very same authors Aschehoug had referred to. There were thus dozens of citations to Cooley's *Constitutional Limitations* in his treatise, and quite a few to Kent's *Commentaries*,[169] Pomeroy's *An Introduction to the Constitutional Law of the United States* and to Bryce's *Studies in History and Jurisprudence*.[170]

In sum, Castberg used the doctrine of vested rights in American law as a point of reference and cited the same authors and works on that point as Aschehoug had done. Some of these American writings were then close to eighty years old, and Cooley's *Constitutional Limitations* had been published half a century before. It was the reliance on this theory that formed the basis for Seip's classifying Castberg as the youngest scholar working within the same framework as Aschehoug and Morgenstierne. However, Norwegian theory's emphasis on 19th century treatise writers when discussing American law was about to change.

2.3.5. The Influence of American Court-critics – Mikael Lie

In 1923 Mikael Lie wrote an essay on '*The Courts and the Constitution*' [Domstolene og Grunnloven], at the request of the Ministry of Justice.[171] This was written in the context of substantial dissatisfaction with judicial review in Norway in the 1910s and 1920s. Several constitutional amendments were proposed during this period, either to repeal art. 97 and art. 105 of the Norwegian Constitution or simply to abolish judicial review, but none was successful.

Lie's essay was fundamentally a challenge to the constitutional doctrine set forth by Aschehoug and Morgenstierne. In order to refute, or at least update, the premises of his predecessors, he discussed judicial review in the U.S. in some detail. This discussion was to a great degree based on the works of critics of classical legal thought, amongst them Charles A. Beard, Elihu Root, Charles Grove Haines, and Edward Corwin.[172] Lie explained that in the U.S., there were "huge differences of opinion concerning the historical roots of this system, its legal foundation, its scope and justification". He then attempted to give an overview of American literature in this field, starting with the U.S. Constitution:

> "The system is not authorised in the federal Constitution. Its art. VI . . . applies to the relation between the state [the federal government] and the individual states and

[169] Castberg was closely acquainted with Cooley's work – his copy of *Constitutional Limitations* is now in the University of Oslo's law library.

[170] Castberg, *supra* note 166, citing J. Bryce's *Studies in History and Jurisprudence* from 1901.

[171] Lie, *supra* note 102. It is stated in the preamble that the Ministry of Justice asked for the essay in relation to the constitutional committee's proposal that art. 97 be repealed.

[172] The bibliography at the end of the chapter on judicial review in the U.S. refers to Cooley's *Constitutional Limitations* and writings by Dodd, Willoughby, Beard, Taft, Root, Corwin, Moore, Goodnow, Powell, Bryce, Black, and Hooper as well as Nerincx, Shall, Boudin, Garner, Lambert, and Freund, writing in German or French.

> has the purpose of securing the federal legislature's authority over the state legislatures. The federal constitution says nothing about the federal courts' authority to review federal laws . . . Based on the newest research, it is likely that the American Constitution was intentionally not decisive concerning whether the courts have a similar authority in relation to the federal constitution and federal laws.
>
> The American system really has its roots in old English law, which people hung on to and developed further on the other side of the Atlantic."[173]

Lie then turned to American jurisprudence, which was a novelty, since earlier Norwegian writers had mostly looked to American treatises.[174] He discussed *Marbury* and translated the part of the decision dealing with judicial review. He then summed up its arguments: "The rationale is found, as we see, partly in the constitution's character of a fundamental law of higher order than ordinary legislative acts, partly in [the supremacy clause] and in the provision in the same article of the constitution stating that "all executive and judicial Officers shall be bound by Oath or Affirmation to support this Constitution".[175] However he noted: "Comments in a court decision are not conclusive concerning the foundation of the principle applied by the court." Which brought him to the heart of his argument:

> "People have not been sufficiently clear on an important aspect of this issue. The American courts' understanding of the nature and scope of their power [of judicial review] is not the same today as when Marshall established this principle more than 100 years ago.
>
> Originally the courts themselves limited their authority sharply. It could only be exercised in extreme cases, as a last resort when 'the violation of the constitution is so manifest as to leave no room for reasonable doubt'. (Chief Justice Thilgman in 1811). Marshall also expressed such reticence in *Fletcher* v. *Peck*: 'The question, whether a law be void for its repugnancy to the constitution, is, at all times, a question of much delicacy, which ought seldom, if ever, to be decided in the affirmative, in a doubtful case. The court, when impelled by duty to render such a judgment, would be unworthy of its station, could it be unmindful of the solemn obligations which that station imposes. But it is not on slight implication and vague conjecture that the legislature is to be pronounced to have transcended its powers, and its acts to be considered void. The opposition between the constitution and the law should be such that the judge feels a clear and strong conviction of their incompatibility with each other.'
>
> From the beginning of the 1880s the understanding changed, which in reality changed the content of this principle completely. Its very nature changed. Not through any one decision but through a line of cases, particularly in the 1890s,

[173] Lie, *supra* note 102, p. 11.
[174] In addition to *Marbury*, 5 U.S. (1 Cranch) 137 (1803), he discussed *Fletcher* v. *Peck*, 10 U.S. (6 Cranch) 87 (1810), various comments from "the famous Justice Field", *Rhode Island* v. *Palmer* (part of the *National prohibition cases*, 253 U.S. 350 (1920)), *Lochner* v. *New York*, 198 U.S. 45 (1905) and *Truax* v. *Corrigan*, 257 U.S. 312 (1921).
[175] Lie, *supra* note 102, pp. 12–13, citing *Marbury*, 5. U.S. (1 Cranch) 137 and art. VI of the U.S. Constitution. Lie left out a few words of art. VI.

> through which this principle acquired a scope unlike that which it has in any other country."[176]

Lie thus suggested that American jurisprudence after 1880 corrupted the true meaning of the principle of judicial review. He then discussed the Fourteenth Amendment, concluding that "'due process of law' is in fact a substantive concept, not a procedural one".[177] He stated that "the [American] courts have superimposed their assessment of the requirements that a rational and socially grounded law must fulfil, on the legislature's", and added:

> "There are two additional factors that have contributed to making it hard [in the U.S.] to enact social legislation in keeping with the necessities of the times:
>
> The understanding within the legal elite is still strongly marked by a narrow individualistic view of the relation between the individual and the state, by legal ideas that have their roots back in natural law ideas of certain absolute human rights.
>
> And American judges are willing to include theoretical and political discussions in their decisions to a degree foreign to European lawyers, which can easily lead to arbitrariness, especially when it comes to interpreting short, unclear, general provisions in the constitutions."[178]

Based on various writings about judicial review, Holmes' dissent in *Lochner* and his opinion for the court in *Noble State Bank* v. *Haskell*,[179] Lie concluded that "it is no

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[176] *Ibid.,* pp. 13–14, citing *O'Hara* v. *Smith*, 4 Binn. 117, 123 (Pa. 1811) and *Fletcher* v. *Peck*, 10 U.S. (6 Cranch) 87, 128 (1810). Important things were happening here; first of all, the idea that American constitutional jurisprudence in the decades after 1880 was a break with the past and with the constitution, correctly interpreted, was introduced into Norwegian theory. Secondly, Lie suggested that this period set American law apart from Norwegian law.

[177] Lie*, supra* note 102, p. 14. Lie also discussed the contracts clause and freedom of contract briefly, inaccurately intertwining the two.

[178] *Ibid.,* p. 14–15. As an example he cites Justice Field's opinion in *Pollock* v. *Farmer's Loan and Trust Co.*, 157 U.S. 429, 607 (1895): "The present assault upon capital is but the beginning. It will be but the stepping-stone to others, larger and more sweeping, till our political contests will become a war of the poor against the rich; a war constantly growing in intensity and bitterness."

[179] Lie, *supra* note 102, p. 16, citing E. Lambert's *Le Gouvernement des Juges et la Lutte Contre la Législation Sociale aux États-Unis - L'expérience Américaine du Controle Judiciaire de la Constitutionnalité des Lois* [*The Government of Judges and the Battle Against Social Legislation in the United States - The American Experience of Judicial Review of Legislation's Constitutionality*] (Marcel Giard, Paris, 1921); *Lochner,* 198 U.S. 45; and *Noble State Bank* v. *Haskell*, 219 U.S. 104 (1910). In the latter case, Holmes wrote: "In answering that question we must be cautious about pressing the broad words of the Fourteenth Amendment to a dryly logical extreme. Many laws which it would be vain to ask the court to overthrow could be shown, easily enough, to transgress a scholastic interpretation of one or another of the great guarantees in the Bill of Rights. They more or less limit the liberty of the individual or they diminish property to a certain extent. We have few scientifically certain criteria of legislation, and as it often is difficult to mark the line where what is called the

wonder that broad and influential groups have started to view this system differently". As examples of the old view of judicial review, he took Bryce, "basing his views on Marshall, Story and Cooley", Davis, Woodrow Wilson, Aschehoug and Morgenstierne.[180] As examples of its critics, he mentioned Thayer, Freund and Holmes.[181] He also cited various articles in *The Nation* and *The New Republic*. He added that "it needs no further demonstration that the [American] workers' protests against this system are extensive and energetic. The Supreme Court is described as the worst sort of class court . . ."[182]

Lie discussed American court-curbing proposals, including Theodore Roosevelt's proposal for a popular referendum of court decisions from 1912[183] and legislative proposals requiring a super-majority of the justices to invalidate an act of Congress.[184] He wrote that the court-curbing proposals "bear witness to the deep dissatisfaction provoked by the developments of the last 10 years" while also discussing the "calmer and more balanced view" of Haines.[185]

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police power of the States is limited by the Constitution of the United States, judges should be slow to read into the latter a nolumus mutare as against the law-making power." *Ibid*., p. 110.

[180] Lie*, supra* note 102, pp. 16–17, citing Bryce's *The American Commonwealth I*, from 1911; Davis' *American Constitutions*; W. Wilson's *Congressional Government* from 1900; Aschehoug's *Present Constitution of Norway* from 1893 and Morgenstierne, *The Supreme Court's Authority*.

[181] *Ibid.,* p. 17, citing Thayer's *Legal Essays* from 1923 pp. 32–33; Freund's *Das öffentliche Recht der Vereinigten Staaten von Amerika* from 1911; Freund's *Standards of American Legislation* from 1917 and *Truax* v. *Corrigan,* 257 U.S. 312 (1921).

[182] *Ibid.,* p. 18, citing Lambert's *Gouvernement des juges*, *supra* note 179, p. 92 and C. E. Merriam's *American Political Ideas; Studies in the Development of American Political Thought 1865–1917* (The Macmillan Co., New York, 1920) pp. 176–186.

[183] *Ibid.,* p. 19. On Roosevelt's proposal, *see* Ross, *supra* note 163, pp. 130–154.

[184] Lie, *supra* note 102, p. 19. On the proposals of Senators Borah, Woodruff and Frear, *see* Ross, *supra* note 163, p. 218–232. Lie also mentioned U.S. constitutional amendments which overruled Supreme Court cases, *see* note 97, noting that "it is therefore not correct, when Aschehoug states that 'There are no examples of constitutional amendments enforcing a constitutional interpretation different from the one advanced by the courts.'" Lie, *supra* note 102, p. 19.

[185] Lie cited Haines: "It seems more likely that a limitation on judicial review, an easier route to amending the constitution and a less hostile attitude towards new legislation from attorneys and judges would remove the most important causes of complaint over the courts' influence in the legislative sphere. It would then be possible and beneficial, also for those who believe the people should have the last word, to support judicial review as a healthy control of much too careless legislation. The sovereignty of the law, such as it is viewed by the courts, the other branches' subordination to the courts will then no longer be viewed as intolerable limits on progress but instead as a valuable and useful corrective of democratic legislation." Lie, *supra* note 102, p. 20, citing C. G. Haines' *The American Doctrine of Judicial Supremacy* from 1914. This citation is not found on the cited page in the cited edition of Haines' book. It is likely that Lie was acquainted with Haines; the University of California's copy of Lie's essay was given by Dr. C. G. Haines in 1936 and it is signed "With my best compliments" by M. H. Lie. Lie's essay is cited in the second edition of Haines' *The American Doctrine of Judicial Supremacy*, which was published in 1932. *See* C. G. Haines, *The American Doctrine*

Lie then followed in the footsteps of the American court-critics in his own discussion of Norwegian law. Concerning judicial review, he emphasised that "[t]his issue has nothing to do with the principle of separation of powers", and that he "profoundly disagreed" with the view that judicial review logically followed once it was agreed that the constitution was a superior law.[186] Lie proceeded to argue that judicial review was not mandated by the Norwegian constitution and that it had not been viewed as an integral part of Norwegian constitutional law until the late 19th century: "It is, in reality, quite a recent legal development we are discussing."[187] This echoes his description of American arguments.[188]

On the issue of art. 97 – the non-retroactivity clause – Lie discussed foreign constitutions, noting that the "principle that no retroactive laws shall be enacted is only rarely found in the constitutions of other countries"[189] and then reprinting, in translation, relevant foreign constitutional provisions. The first cited are the U.S. Constitution and provisions from the oldest state constitutions,[190] from which he concluded that it was "clear from the information here, that the picture drawn of American law in this field by Aschehoug . . . and F. Castberg . . . is not quite accurate".[191]

Concerning vested rights, Lie stated that

> "newer theory has tried to include the following rules in this article [97]: New legislation outside of the economic sphere, which impairs the 'vested rights' of the individual, is invalid. By analogy to art. 105 of the constitution, new economic legislation may be applied, even though it impairs the 'vested rights' of the individual, if full compensation is paid . . . It is the right and the duty of the courts to independently decide all the difficult cases that arise"[192]

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of Judicial Supremacy (2nd ed.) (University of California Press, Berkeley, 1932) p. 637. Haines also refers to Morgenstierne's 'Das Staatsrecht des Königreichs Norwegen [The Constitutional Law of the Kingdom of Norway]', in *Öffentliches Recht der Gegenwart* (Mohr, Tübingen, 1911). Many of the sources Lie cited in his essay, both American and European, are also cited in Haines' book.

[186] Lie, *supra* note 102, p. 42, referring to Bryce's *The American Commonwealth I* from 1911 pp. 545–554 and 561–564.

[187] *Ibid*., p. 49. Lie dated the emergence of judicial review in Norwegian law from the publication of the 3rd volume of Aschehoug's treatise. *See* on that point *supra* note 111 and accompanying text. He also discussed the case-law, concluding that in the discussion of the jurisprudence, "people have, in my opinion, engaged in surprising exaggeration". *Ibid.,* p. 48.

[188] *See supra* note 176, and accompanying text.

[189] Lie, *supra* note 102, p. 3.

[190] *Ibid*., pp. 3–4. Lie reprinted provisions from the constitutions of Maryland (1776), Virginia (1776), Delaware (1776), Massachusetts (1780), New Hampshire (1784), Tennessee (1776), Ohio (1803) and Louisiana (1803).

[191] *Ibid.,* p. 4, citing Aschehoug's *Present Constitution of Norway* p. 85 and Castberg's *The Constitution's prohibition on retroactive laws* p. 30. By contrast, Lie referred with apparent approval to Aschehoug's discussion of the property clauses in foreign constitutions, adding that "newer constitutions have in general adopted the same system". *Ibid.,* p. 5.

[192] *Ibid.,* pp. 53–54.

He argued, however, that "[o]ur older theory understood art. 97 differently. That understanding was closer to the constitution and its principles and I believe it had a clearer view of many fundamental constitutional questions . . ."[193] The similarities between this view and that of American court-critics of the same period is obvious: In the 1880s, the correct understanding of individual constitutional provisions and of the proper role of the courts was superseded by an understanding emphasising the protection of vested rights and the role of the courts as guardians of the constitution.[194]

In addition, Lie emphasised that "[o]ne of the main goals of our constitution was, as far as possible, to eliminate social differences. At the time, this was evident from attempts to prevent monopolies from forming on the basis of a legal privilege".[195] This argument echoes the American arguments based on the hostility towards monopolies and special privilege, which characterised American law in the 18th and 19th centuries.[196] He then linked this hostility to monopolies and special privilege to the main issues of his day:

> "As a society develops, there may be a serious danger of monopolies forming, with the ensuing social tendencies. It is the duty of the legislature to prevent this. In our times, monopolies in fact [this seems to be a reference to big corporations] are much more dangerous than legal monopolies."[197]

He then argued that by examining how

> "economic monopolies could become big players within American society . . . quite often in open opposition to the lawful authorities, one gets an idea of the dangers that they can pose in our society . . . The corporation makes things easier for huge capital conglomerates . . . this development entails a concentration or a stabilization of social power which is much more dangerous than the fidei commissa prohibited by the constitution."[198]

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[193] *Ibid.,* p. 55.

[194] However, Lie's discussion was more nuanced than that of many of his successors, who were much more critical of the Supreme Court in this period. *See e.g.,* note 111, *supra* and accompanying text. After counting the cases in which art. 97 had been argued, he concluded that until late 1922, only 11 such challenges had been successful and noted that "[w]hen one thinks of the direction newer theory has taken, this seems like moderate use of the courts' authority. More importantly, the jurisprudence of the last few years is obviously working its way out of the constructions that this theory is based on." Lie, *supra* note 102, p. 58.

[195] *Ibid.,* p. 64. As examples of this thought in the Norwegian constitution, he cited art. 23 ("No personal, or mixed, hereditary privileges may henceforth be granted to anyone."), art. 101 ("New and permanent privileges implying restrictions on the freedom of trade and industry must not in future be granted to anyone.") and art. 108 ("No earldoms, baronies, entailed estates or fidei commissa may be created in the future."). Lie also referred to comments of the drafters of the constitution on this point.

[196] The role of this idea in 19th century American law was described in part 2, *supra*.

[197] Lie, *supra* note 102, pp. 64–65.

[198] *Ibid.,* p. 66. Lie discussed the *Waterfall case* (*see* chapter 2.4.1. Judicial Rreview and Standards of Review, *infra*) on this point, noting that the key considerations in that case were

In sum, Lie criticised the constitutional theory of his predecessors in part by comparing it to older American theory and by introducing newer American ideas to Norwegian law.[199] Therefore, he not only introduced new American thought into Nordic law but he also emphasised – indeed, he may have over-emphasised – the similarities between late 19th century Norwegian constitutional thought and late 19th century American constitutional thought. That link greatly affected the interpretation of Norwegian theory and jurisprudence in the following decades.

2.3.6. Danish and Icelandic Writings

The Norwegian writers' influence was also considerable in Denmark and in Iceland. This is especially true of Aschehoug's *The Present Constitution of Norway*. That treatise's structure and focus were immensely influential, as was its discussion of judicial review and of constitutional rights more generally.

Matzen, who wrote the main Danish constitutional law treatise in the late 19th century, focused on limitations of state power, just as Aschehoug had done.[200] Matzen was the first Danish writer to include a special chapter on constitutional limitations on state power in his treatise.[201] It has been discussed in Danish theory whether this was a purely systematic move or symptomatic of a conceptual change. The proponents of the latter theory argue that Matzen's presentation indicates a shift in perspective, in that he focused on limitations on state power while earlier writers

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economical and the fact that the law mainly prohibited selling to "monopolies. This can hardly be prevented, except by a legal limitation on the future use of the [waterfalls]. Based on this, it is a given, that the economic profits from the operation and the restrictions that must be in place are for the good of society as a whole. This has nothing to do with the constitution's art. 105, 97, or 75." *Ibid.*

[199] At the end of his essay, Lie concluded that the "authority of the courts to review the constitutionality of legislation is a special constitutional and political guarantee. It is not the case, as people have generally believed here, that this principle is unique to the Unites States and to Norway. There is strong . . . sympathy for this system in most leading societies . . . [It] gives the ordinary citizen a sense of security, which has its own psychological value, irrespective of whether it has a solid base in fact or not." *Ibid.,* p. 68. Lie concluded that unless art. 97 was repealed, the legislature would be hindered from doing its job, "which would be at odds with the legal views of the nation. And thereby, the system would be doomed." He thus suggested repealing art. 97 but keeping art. 105 and the institution of judicial review intact.

[200] The first volume of Matzen's *Danish Constitutional Law* was published in 1881 and 1888. A second edition was published in 1887–1895. The treatise was published in a third edition in 1897–1901.

[201] In the treatise preceding Matzen's, some provisions of the bill of rights had been discussed under the heading "Rights linked to citizenship", and others as "The right to protection from arbitrary state interference in the individual's rights." C. G. Holck, *Den danske Statsforfatningsret II* [*The Danish Constitutional Law II*] (Gyldendal, Copenhagen, 1869) p. 325. *See also* J. P. Christensen, *Forfatningsretten og det levende liv* [*Constitutional Law and Real Life*] (Jurist- og Økonomforbundets Forlag, Copenhagen, 1990) p. 39.

focused on the rights of individuals.[202] In later editions of his treatise,[203] Matzen discussed the views of older Danish writers and the various reasons for and against judicial review's existence.[204] His emphasis was different from the Norwegian writers', however, because he linked judicial review to the provision on constitutional amendments and not to individual constitutional rights.[205] But he also referred his readers to Aschehoug's chapter on judicial review in its entirety, stating that he himself "had reached the same conclusion".[206]

Knud Berlin succeeded Matzen as a professor of constitutional law in Copenhagen. He not only used the treatises of Aschehoug and Morgenstierne but was also acquainted with many of their sources, notably Freund. He discussed judicial review as a given but relied on Matzen and did not add much to what Matzen had written. In 1921, Danish Supreme Court Justice Eivind Olrik wrote an article in TfR. on judicial review.[207] Once again, Aschehoug's treatise was cited, but no American writings were. Apart from Olrik's article, there was not much discussion of judicial review in Denmark until 1937 and 1938, when a new constitution was drafted but failed to be promulgated.

Icelandic lawyers were educated in Copenhagen until 1908, when a law school was founded in Reykjavík. The oldest Icelandic constitutional treatises, *Íslenzk stjórnlagafræði* [*Icelandic Constitutional Law*] from 1913[208] and *Ágrip af íslenzkri stjórnlagafræði* [*An Overview of Icelandic Constitutional Law*] from 1927,[209] are heavily indebted to Matzen. The latter refers to Matzen's work as a "[t]reatise of importance concerning the current constitutional law of Iceland",[210] and their authors were probably acquainted with Aschehoug's work as well. It is noteworthy that on the issue of the relationship between Iceland and Denmark, Icelandic writers

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[202] *Compare* H. Zahle, *Dansk Forfatningsret 3 – Menneskerettigheder* [*Danish Constitutional Law 3 – Human Rights*] (2nd ed.) (Christian Ejlers, Copenhagen, 2000) pp. 17–19, *with* Christensen, *supra* note 201, p. 50.

[203] H. Matzen, *Den Danske Statsforfatningsret I* [*The Danish Constitutional Law I*] (2nd ed.) (Copenhagen, 1895).

[204] *Ibid.*, discussing the theories of Holck (*see supra* note 201) and of Nellemann's *Civilprocessens almindelige Deel* [*The General Part of Civil Procedure*] from 1868. Matzen did not discuss judicial review in the first edition of his treatise, whose third volume was published in 1889. It is therefore likely that he was influenced by Aschehoug in his treatment of the subject.

[205] Matzen, *supra* note 203, pp. 278–300.

[206] *Ibid.,* p. 300. For this reason, one Danish constitutional history scholar treats Aschehoug and Matzen much as one as far as judicial review is concerned. *See* Andersen, *supra* note 3, pp. 17–18.

[207] E. Olrik, 'Domstolene og loves grundlovmæssighed [The Courts and the Constitutionality of Laws]', *TfR* (1921), p. 226.

[208] L. H. Bjarnason, *Íslenzk stjórnlagafræði* [*Icelandic Constitutional Law*] (Reykjavík, 1913).

[209] E. Arnórsson, *Ágrip af íslenzkri stjórnlagafræði* [*An overview of Icelandic constitutional law*] (2nd ed.) (Reykjavík, 1935–1940). It makes all research more difficult that both treatises were published as manuscripts and did therefore not include bibliographies.

[210] *Ibid.,* p. 4. *See also* Ragnarsson, *supra* note 5, p. 109.

disagreed fiercely with Matzen. He was therefore no favourite of Icelandic authors, which makes it all the more likely that they looked to other Nordic sources.[211]

None of the Icelandic writers in this period referred directly to American law. Their approach was similar to Aschehoug's, however- the emphasis was on the limitations of state power, and judicial review was discussed in that context. In spite of the lack of direct references or citations, the influence of American thought can be discerned in the text. In 1927, Einar Arnórsson wrote on judicial review:

> "Either the existing courts are competent to decide such cases or the legislative power . . . is the sovereign power; makes the final decision as to its own competence, so that the judicial and executive powers have to apply general laws . . . even if they are inconsistent with the constitution . . . The protection of the citizen would be almost non-existent if the legislature were sovereign as to its competence. And then it could unhesitatingly invade the sphere of the constitutive power and thus in practice make art. 76 [on constitutional amendments] non-existent. The weight of the evidence is against this."[212]

Once again, the echoes of *Marbury* v. *Madison* – which had been printed in translation in Morgenstierne's article of 1913 – are clear. In a 1962 article on the development of judicial review in Iceland, a commentator concluded that

> "the doctrine of judicial review originated in the United States. From there, it migrated to Norway and then to Denmark. We can trace the doctrine's travels thus: Alexander Hamilton c.a. 1790, John Marshall 1803, probably Stang 1833, but mainly Aschehoug 1870 and Lárus H. Bjarnason got acquainted with this doctrine through him – either directly or via Matzen's treatise of constitutional law."[213]

While this may be an over-simplification, especially as far as American law and the introduction of judicial review into Norwegian law are concerned, it is clear that American constitutional thought considerably influenced the constitutional law of Denmark and Iceland through Norwegian theory.

2.3.7. Concluding Remarks – the 19th Century Law Writers' Influence

The extensive citations to American legal writings and the scope of the influence of American thought on Norwegian constitutional writings suggest that Norwegian writers were familiar with the treatises they referred to in their entirety. Therefore, it is to some extent justified to look at the American writers that Nordic writers referred to rather than the citations or references themselves.

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[211] *See* K. Heimisdóttir, 'stjórnarskrárbundið fullveldi Íslands' [The Constitutionally Guaranteed Sovereignty of Iceland], 51:2 *Tímarit lögfræðinga* (2003) p. 19 at pp. 25–7, and Bjarnason, *supra* note 208, p. iii: "Icelandic constitutional law cannot be taught from Danish books".

[212] Arnórsson, *supra* note 160, pp. 49–50.

[213] Ragnarsson, *supra* note 5, p. 109. This influence was followed more closely in Helgadóttir, *supra* note 3, pp. 495–6.

PART 2

Prior to Aschehoug's treatise, de Tocqueville's *De la démocratie en Amérique* and Story's *Commentaries of the Constitution*, both of which appeared in the 1830s,[214] were the books referred to in Norwegian theory. Later in the 19th century, Cooley's *A Treatise on the Constitutional Limitations Which Rest upon the Legislative Power of the States of the American Union*, Sedgwick's *A Treatise on the Rules Which Govern the Interpretation and Construction of Statutory and Constitutional Law*, and Kent's *Commentaries on American Law* were added to the list of those frequently referred to in Norwegian law – primarily in Aschehoug's writings.[215] In addition, Redfield and Pomeroy were referred to once or twice.[216] It is noteworthy, if completely natural, that many of the books cited were published long before the period discussed here. Story, Kent, and de Toqueville were all working well before 1850.

More importantly, the writers whose works are most frequently cited were in the mainstream of American legal thought; Story, Kent and Cooley.[217] Cooley's immense influence on 19th century American law, especially at the state level, has already been described.[218] The other two belonged to a different era. Kent, "perhaps the most learned jurist in America",[219] was Chief Judge of the New York Supreme Court and later Chancellor of New York, and he "emerged as the first of the great treatise writers of the early nineteenth century".[220] Story was a U.S. Supreme Court justice from 1811–1845, thus taking part in some of the most famous Marshall Court decisions. Both Kent and Story sought to develop American jurisprudence in an era

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[214] Alexis de Tocqueville was born in 1805 and *Of Democracy in America* was published in 1835–1840. Joseph Story was born in 1779 and his *Commentaries* appeared in 1833.

[215] Theodore Sedgwick was born in 1811 and his treatise was first published in 1857. Thomas M. Cooley was born in 1824 and the first edition of his treatise on *Constitutional Limitations* appeared in 1868. James Kent was born in 1763 and published his *Commentaries* in 1826-1830.

[216] John Norton Pomeroy was born in 1828 and published *An introduction to the constitutional law of the United States: especially designed for students, general and professional* in 1879. Isaac Fletcher Redfield was born in 1804 and wrote on railways in the 1850s and 60s. It is not clear from Aschehoug's book which book by Redfield he was referring to.

[217] Those most frequently referred to indirectly by the Norwegian Supreme court are Cooley, Sedgwick and Story.

[218] *See* Jacobs, *supra* note 35. McCloskey states that "Cooley's classic treatise on *Constitutional Limitations*, first published in 1868, had become a canonical text for jurists". R. G. McCloskey, *The American Supreme Court* (2nd ed.) (University of Chicago Press, Chicago, 1994) p. 87. Another commentator notes that Cooley's "treatises on Constitutional Limitations (1868) and Taxation (1876), and his edition of Blackstone's Commentaries, are three of the nineteenth century's most influential legal texts". H. Hovenkamp, 'Law and Morals in Classical Legal Thought', 82 *Iowa L. Rev*. (1997) p. 1427 at p. 1459. On Cooley's influence on state constitutional law in particular, *see* White, *supra* note 39, p. 119.

[219] Kelly, Harbison and Belz, *supra* note 57, p. 202.

[220] White, *supra* note 39, p. 39.

when there was "an absence of established American law".[221] Their treatises, "ostensibly collections of and glosses on 'the authorities,' became authoritative in themselves".[222] All three have been described as conservative.[223] There were certainly other legal writers – just as mainstream – who were never referred to in Norwegian literature; amongst them Christopher G. Tiedeman and John F. Dillon,[224] as well as prominent judges – like Field – who were not discussed in Nordic law until the 1920s and 30s because of the emphasis on treatises. What is important though is that Aschehoug, working from 1850 to about 1900, read much the same texts as an American lawyer writing in the 1860s or 70s might have done, and their views permeated his constitutional doctrine. Later Norwegian authors, as well as their Danish and Icelandic counterparts, then relied on Aschehoug's writings. Not until Lie's essay in 1923 did Norwegian authors look to newer American theory. The influence of that theory will be discussed in the next part.

Another factor that deserves to be mentioned is the fact that Norwegian and Danish authors had access to much the same British and continental European legal writings as American lawyers. Aschehoug's treatise is replete with citations and references to Savigny, and later Norwegian writings frequently cited Jhering and Jellinek.[225] The historicist school considerably influenced American legal thought as well.[226]

2.4. AMERICAN INFLUENCE IN NORDIC CONSTITUTIONAL JURISPRUDENCE

In this chapter, the degree to which American legal thought influenced Nordic case law will be examined. In what follows, Nordic cases and doctrine on five points will be examined more closely and compared to American jurisprudence. The discussion

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[221] *Ibid.,* p. 44. On the means they employed; reporting court decisions, historical scholarship and – most importantly in this context – treatise writing, *see ibid*., pp. 44–47. *See also* Jacobs, *supra* note 35, pp. 9–10.

[222] White, *supra* note 39, p. 46.

[223] Kent's doctrines have been viewed as tending to "erect barriers to the broadening of economic or political power. For this reason he had become anathema to radical Democrats . . ." *Ibid.,* p. 39. The same author notes that "Like Kent, Story was interested in maintenance of support for static property rights amidst a climate of economic expansion." *Ibid*., p. 51. One scholar speaks of the "extreme . . . economic conservatism" of "Marshall or Story or Kent." B. F. Wright, *The Growth of American Constitutional Law* (Houghton Mifflin, Boston, New York, 1942) p. 57.

[224] On their influence, *see* Jacobs, *supra* note 35.

[225] *See e.g.,* Castberg, *supra* note 166, who refers to Savigny's *System des heutigen römischen Rechts* I–VIII and Jhering's *Der Zweck im Recht* I.

[226] *See e.g.,* R. A. Posner, 'savigny, Holmes, and the Law and Economics of Possession', 86 *Va. L. Rev*. (2000) p. 535, (discussing the treatment of Savigny's theory of possession in O.W. Holmes' *The Common Law*); J. E. Herget and S. Wallace, 'The German Free Law Movement as the Source of American Legal Realism', 73 *Va. L. Rev*. (1987) p. 399 (documenting *inter alia* Savigny and Jhering's influence on John Chipman Gray).

will primarily focus on Norwegian law, because the Danish and Icelandic courts decided fewer constitutional cases, which had, in general, a lower profile, and because Danish and Icelandic court opinions were so brief that their premises were not always clear. The points to be examined are the doctrine of judicial review; the doctrine of vested rights, especially concerning privileges granted by the state and rights under a contract; the possibly pretextual use of government power; the antipathy towards special legislation; and the division into private and public spheres.[227]

2.4.1. Judicial Rreview and Standards of Review

In 1918, a Norwegian law which provided that a licence was needed to sell the rights to waterfalls to corporations or to citizens of foreign countries was challenged before the Supreme Court, in what became a landmark case concerning judicial review.[228] The law also stipulated that property rights to harvested waterfalls would be transferred to the state after the maximum renting period of 80 years. A landowner argued that the law unconstitutionally reduced the value of his property because he could not sell it or sell the right to utilise the waterfall except on these conditions.[229] Regulating the utilisation of waterfalls was a major political issue in Norway in the 1910s, and because the law was important to the left-wing government, the case was followed closely.[230]

In this case, the state argued, for the first time in decades, that the Courts did not have the power to exercise judicial review. This led the Supreme Court to directly discuss its authority and the standard of review in the opinion.[231] Justice Backer, whose vote was endorsed by the majority, noted that

> "[i]t has been disputed in this case whether the Court is competent to decide whether a law is unconstitutional and should, for that reason, be set aside in whole

[227] When discussing this period, Norwegian constitutional historians have primarily focused on cases concerning privileges and one or two cases concerning contractual rights. These cases are discussed here, but so are many others, such as those concerning land use regulations. The focus has also been on the cases in which a law was struck down, which were only a small percentage of the cases in which a law's constitutionality was at issue.

[228] Rt. 1918.401. The Court split 4 to 3, and the Justices wrote 6 separate opinions.

[229] The landowner's arguments were thus classic vested rights arguments.

[230] Eckhoff, Impartiality, *supra* note 111, p. 28, argues that the case was important because the law was a poster-child for the government and not because of the facts of the case or the substantive importance of the law. Jens Arup Seip, on the other hand, argues that the case was a "turning point to the extent that the Supreme Court, when forced to decide a case where important political and economic interests clashed, did not dare to go against the decision made at the highest political level". Seip, Supreme Court, *supra* note 111, p. 9.

[231] The Norwegian Supreme Court had addressed it power to exercise judicial review in an 1866 opinion, discussed *supra*. In 1912, the Danish Supreme Court had commented that irrespective of its power to exercise judicial review, it was not competent to determine whether legislation was in the common weal. UfR. 1913.457. Even though Icelandic courts had clearly exercised judicial review at this time, they had never addressed the issue directly.

> or in part. In my opinion, this question is resolved both in theory and practice; the Constitution puts legal limitations on the legislature's authority and the Court has a right and a duty to review whether these limitations are respected or overstepped. I believe it sufficient in this context to refer to the development in Aschehoug's public law, vol. III, Ch. 63, section 19 and what follows, to the article by Professor Morgenstierne in Rt. 1913.449 . . . and, as far as practice is concerned, to the earlier Supreme Court decisions cited by these authors and to [the pharmacy cases of 1917, invalidating a law levying fees on pharmacists and limiting the rights of pharmacists' legatees, on vested rights grounds]. What the Court should require before using its competence in this matter to determine that a law is unacceptable because it is unconstitutional, may be a different issue. It will be a matter of judgment in each concrete case, how much is needed for that. I will just note that I agree with Aschehoug's comment in Ch. 63, section 20 i.f.; that courts need to be especially careful in setting a law aside when the legislature has, when enacting the law, debated its constitutionality specifically and come to the conclusion that the law is constitutional."[232]

This part of the opinion was immensely important because it explicitly set out the Court's view on its authority to exercise judicial review. Concerning constitutional doctrine, the court believed it "sufficient" to refer to Aschehoug's discussion of judicial review and Morgenstierne's article from 1913. Aschehoug's general discussion of judicial review, its indebtedness to Cooley's *Constitutional Limitations* and the references made to that work have been described in chapter 2.3.[233] The part

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[232] Rt. 1918.401, 404–405. The 1917 pharmacy cases, Rt. 1917.392 and Rt. 1917.402 are discussed in more detail *infra, see* note 291 and accompanying text. Justice Berg, who later became Chief Justice, wrote an important concurrence in this case. Like the majority, Berg referred to Aschehoug on the standard of review to be used. He wrote: "I agree that the understanding of the law that has evolved in this country goes in the direction of the courts reviewing whether legislation is consistent with the constitution. But the general understanding reaches, in my opinion, only so far as to say that the courts have a duty and a right not to enforce or apply laws that are obviously or without doubt inconsistent with the constitution. If the courts cannot ascertain with certainty that a certain construction is the correct one, and must therefore acknowledge that people may differ on the construction of a particular constitutional provision, I believe they have no constitutional power to superimpose their interpretation on the legislature's. It is not left to the subjective evaluation of the courts whether they should set aside the constitutional interpretation on which the legislature based its decision. I believe that in such cases, the courts may not strike down the law. As far as I can tell, this is the understanding conveyed in Aschehoug's *Statsforfatningsret* . . . and also in Stang's *Commentary on the Constitution* p. 610. Stang's exhaustive analysis of this question, p. 548 and on, goes further in the direction of limiting the courts' authority – a theory which has been accepted by Dunker." *Ibid.,* p. 424. This concurrence has been viewed as a seminal event in Norwegian constitutional law since it has been believed to mean that "[t]he authority of the Supreme Court to control the decisions of Parliament was put in context of a positive view of political democracy and social radicalism". Seip, *supra* note 157, p. 136. Chief Justice Thinn also wrote a concurrence, in which he referred to the chapter in Aschehoug's treatise concerning the interplay of regulations and takings, from which Berg took his citation, in full. Rt. 1918.401, 427.

[233] *See* note 128, *supra* and accompanying text.

of Aschehoug's treatise referred to is thus based on the model of an American treatise, contains many references thereto, and restates the fundamental argument of *Marbury* v. *Madison*, with which Aschehoug was probably familiar, given his reliance on American materials in this field.[234]

The other source of theory referred to by the majority, Morgenstierne's article from 1913, has also been described in chapter 2.3. His arguments for judicial review in general, just like Aschehoug's, were the same as the arguments in American legal theory.[235] For our purposes, the key issue concerning this case is that when stating explicitly that the courts have the authority to exercise judicial review, the Supreme Court's majority referred, in addition to its earlier case law, to two discussions of judicial review, both of which relied extensively on American law at the most fundamental level concerning the justification of the institution.

The majority in the *Waterfalls case* mentioned specifically that it agreed "with Aschehoug's comment . . . that courts need to be especially careful to set a law aside when the legislature has, when enacting the law, debated its constitutionality specifically and come to the conclusion that the law is constitutional".[236] In fact, Aschehoug wrote in this sentence that the courts should be careful in such instances "just as they should always proceed with caution" when there is question of striking down a law. In a footnote to this very sentence, he referred to a chapter in *Constitutional Limitations* and noted that "[w]hat was just said is substantially in accord with the theory and various statements of the courts in North America", adding that "[i]n order to fully understand their jurisprudence it must be noted that every so often they set aside legislation whose constitutionality is disputed even within the court itself".[237] In the cited chapter, Cooley emphasised *inter alia* that "the power to declare a legislative enactment void is one which the judge, conscious of the fallibility of the human judgment, will shrink from exercising in any case where he can conscientiously and with due regard to duty and official oath decline

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[234] *See* the discussion *supra* in "Aschehoug, influenced by American theory and practice . . ." - Jurisprudence and theories of judicial review in *Norges nuværende statsforfatning.*

[235] Morgenstierne, however, referred more anecdotally and more generally to American law than did Aschehoug. *See supra* note 155 and accompanying text.

[236] In light of Eivind Smith's theory that this is an issue on which Aschehoug's ideas were moderate compared to Morgenstierne's, it may be that the Court was expressly endorsing Aschehoug's theory rather than Morgenstierne's. *See supra* note 153 and Smith, *supra* note 3, p. 184.

[237] Aschehoug, *supra* note 116, p. 368. The pages referred to in Cooley's treatise describe the "authority to declare statutes unconstitutional [as] a delicate one", that it will "not be done by a bare quorum of court [,] nor unless a decision upon the point is necessary [,] nor on objection by a party not interested [,] nor solely because of unjust or oppressive provisions [,] nor because conflicting with fundamental principles [,] nor because opposed to the spirit of the constitution". Here taken from T. M. Cooley, *A Treatise on the Constitutional Limitations Which Rest upon the Legislative Power of the States of the American Union* (Little, Brown and Co., Boston, 7th ed. 1903) p. xii. This question, whether laws could be invalidated if inconsistent with the spirit and principles of the constitution, preoccupied Nordic lawyers for most of the 20th century.

the responsibility".[238] He also noted that the "task is . . . a delicate one, and only to be entered upon with reluctance and hesitation… But the duty to do this in a proper case, though at one time doubted, and by some persons persistently denied, it is now generally agreed that the courts cannot properly decline",[239] and that "[a] reasonable doubt must be solved in favour of the legislative action, and the act be sustained".[240]

It is ironical that the two authors that were later associated with a discredited judicial activism for the benefit of property and vested rights in their respective countries,[241] Aschehoug and Cooley, are extensively cited in the very case where the standard of review was lowered compared to earlier cases,[242] and on the very point of the level of scrutiny the courts should apply. In *Constitutional Limitations*, Cooley recommended judicial caution; but he was, because of his writing on vested rights and the protection afforded by the due process clause, viewed as at least one of the architects of Lochner era jurisprudence, which was again linked to illegitimate judicial activism. In a similar way, Aschehoug was in later legal writings viewed as the protagonist of an "activist" period of the Norwegian Court in spite of his own words on the level of scrutiny that should be applied.

This case from 1918 was the only one during this period in which the Norwegian Supreme Court discussed its power of judicial review. The Danish Supreme Court suggested, in 1921, that it would apply a low level of scrutiny;[243] but

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[238] Cooley, *supra* note 237, p. 227.
[239] *Ibid.,* pp. 228–9.
[240] *Ibid.,* p. 253.
[241] Andersen speaks of "Cooley-ism", noting that it "is [in 1947] past its prime and has been replaced by a more alive historical-realist view of legal developments." Andersen, *supra* note 3, p. 19. Of the 1918 case, Seip wrote that "The long awaited 1918 case concerning the concession legislation . . . was a huge disappointment to Morgenstierne and others who had tied their hopes to the courts. This case will remain a central event in Norwegian political history. Paal Berg's vote, representative of the majority [it was in fact a concurrence] is an important political act. In that vote, Venstre [The political party "Left"] confronted judicial reaction. The authority of the Supreme Court to control the decisions of Parliament was put in context of a positive view of political democracy and social radicalism." Seip, *supra* note 157, p. 136.
[242] In earlier cases, the standard of review had not been discussed explicitly. However, legislation interfering with vested rights had consistently been invalidated if it interfered with the substance of the right and not only its exercise. After 1910, legislation was also invalidated if it entailed a substantial loss of value. *See* chapter 2.4.2.1. Privileges and Regulatory Power*, infra.* In one of the pharmacy cases, Rt. 1917.392, the Supreme Court noted that "a limit on [the pharmacist's] rights ... which would lead to the fact that the appellee would not be able to sell his pharmacy and the privileges linked to it on the same terms as he has held it, must be viewed as such a considerable interference with the economic value of his privilege, that he is not bound to accept it without getting compensated." Rt. 1917.392, 394. The question at issue was quite similar to the one in the *Waterfalls case*, but the Court's view was quite different.
[243] UfR. 1921.644. In this case, the law was upheld because the law's unconstitutionality had not been shown "with the certainty required for the courts to be able to set aside the provisions of a law adopted in pursuance to the constitution" UfR. 1921.644, 646.

it did not elaborate, so the rationale for that decision and its origins are by no means clear.

2.4.2. Liquor and Milk – the Doctrine of Vested Rights

The doctrine of vested rights, which was a fundamental tenet of American constitutional thought in the 19th century, was discussed in chapter 2.2., *supra*. It was an important characteristic of American jurisprudence until the 1930s. The protection of vested rights was similarly a staple of Norwegian jurisprudence in the period from about 1895 to 1920 or so, and the doctrine was known in the other Nordic countries.[244] In this section, the influence of American vested rights jurisprudence on Nordic, primarily Norwegian, jurisprudence will be examined.

2.4.2.1. Privileges and Regulatory Power

It was described in chapter 2.3. how Aschehoug was one of the main intermediaries between the constitutional thought of the U.S. and Norway, and how he based his writings on American theory predating the Civil War. It will be argued here that due to Aschehoug's influence, 19th century American vested rights doctrine was immensely influential in Norway until around 1920, long after it had been modified in American law. This is evident from cases concerning privileges as well as cases concerning vested rights in tax exemptions.

It was described in chapter 2.2. that in American law, privileges were secure under the doctrine of vested rights. *Fletcher* v. *Peck* established, based on the contracts clause, that "once government had granted land, perpetual tax exemptions, or corporate charters to private groups, the state could not thereafter take away those privileges".[245] It was also described in chapter 2.2., that in *Boyd* v. *Alabama, Boston Beer* and *Stone* v. *Mississippi,*[246] decided around 1880, the U.S. Supreme Court held

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[244] *See e.g.,* Seip, 'supreme Court', *supra* note 111, p. 7, pointing especially to the decades around 1900. *But see* Smith, *supra* note 3, p. 188, arguing that the Norwegian Supreme Court most actively protected vested rights in the decade from 1909, and Slagstad, 'Judicial review', *supra* note 101, p. 172. While it is questionable whether judicial activism in vested rights cases was really characteristic of the decades around 1900, as was argued by court-critics in both countries around 1930, it is clearly true that the Norwegian Supreme Court often decided cases using a vested rights rationale, and that this argumentation ceased to appear in Supreme Court opinions after the Second World War.

[245] McCurdy, *supra* note 26, p. 255. *See* also chapter 2.2.3. Vested Rights *supra.*

[246] *Boyd* v. *Alabama*, 94 U.S. 645 (1877) upheld the conviction of an agent for selling lottery tickets. The charter of his company explicitly permitted it to run a lottery and included no revocation clause. The law granting permission and the charter were struck as violative of the anti-logrolling provision in the state constitution, but Justice Field noted that the Court would not admit that "it is competent for one legislature, by any contract with an individual to restrain the power of a subsequent legislature to legislate for the public welfare". *Ibid.,* p. 650. *Stone*, on the other hand, refused a similar contracts clause claim on the basis of the inalienability of the police power only. *Stone* v. *Mississippi*, 101 U.S. 814 (1880). In *Boston Beer*, 97 U.S. 25 (1877) prohibition was not viewed as inconsistent with the Boston Beer

that the police power was inalienable. In the latter case, Chief Justice Waite, speaking for the Court noted that

> "All agree that the legislature cannot bargain away the police power of a State. 'Irrevocable grants of property and franchises may be made if they do not impair the supreme authority to make laws for the right government of the State; but no legislature can curtail the power of its successors to make such laws as they may deem proper in matters of police.'"[247]

This meant that even though privileges were, in principle at least, protected by the contracts clause, and later the due process clause, activity engaged in under a charter or privilege was subject to police power regulations: "All rights are held subject to the police power of the state."[248] The question was, therefore, in privilege cases as in other instances, one of the scope of the police power.

Cases concerning privileges granted by the state were an important part of Nordic constitutional jurisprudence from around 1890 to 1920, partly because people needed privileges or licences to engage in many of "the ordinary trades" in which anyone could engage in the U.S. Under the Norwegian trade law of 1842, a vending licence was needed in order to sell any goods in towns, but a licensee had the right to sell "everything except those items specifically excluded". When the legislature later regulated certain sales, licensees challenged the regulation. Many privilege cases concerned the right to sell liquor,[249] while other cases concerned licences to run pubs,[250] bakeries,[251] and pharmacies.[252]

There are clear echoes of American thought in the Norwegian privilege cases. Just as they had been in early 19th century American law, vested rights were viewed as inviolable[253] unless the right to revoke or amend them had been reserved at the

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Company's constitutional rights, even though it had been granted a right – in its charter – to manufacture and sell alcohol. *See supra* note 87 and accompanying text.

[247] *Stone* 101 U.S. 814, 818 (1880), citing *Metropolitan Board of Excise* v. *Barrie*, 34. N.Y. 657 (1866) and *Boyd* v. *Alabama*, 94 U.S. 645 (1877).

[248] *Boston Beer*, 97 U.S. 25, 32 (1877).

[249] *See e.g.*, Rt. 1890.455 and Rt. 1890.533 concerning the right to sell liquor under a general vending licence and Rt. 1910.124 (a special licence requirement for selling used goods invalidated because applying it to a woman who had an older vending licence was inconsistent with art. 97). Regulations on alcohol sales were similarly challenged in Iceland but these challenges never met with any success. In Lyfr. VI, 176 (decided 19 March 1900) a licensing fee for alcohol sales was upheld.

[250] *See e.g.*, Rt. 1909.156, invalidating closing time regulations.

[251] Rt. 1895.297 (The owners of 12 bakeries in Bergen challenged an 1839 law providing that after the death of the last spouse of the bakers running the 12 guild bakeries in Bergen at the time the law entered into force, the guild would lose its monopoly in the city. The constitutional challenge was unanimously rejected).

[252] Rt. 1917.392 (invalidating new regulations and fees on pharmacies as inconsistent with art. 97), Rt. 1917.402 (invalidating the same law *vis-à-vis* a more recently established pharmacy).

[253] The fundamental tenet of Norwegian vested rights doctrine was clear: "Neither the state nor the municipality should be able to limit the legally vested rights of the citizens without paying compensation ... [I]t cannot be required of the individual that he make a greater

outset, or the owner of the privilege had reason to expect the privilege not to be inviolable.[254] If the common good required regulation, then the state needed to compensate those whose vested rights suffered.[255] In the decades around 1900, Norwegian law was therefore more protective of vested rights than the law of any of the other countries discussed here. The difference is clearly illustrated in cases

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sacrifice than others for the benefit of the state or the municipality by relinquishing his legally vested rights." Rt. 1909.417, 418. In this case, a preservation law was struck down because it invalidated the contractual right of a tenant to fell all trees over a certain height which was lower than the minimum height stipulated by the law.

[254] Concerning American law, *see supra* note 70. In Norway, many cases were decided on the basis of what the privilege granted entailed and the reasonable expectations of the privileges. *See e.g.,* Rt. 1896.609 where a law prohibiting liquor sales in quantities of less than 250L was upheld because the licence itself referred to the "special provisions" on liquor sales. Based on that reference and frequent changes in the liquor legislation, the merchant's vending licence "could not, regarding the right to sell liquor . . . be understood as giving him an unassailable right to . . . sell liquor in quantities over [the older limit of 40L] I believe the accused . . . did not have any reason to personally understand his right in this way either. He should have been prepared for the economic regulation in this field to be changed." *Ibid.,* p. 611. On this point, *see* T. Eckhoff, 'Høyesterett som Grunnlovens Vokter' [The Supreme Court as the Guardian of the Constitution], *Jussens Venner* (1976) p. 1 at p. 13. *See also* Rt. 1917.402, 402–3. Only in 1931 did a dissent clearly question the value of this criterion. *See infra* note 265, discussing Rt. 1931.865, 868. The expectations of the privilegees were an important factor in Danish jurisprudence, just as in Norwegian law. In a 1935 case, former judges challenged a law mandating that judges retire at a certain age. They argued that the law was a violation of the constitutional provision concerning the judiciary and that "the appellants, who were all appointed in 1919, had a right to count on and make plans based on the understanding that as far as dismissals go, the only rule applicable to them was the Constitution's art. 71 and that applying newer and less beneficial rules to them would violate their vested rights". UfR 1935.1, 3. The Danish Supreme Court upheld the act, noting that "neither can one say that such a rule violated the vested rights of the appellants". *Ibid.,* p. 6.

[255] Ideas of regulations benefiting those regulated and other considerations based on an idea of *quid pro quo* are related to both vested rights, through the idea that grants are contracts with the state, and the question whether regulations were for the common good. Such considerations were a part of American jurisprudence. *See e.g., Railroad Co.* v. *Maine*, 96 U.S. 499, 509 (1877). Similar considerations were apparent in a number of Norwegian cases. Speaking in 1890, the Norwegian Supreme Court said that when a man "acquired his vending licence, he acquired a right that both involves economic sacrifice, and especially in earlier times, significant personal burdens and duties. In my view, the rights secured to him in return can therefore not be summarily taken away." Rt. 1890.455, 456. Such considerations were also important in the forestry case, since part of the rationale for striking the preservation law at issue was that it affected the vested rights of the lessee, who did not benefit from the law like owners did. These considerations were also obvious in the case concerning price-equalising fees on milk. Rt. 1933.1041, *see infra* note 326 and accompanying text. A few years before, an Icelandic plaintiff had argued that he did not have to pay parish taxes because he had resigned from the state church and did not get anything for his money. This argument was successful in the lower court but the High Court reversed. Lyrd. II.455.

concerning liquor sales.[256] The U.S. Supreme Court addressed this question in *Crowley* v. *Christensen*. Speaking for the court, Justice Field noted that

> "there are few sources of crime and misery to society equal to the dram shop, where intoxicating liquors, in small quantities, to be drunk at the time, are sold indiscriminately to all parties applying . . . The sale of such liquors in this way has therefore been, at all times, by the courts of every State, considered as the proper subject of legislative regulation. Not only may a licence be exacted from the keeper of the saloon before a glass of his liquors can be thus disposed of, but restrictions may be imposed as to the class of persons to whom they may be sold, and the hours of the day and the days of the week on which the saloons may be opened. Their sale in that form may be absolutely prohibited. It is a question of public expediency and public morality, and not of federal law. The police power of the State is fully competent to regulate the business -- to mitigate its evils or to suppress it entirely."[257]

Icelandic and Danish judges similarly had little difficulty upholding liquor legislation.[258] In a 1916 Icelandic case, a merchant argued that he should be compensated for the loss of his privilege to sell liquor when prohibition was introduced. He argued that this right was protected by the takings clause of the constitution and that this was in fact a taking.[259] The Danish Supreme Court, still the Supreme Court in Icelandic cases, noted that the prohibition law "does not have the purpose of affecting the appellant's enterprise in particular and does not have that effect either, since the law is only an application of the legislature's mandate to enact general regulations concerning the economy".[260] In other words, it was willing to accept that the right vested under the licence was a property right, which was then

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[256] *See supra* notes 76 and 77. American judges generally did not find such cases very problematic. *See* Horwitz, *supra* note 27, pp. 28–29. Norwegian constitutional theory has focused on the privilege cases and the liquor cases in particular and frequently, the conclusion has been that the Supreme Court of 1890–1930 was extremely property-protective. *See e.g.,* Seip, *supra* note 157. However, there was much more to constitutional jurisprudence during this period than privilege cases, and they may give a skewed picture of the jurisprudence of the period.

[257] *Crowley* v. *Christensen*, 137 U.S. 86, 91 (1890) (upholding a law entrusting it to the discretion of the chief of police in San Francisco to grant or refuse a licence to sell liquor).

[258] *See* Lyrd. VI.176 (upholding a licensing fee on pubs).

[259] The High Court refused to accept his right under the licence as a property right. The High Court stated on this point: "Even though one can now conclude that the words property right and property in this provision of the constitution do not only mean property in the narrow sense of that word but also various other valuable rights, such as using rights, rights under an obligation, intellectual property and a monopoly, it cannot be said that the right at issue here falls within the scope of that provision and there does not seem to be enough reason to bring it within its scope per analogiam." Lyrd. IX.809, 811–813 (Aug. 7, 1916).

[260] Lyrd. X.601, 601–2. Similar cases were decided in Lyrd. X.20 and X.603. The antipathy of American judges towards special legislation was discussed in part 2, *supra*. For a discussion of this and other Nordic cases in this context, *see infra* 2.4.4. Antipathy towards Special Legislation

in principle protected by the takings clause, but found that the law was a valid exercise of the legislative power "to enact general regulations concerning the economy". Therefore, the loss of the right did not amount to a taking.
The next year, the Icelandic High Court elaborated that rights to run businesses did not fall within the scope of the property clause

> "and the same must be true of the right here at issue, the fact that the appellant's business was run under a licence from the state notwithstanding, since one must conclude that such general licences are conditional on such businesses being allowed in the country at all, and even though [the older laws] presumed that older privilege holders would not be deprived of this privilege, that can not tie the legislature's hands when it later decides to limit or prohibit the business in question without awarding compensation."[261]

The Danish Supreme Court affirmed, endorsing the rationale of the High Court. This case shows that vested rights under a licence or privilege were not inviolable in Danish and Icelandic law; later legislatures were constitutionally able to "limit or prohibit the business in question".[262]

In Norway, on the other hand, vested rights – even to sell liquor – were better protected. The privilegees could not constitutionally be deprived of their vested right to sell liquor. It was clear, for instance, that new licence requirements were unconstitutional,[263] since they had in fact the effect of prohibiting activity that privilegees had a vested right to engage in. The question was therefore which regulations were constitutional and which were not, and alcohol regulations came before the Supreme Court more or less every year from 1890 to 1920. The approach of the Norwegian Supreme Court to these cases will now be described in more detail, since both the results in concrete cases and the developments in the mode of analysis are analogous to American cases and developments.

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[261] Lyrd. X.20, 23–6.

[262] Although vested rights in property other than liquor licences were often argued in Danish and Icelandic cases, such arguments were never successful, which indicates a difference in the constitutional law of Norway, Denmark and Iceland, during this period. In a 1933 Icelandic case concerning a law prohibiting margarines being called anything related to dairy products, a constitutional challenge from the owner of the trademark "Dairy Margarine" was rejected. The owner argued that this was a taking, but the Icelandic Supreme Court stated that a registered trademark could not "prevent the legislature from making general rules about trade and the names of products offered for sale, or change the situation that was in force when the privilege was granted". Hrd. 1933.790. Concerning vested rights arguments in Danish law, *see* UfR. 1935.1 and the discussion in note 254, *supra*. While Norwegian constitutional thought may have been changing at this point – in 1933 – this result would probably have been unthinkable in Norway around 1910.

[263] In a 1910 case concerning a special licence requirement for the sale of used goods, for which the general vending licence had previously been sufficient, a unanimous Court wrote that it was, "in other words, not dealing with a question of regulating or controlling the exercise of a right, but of its very existence", and invalidated the law. Rt. 1910.124, 125.

Until 1910 or so, the key question was, based on Aschehoug's writings, whether a law regulated the exercise of a right or whether it impaired its substance.[264] If it was deemed to do the latter, it ran afoul of the non-retroactivity clause in art. 97, sometimes in conjunction with the takings clause in art. 105. On the other hand, the Supreme Court noted that "losses that the licensees may suffer due to provisions . . . that do not assail the substance of the right must in these cases as elsewhere be borne without compensation".[265]

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[264] Aschehoug wrote that "the holder of the right can be deprived of no important part of the right, whereas he can be bound by new provisions on how the business shall be run, even if they place costly limitations on him or decrease his profits". Aschehoug, *supra* note 116, pp. 280–281. Already in a concurrence in 1890, one justice wrote that the law in question, which limited the sale of alcohol in small quantities, did not interfere "with the substance of the right" and upheld it, as did the majority. Rt. 1890.533, 537. This distinction was also the basis of a 1931 case concerning allodial property. Justice Larssen wrote that the amendment in question took "aim at the priority of this right and hence at its very existence . . . I believe that when their rights predate the amendment, these creditors are protected by art. 97 in the legal position they have benefited from since at least the 1821 law of allodial property." Rt. 1931.865, 874. Two justices dissented and their opinions – this was in 1931 – are interesting because they hint at the changes in constitutional jurisprudence that were coming: "an old rule like the one amended", wrote one, "can lead people to count on it continuing to be in force, but they must do so at their own risk when the provision is of the kind I just described, namely a provision that the legislature can alter at any time. It is the legislature alone to decide to which extent this circumstance [that people put their trust in the continuity of the law] shall be taken into account." Perhaps more importantly, he looked to the agricultural situation in the country: the amendment "is based on the fact that the legislature believed it was necessary to keep open the possibility of exercising allodial rights, in the situation that has been shaped by the price fluctuations of the last years. Characteristically, it was clear when the allodial property law was enacted, or soon afterwards, that [the provision that was amended in 1929] could, in certain circumstances put the whole institution of allodial property at risk. It has also been clear, in the later years, that this risk was not to be underestimated. But it is clear to everyone that these risks have come to pass to a frightening degree, as the circumstances changed after the World War. Based on the considerations really at issue, [the amendment] is an obvious emergency measure." *Ibid.,* p. 870. The other dissenter, Chief Justice Berg, also noted that "the fact that this was the situation until 1929 . . . is not the same as saying that a creditor who had a lien in allodial property prior to 1929, has been promised by the legislature that the situation will not change . . ." *Ibid.,* p. 876. He questioned the very basis of the doctrine of vested rights: "The individuals must always be prepared for the fact that the state may interfere in their legal sphere with new takings laws, forcing them to hand over interests acquired at a time when such takings were impossible." *Ibid.*

[265] Rt. 1909.156, 162. This was also referred to in a 1911 property case in which the Supreme Court upheld regulations of salmon fisheries. Three farmers argued that the regulations were inconsistent with art. 97 and 105, but in spite of the fact that the fishing was listed as an asset to their properties and therefore taxed as such, the Supreme Court rejected the challenge: "The challenged provision simply regulates the exercise of the fishing trade and cannot be viewed as interfering with the substance of any right. It is obviously based on general considerations and it is in the best interest of the fishing trade to preserve the fish-stocks. I believe it is clear

So what were the regulations that were upheld because they regulated the exercise of the rights in question but did not deprive the privilege holders of the substance of their privilege? As far as privileges were concerned, the regulations that were permissible according to these criteria were hour[266] and perhaps volume restrictions.[267] In 1896, a unanimous Supreme Court stated that since licensees "must accept limitations of time and scope concerning normal vending activity, that is even truer for the sale of liquor".[268] The regulations upheld under this standard were, in other words, prototypical police power regulations; the regulation of the time and manner in which the activity in question could be engaged in, enacted for the public order and safety – as long as they seemed reasonable and not intended to impair the substance of the right in question.[269]

Another standard started to emerge in Norwegian law around 1910. While it still mattered whether regulations regulated the exercise of a right or interfered with its substance, the Court also looked at the degree of interference, as indicated by the pecuniary losses of the plaintiff. In the first such case, decided in 1909, a closing time for pubs was struck.[270] The Court focused on the effect of the regulations, examining whether sales at the plaintiff's pub had actually declined and whether there was a causal relationship between the new regulations and that decline, assessing in particular whether the bad herring season of 1908 and the consequent poverty in and around Ålesund had caused the decline. The Court concluded that it was "highly likely that the [regulation] interfered very significantly with the economic value of the rights of the accused, and of the rights of other licensees . . . I must thus presume that . . . his licence to serve alcohol was affected in a way that he has, in any case, no duty to submit to without getting compensated".[271]

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that the legislature must be able to promulgate such regulations in spite of the Constitution's art. 105 or eventually 97." Rt. 1911.38, 39. Similar cases concerning the tools used for fishing were decided in a similar manner in 1894 and 1927. *See* Rt. 1894.550 and Rt. 1927.49.

[266] Such regulations for the alcohol sales of general vending licensees were upheld in Rt. 1915.617 (closing time at 7 p.m.), Rt. 1913.773 (prohibition on alcohol sales on independence day, labour day and the day before certain major holidays), Rt. 1912.321 (closing time at 6 p.m.), Rt. 1894.241 (closing time at 5 p.m. on Saturdays). On the other hand, such regulations were invalidated in Rt. 1910.181 (closing time at 5 p.m.) and Rt. 1910.186 (alcohol sales permitted only from 10 to 12 a.m. and 3 to 6 p.m.). As far as beer serving licensees in particular were concerned, regulations were upheld in Rt. 1910.283 (closing time at 10 p.m. and 1 p.m. the day before major holidays), Rt. 1891.22 (same closing rules for beer as for liquor) whereas the regulations were struck in Rt. 1909.156 (closing time at 5 p.m.).

[267] *See* Rt. 1896.609, discussed *supra* note 254.

[268] *Ibid.*

[269] *See infra* note 366 and accompanying text.

[270] Rt. 1909.156.

[271] *Ibid.,* pp. 162–3. In Rt. 1909.417 (the forestry case), a dissenter noted in response to this that "[i]t is absolutely certain that even laws that deeply affect a citizen's economic situation, can well be consistent with the Constitution's art. 97. The criteria for a law's consistency with art. 97 is not whether more or less people are economically more or less harmed by the law." Rt. 1909.417, 425. The following year, the Court commented, apropos closing times, that

The shift from distinguishing between the exercise of a right and its substance to distinguishing between acceptable regulations and unacceptable infringement on vested rights based on the loss of value the regulation entails was an important one.[272] Writing in 1920, Castberg integrated the two doctrines, noting that the closing time cases illustrated

> "a principle . . . established in our law: The legislature can regulate the exercise of protected economic privileges, on the condition that it does not interfere with the substance of the right...The question whether a law . . . interferes with a right to the extent that it must – based on this principle – be viewed as inconsistent with art. 97, is a matter of judgment. And this judgment must be exercised concretely: The decisive factor is the effect of the law or the decision on the right in question."[273]

This suggests that Castberg conceptualised the question of constitutionality as one of degree and no more as one of kind.[274] To Castberg – and the majority of the Norwegian Supreme Court in the late 1910s – a regulation's constitutionality depended on the degree to which it affected the value of the privilege in question.[275] Similar developments in American law were discussed in chapter 2.2., *supra*.

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when regulations "seeming to be provisions for the public order, lead to a really significant interference of substantial importance with the licensee's vending right, he is not obliged to submit to that without getting compensation". Rt. 1910.181, 182. The plaintiff's sales had diminished by a third so the Court found that it "must assume that the municipal decision of 1908 . . . has interfered so deeply with the economic value of the accused's legal vending right, that if the municipality wants to implement the closing time regulations it will have to do so by using the power of eminent domain." Rt. 1910.181, 183. One justice dissented, distancing himself from this way of thinking: "[B]oth businesses and civilian live in general must be prepared for the authorities to enact regulations based on the needs of society . . . without being able to claim compensation for the loss that these regulations for the common welfare entail for the citizen. Whether this loss, in concrete cases, is big or small is not particularly important or conclusive." Rt. 1910.181, 184. This standard was also applied in a pharmacy case in 1917 (Rt. 1917.392, 393–394).

[272] *See also supra* discussion in chapter 2.2.4. The scope of the Police Power.

[273] Castberg, *supra* note 166, p. 119. Eckhoff agreed in 1976, characterising the first standard as a gradual distinction and noting that the difference lay in the importance of the interference. *See* Eckhoff, *supra* note 254, p. 11. I believe this distinction was not viewed as gradual at the time but instead as a difference in kind. Apart from the language of the test itself, this is clear from a dissenting opinion in Rt. 1890.455. The dissenting justice wanted the plaintiff to obey the law and then sue the state for damages, noting that the outcome of that case would "substantially depend on . . . how the interference can best be characterised". Rt. 1890.455, 457. This standard was also applied in other vested rights cases, like Rt. 1909.417, *see infra* note 340 and accompanying text.

[274] For a discussion of similar developments in American law, *see supra* discussion in 2.2.5. Summary.

[275] For a discussion of this issue in American law, *see infra* note 302 and accompanying text. *See also Pennsylvania Coal Co.* v. *Mahon*, 260 U.S. 393 (1922). The U.S. Supreme Court concluded in this case that the regulation in question was not a legitimate exercise of the police power, but rather was an unconstitutional taking of the defendant's contractual and property rights because it served to take away those valid rights without adequate and just

In the early 1920s, the liquor issue in and of itself was resolved, as the Norwegian Supreme Court upheld prohibition and expressly overruled earlier liquor decisions.[276] The Court was careful, however, not to renounce the doctrine of vested rights. The decision was based on the narrower ground that the right to sell liquor had never really been a "privilege that should be preserved irrespective of later legislation".[277]

It was described in chapter 2.2. how the abstraction of property in American law led to the acceptance of new property interests and to a legal situation in which all changes in expectations that diminished the value of property were viewed with suspicion.[278] The abstraction of property, if it occurred at all in Norway, did not happen at this time. The takings clause *per se* had a relatively narrow scope unless it was used in conjunction with art. 97. However, the evolving standard for privilege cases had somewhat similar effects in Norwegian law. Both developments meant

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compensation. Justice Holmes, speaking for the Court, wrote that "some values are enjoyed under an implied limitation and must yield to the police power. But obviously the implied limitation must have its limits, or the contract and due process clauses are gone. One fact for consideration in determining such limits is the extent of the diminution. When it reaches a certain magnitude, in most if not in all cases there must be an exercise of eminent domain and compensation to sustain the act . . ." *Ibid.,* p. 413. He added that "The general rule at least is, that while property may be regulated to a certain extent, if regulation goes too far it will be recognised as a taking . . . We are in danger of forgetting that a strong public desire to improve the public condition is not enough to warrant achieving the desire by a shorter cut than the constitutional way of paying for the change. As we already have said, this is a question of degree – and therefore cannot be disposed of by general propositions. But we regard this as going beyond any of the cases decided by this Court. The late decisions upon laws dealing with the congestion of Washington and New York, caused by the war, dealt with laws intended to meet a temporary emergency and providing for compensation determined to be reasonable by an impartial board. They went to the verge of the law but fell far short of the present [Act]." *Ibid.,* pp. 415–6, citing, *inter alia*, *Block* v. *Hirsh*, 256 U.S. 135 (1921).

[276] Rt. 1922.624.

[277] *Ibid.,* p. 625. The Court elaborated: "In public circumstances like these, one must, in my opinion, be very careful to judge an opinion of the authorities like the one here at issue, whose substance is important for the state's ability to reform an important part of trade as required by the common welfare and the developments in society, in such a way as to tie their hands. This is even more true because the opinion [that the rights are unassailable] which has also been expressed within the legislature, apparently is not based on a thorough examination of the circumstances and, as far as the legislature is concerned, not in any particular deliberation on that account and also, in my opinion, because due to the gradual development of alcohol legislation it is doubtful that one has found it necessary until recently to determine whether the legislature has, when push comes to shove, free rein *vis-à-vis* the older licensees. I am therefore of the opinion that we must have good reason to determine that a custom has changed the old relations in this question which is of such importance to the legislature's position."

[278] *See* footnote 74, *supra* and accompanying text.

that the "compensation doctrine" [279] threatened to become applicable to most business regulation – since either the due process clause (in the U.S.) or the non-retroactivity clause (in Norway) would often be applicable. This was resolved, in American law, through the doctrine of the inalienability of the police power. Once it was clear that even rights under a charter or a privilege were subject to the police power, the question was only where to draw the line. In Norway, by contrast, state power was not inalienable, so the question was whether the substance of a right had been impaired or whether the legislation substantially diminished the right's value. If that was the case, the legislation could not withstand constitutional scrutiny. The only way for the Norwegian Parliament to enact police power regulations that substantially affected privileges was therefore to pay compensation.

In this area of the law, the time lag between the emergence of American doctrine and its appearance in Nordic law is therefore important. Norwegian law, which seems much more protective of vested rights relating to privileges or licences than American law in the decades around 1910, was building on American law. The main intermediary was Aschehoug, whose sources were American treatises from before 1870. It therefore seems likely that Norwegian law until the early 1920s was a continuation of early 19th century American contracts clause jurisprudence. On the other hand, echoes of the rationale concerning the inalienability of the police power can be heard in Danish and Icelandic jurisprudence and emerging in dissent in Norwegian jurisprudence from 1918; no legislature should be able to tie the hands of its successors when it comes to regulating for the public good.

This link between American and Norwegian law is also evident from cases concerning tax exemptions.[280] In the early 19th century, the U.S. Supreme Court found that tax exemptions were irrevocable under the contracts clause.[281] That understanding was affirmed in *Home of the Friendless* v. *Rouse*, decided in 1868. In spite of that decision, the state courts did not uphold such tax exemptions, and one commentator writes that by 1890 "vested rights in special tax concessions" had been "effectively destroyed".[282]

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[279] Scheiber notes that in the U.S. there were frequent instances where "the judiciary did . . . invoke the compensation doctrine as a limitation upon the police power". Scheiber, *supra* note 46, p. 373.

[280] It was discussed in part 2, that the contracts clause of the U.S. constitution applied not only to licences, but also to charters and tax exemptions. *See supra* chapter 2.2.3. Vested Rights With the exception of the Wine Monopoly case, which concerned tax exemptions, there was no discussion of corporate charters in Norwegian law.

[281] *See New Jersey* v. *Wilson*, 11 U.S. (7 Cranch) 164 (1812) where a law repealing an older law stipulating that certain land should be exempt from taxes was invalidated; *Home of the Friendless* v. *Rouse*, 75 U.S. (8 Wall.) 430 (1868) (the property of a charitable organisation which had been granted a tax exemption could not be taxed while the organisation owned the property and used it for the purposes originally intended); and McCurdy, *supra* note 26, pp. 256–7.

[282] *Ibid.,* p. 257.

This question did not arise in Norwegian law until 1929.[283] The shareholders in the aptly named Wine Monopoly challenged a change in the taxation rules of the company arguing, *inter alia*, that this was really special legislation and that by appropriating a bigger part of the profit, the state was breaching a contract entered into when the monopoly was founded. The majority of the Supreme Court concluded that the amendment was constitutional due to the peculiar quasi-public character of the corporation.[284] Two dissenting justices based their opinion on the contract between the state and the company, noting that

> "Just as the state cannot directly and unilaterally change the conditions of the concession and lower the guaranteed return of the shareholders, it cannot do so by making the decision in the guise of a tax law. [/] I believe – and presumably the [majority] agrees with me – that even though such a law on municipal taxes on shareholders was general and applied to all corporations, it could not be applied to the Wine Monopoly, which was promised in its contract with the state that no such thing would occur."[285]

The minority thus conceptualised the case as one concerning vested rights, using what sounds like a contracts clause rationale. Two years earlier, a Danish High Court had suggested that the state could not change certain tax rules to the appellant's disadvantage.[286]

When a similar question reached the Icelandic Supreme Court in 1943, it decided that a temporary tax exemption could not be revoked when the law under which it was granted was repealed. The court simply stated that it was "impossible to deprive the firms granted a tax exemption of this privilege by repealing [the Act permitting the exemptions], see also art. 62 of the Constitution no. 9/1920 [the takings clause]".[287] This case, however, did not concern new legislation but an administrative assessment of taxes. It is therefore not clear what would have happened had the legislation repealing the older law clearly stated that the grants were revoked as well.

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[283] Rt. 1929.529.

[284] *See infra* chapter 2.4.5. Private and Public Spheres.

[285] Rt. 1929.529, 541.

[286] The appellant argued that a yearly assessment was a "contractual fee" and challenged a law requiring him to pay a one-time lump sum instead of a yearly fee. The Eastern High Court based its decision on the premise that the lump sum was a fair equivalent of the yearly assessment and that the appellant had therefore suffered no disadvantage. The court said simply that "[b]ased on the nature of the assessment in question, the validity of the . . . revocation depends on whether the rules in the Constitution's [takings clause] are followed". It then upheld the law because it found that it had been enacted for the common good and that the appellant was not worse off than before the amendment. Decision of the Eastern High Court (Østre Landsret), UfR. 1927.1060, 1062. This seems a strange mode of analysis, but both the appellant and the court seemed to proceed on the assumption that the state could not change the taxation rules to the appellant's disadvantage.

[287] Hrd. 1943.154.

The – admittedly meagre – case law concerning tax exemptions supports the theory that Nordic law was influenced by early 19th century American vested rights doctrine. Even though vested rights in such exemptions were no longer protected in the U.S. after 1890, Norwegian courts built on the older theory, and it did not disappear completely until the doctrine of vested rights disappeared quietly in the 1930s and 40s in the case of Icelandic law.

It mattered concerning both licences and tax exemptions whether the rights vested could change hands along with the privilege or the corporation. In *Morgan* v. *Louisiana*, decided in 1876, the U.S. Supreme Court held that property tax exemptions granted to a railroad company did not follow the property when it was sold: "In our judgment", wrote Justice Field for the Court, "the exemption ceased when the property of the company passed to the defendant".[288] And he added:

> "The franchises of a railroad corporation are rights or privileges which are essential to the operations of the corporation, and without which its road and works would be of little value; such as the franchise to run cars, to take tolls, to appropriate earth and gravel for the bed of its road, or water for its engines, and the like. They are positive rights or privileges, without the possession of which the road of the company could not be successfully worked. Immunity from taxation is not one of them."[289]

In *Railroad Co. v Maine*, decided the next year,[290] the majority held that a company formed by the merger of two companies, both of whom enjoyed tax immunity, did not have such immunity. In sum, under American law, only rights or privileges essential to the operation of a corporation were included when it changed hands.

By contrast, Norwegian law viewed the ability to sell the whole right held by the licensee or privilegee as an important aspect of the privilege. Many cases were solved on this basis, especially once the Supreme Court evaluated vested rights claims based on the pecuniary losses suffered by the plaintiff. In a 1917 case, the Court noted that a proposed fee on pharmacists "would obviously diminish the value of [the appellant's] pharmacy considerably. The fees already levied must be presumed to have had this effect. But an interference of this importance with the value of the privilege is beyond what the apellee has to submit to without getting compensation".[291] Amendments that limited the rights of pharmacists' legatees were struck on similar grounds: "a limit of this right, of the scope and kind described . . . must be viewed as such a considerable interference with the economic value of [the pharmacist's] privilege that he is not bound to accept it without getting compensated".[292]

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[288] *Morgan* v. *Louisiana*, 93 U.S. 217, 222–223 (1876).
[289] *Ibid.,* p. 223. After commenting on other cases, Field added: "Immunity of particular property from taxation is a privilege which may sometimes be transferred under that designation, as held in *Humphrey* v. *Pegues*, 16 Wall. 244 (1873). All that we now decide is, that such immunity is not itself a franchise of a railroad corporation which passes as such without other description to a purchaser of its property."
[290] *Railroad Company* v. *Maine*, 96 U.S. 499 (1877).
[291] Rt. 1917.392, 393.
[292] *Ibid.,* p. 394.

Under this decision, the Norwegian Parliament was constrained indeed as far as privileges that could be sold were involved; if a licensee lost money due to regulations, this was an unconstitutional interference with his vested rights. However, any change in regulations that did not cause the privilegee to lose money, for instance because the change was to take effect only when the privilege changed hands, was also unconstitutional if it diminished the resale value of his privilege. This was particularly problematic because it potentially limited the range of regulation for all time. This was therefore one more instance of the Norwegian jurisprudence being more protective of property than its American – or Icelandic or Danish for that matter – counterpart. Once again, this may be because the foundation of the doctrine was the early 19th century version of the American doctrine of vested rights. So while the American doctrine of vested rights adapted (at least to some degree) to a rapidly changing society, the Norwegian doctrine – another society in which industrialisation happened relatively late and very quickly like in the U.S. – stuck to a version of the doctrine more appropriate for the relatively stable agrarian society that it had been one hundred years before.

This changed, to a degree, in the *Waterfalls case* of 1918, which was discussed in the previous section. This case has been described by commentators as heralding a new concept of property in Norwegian law.[293] The case did not concern a privilege but the regulation of property. Justice Backer, speaking for the majority, refused to find that the takings clause was applicable,[294] since "one must be careful about construing art. 105 so as to widen its scope. And I believe the Act of 1909 is best understood as not being analogous to a forced transfer of property. The owner is not forced to transfer his property to anyone, he can keep it and use it as before."[295] In

[293] It is noteworthy in this context that all zoning and land use laws that came before the Norwegian Supreme Court in 1877–1917 were upheld. These cases are Rt. 1877.673 (rebuilding of a shed closer to road than allowed by zoning law prohibited even though it originally fell due to the building of the road); Rt. 1897.593 (partial building prohibition upheld and no compensation awarded because the value of the property as a whole did not decrease); Rt. 1900.849 (zoning regulations requiring a more expensive building than the lot owner could afford upheld); Rt. 1903.247 (temporary complete building prohibition upheld); and Rt. 1917.173 (zoning law prohibiting building close to churches in rural areas upheld). *See also* Rt. 1940.527 where a challenge to the building code was rejected even though it was enacted after the house in question had been built. The Court noted that "one cannot tolerate buildings deteriorating to the point that they cause damage or pose a risk to passers-by. It is clear to me that such a prohibition does not violate art. 97 of the Constitution." *Ibid.,* p. 528. It is clear from these cases, that even though they concerned regulations of the use of property, they were conceptualised very much like privilege cases. The question – as in the privilege cases – was either whether the substance of the right was interfered with or whether the property's value was significantly diminished.

[294] He noted at the outset that "[t]he question is then, whether this limitation of the property right is so significant that it should be struck down under the Constitution's takings clause". Rt. 1918.401, 406.

[295] *Ibid.* The concept of a taking was relatively narrow in all the Nordic countries. The impact of the Norwegian takings clause was greater because of the protection it afforded in

the main dissent, on the other hand, Justice Mejdell fell back on a mode of analysis familiar from the privilege context:

> "if [the owner] wants to utilise this legally vested right in the only way it is reasonable to use it, due to the capital necessary, he cannot transfer the full property rights that he has, but only a using right, limited in time. I cannot understand how it can be denied that this is a substantial interference with his property rights. This is changing a full property right into a using right so limited in scope that the core is gone and only the hull remains."[296]

Just as in the privilege cases, the emphasis was on interference with the resale value. Once again – this time in the context of property regulation – some Justices thought in terms of the difference between regulating the exercise of a right and depriving the owner of it.

From our point of view, perhaps the most important discussion in this context is found in Justice Berg's concurrence. He wrote "[a] property right does not secure the owner any greater right than can be inferred from current legislation. It may be unreasonable when the legislature limits a property right to such a degree that the thing in question practically loses its value to the owner... But an owner has no legal claim to compensation in such cases."[297] On this last point, Berg cited Aschehoug, who in turn cited Sedgwick.[298] One commentator has written that in this decision "the Supreme Court confirmed the new view of property rights which Fredrik Stang Jr. characterised as a modern property right 'with ever-increasing social overtones' as opposed to the liberal phase's 'holy property right'".[299] More importantly for our purposes, however, we finally find, in Norwegian law, an echo of the American doctrine of the inalienability of the police power.

It is clear from the jurisprudence in various fields that the doctrine of vested rights was a fundamental part of Nordic constitutional jurisprudence in the late 19th

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conjunction with art. 97. Yet even there, the takings concept was understood narrowly throughout this period. A narrow concept of takings is also evident from the privilege cases in Denmark and Iceland, which were argued as property cases. In all three Nordic countries comments in court opinions indicate worries that the takings clause should not be stretched and in fact not applied by analogy. *See* Berg's dissent in Rt. 1918.401; Lyrd. IX.809 and G. Gauksdóttir, *Property Rights under the European Convention on Human Rights – A Nordic Approach* (Lund, 2004).

[296] Rt. 1918.401, 414. Justice Heggen, who concurred with the majority, used the same method of analysis, coming to the conclusion that "this limitation, which is general in nature and applies to all unutilised waterfalls is not so significant as to require compensation". *Ibid.,* pp. 423–4.

[297] *Ibid.,* p. 425.

[298] Aschehoug, *supra* note 116, p. 79, citing Sedgwick p. 438 *et seq.*

[299] Slagstad 1987, *supra* note 107, p. 172, citing F. Stang, *Norsk Formueret 1- Innledning til Formueretten* [*Norwegian law of Property and Obligations - An Introduction to the Law of Property and of Obligations*] (Aschehoug, Kristiania,1911) p. 15. In his treatise, Stang cited, *inter alia*, F. Wharton's *A Commentary on the Law of Contracts* from 1882 and Sir F. Pollock's *Principles of Contract – A Treatise on the General Principles Concerning the Validity of Agreements in the Law of England* from 1902.

and early 20th century. Ideas of vested rights were the underpinnings of decisions in many areas: those concerning privileges, regulations of rights under contract, and cases concerning taxation and property. This emphasis, which was, as we have seen, inspired at least in part by American law, was the main characteristic of Nordic constitutional law during this period.[300]

In sum, the vested rights issues that came before the courts in the four countries were similar; the main question was the extent to which rights, once granted, could be regulated or revoked. There was, however, considerable difference in practice because while the American courts were "pricking out the line" between the police power and vested rights under the due process clause, Norwegian decisions of this period did not acknowledge the inalienability of regulatory power and were therefore considerably more protective of vested rights than decisions of other courts. A probable reason for this is the fact that early 19th century American doctrine influenced Norwegian law through Aschehoug. Due to the time lag – Aschehoug cited writings from the 1850s and 1860s in his treatise published in the 1890s – Norwegian law around 1900 was clearly related to early 19th century vested rights jurisprudence while quite different from contemporary American decisions. This is evident from the privilege cases and from Aschehoug's writings and this conclusion is supported by cases concerning tax exemptions and the status of vested rights when privileges changed hands.

2.4.2.2. Contractual Rights and a Liberty of Contract

A constitutionally protected liberty of contract is a famous characteristic of American Lochner era jurisprudence. It developed around the turn of the 20th century and was most clearly put forth in *Lochner* in 1905 and *Adair* in 1908,[301] both of which are amongst the least admired constitutional cases decided by the U.S. Supreme Court. Contracts were also a subject of Norwegian jurisprudence during the same period, but the cases were somewhat different. It will be argued here that there was no doctrine of liberty of contract in the Nordic countries similar to the American doctrine. There was certainly an emphasis on contracts and contractual rights in the jurisprudence, but the focus was on rights under a contract as vested property rights, not on liberty of contract in the American sense. This is consistent

[300] Just as the great majority of Norwegian constitutional cases were argued based on art. 97 and art. 105 – which together provided solid protection for vested rights of all kinds – the overwhelming majority of Danish and Icelandic cases concerned those constitutions' takings clauses. Cases argued under other constitutional provisions were few and far between. The most notable exception are the free speech and provisional legislation litigation arising from the repressive governance of the Danish Estrup government in the 1880s. *See* UfR. 1886.486, UfR. 1886.801, UfR. 1886.1036, UfR. 1887.142 and UfR. 1887.170

[301] A maximum hours law for bakers was struck down in *Lochner* v. *N.Y.*, 198 U.S. 45 (1905). In *Adair* v. *U.S.*, 208 U.S. 161 (1908) a federal statute prohibiting employers from firing people because of their membership in a labour union was invalidated. In *Lochner*, the Court did not accept the police power rationale for the law at issue. In *Adair*, it did not find the necessary relationship between the law and interstate commerce, which might have justified the federal government's authority in this field. *See* Cushman, *supra* note 26, pp. 110–111.

with the conclusion of the previous section, that American law influenced Norwegian law primarily through Aschehoug and that therefore early 20th century Norwegian law echoed early 19th century rather than contemporary American law.
In this section, constitutional cases concerning contracts will be discussed and compared. Rent regulations will be examined first, then price regulations and laws regulating terms of employment. In all these areas, Norwegian courts on one hand and American courts on the other conceptualised cases with comparable fact patterns in very different ways. Finally, some additional examples which illustrate how the Norwegian courts conceptualised contractual rights as vested rights will be discussed.

Rent regulations in the wake of World War I were challenged in the U.S., but the Supreme Court upheld them against a due process challenge in *Block* v. *Hirsch*.[302] That decision was based on the fact that those were temporary emergency measures and that the renting out of apartments in Washington D.C. was, under the circumstances, sufficiently clothed with a public interest to permit regulation. Justice Holmes wrote for the majority:

> "Housing is a necessary of life. All the elements of a public interest justifying some degree of public control are present. The only matter that seems to us open to debate is whether the statute goes too far. For just as there comes a point as which the police power ceases and leaves only that of eminent domain, it may be conceded that regulations of the present sort pressed to a certain height might amount to a taking without due process of law."[303]

The key to the decision was that there was sufficient public interest in the Washington D.C. housing market to justify regulation. The Norwegian Supreme Court had decided a case with very similar facts in 1919.[304] The majority of the court upheld the law, endorsing a lower court opinion stating that "the liberty of contract in the area was limited by the law . . . which entered into force right away, to the extent that it was provided that rent increases after that point would be invalid if they exceeded what was allowed by later regulations".[305] The majority thus referred to the liberty of contract being limited – but that was fine, as long as it was done only prospectively and did not interfere with the contractual relationships

[302] *Block* v. *Hirsh*, 256 U.S. 135 (1921).
[303] *Ibid.,* p. 156.
[304] Rt. 1919.742. Similar rent regulations were upheld in Rt. 1921.721. In Rt. 1920.909 a prohibition of ending rental contracts was believed not to apply to contracts predating the law's entering into force, which were supposed to end on their own terms after the law went into force. The Supreme Court framed this as a question of statutory interpretation and did not reach the constitutional question.
[305] Rt. 1919.742, 746 and 743. Three justices dissented, noting that "valid contractual rights cannot later be repealed in this manner. What this act does is very different from stating that rent increases decided after the law was enacted shall be invalid unless a working committee accepts them. In such a case, no vested right would be impaired." *Ibid.,* p. 744. The fact that these were emergency regulations in war-time certainly played a role in the decision.

already entered into and change the respective duties of the parties.[306] The Norwegian court thus did not presuppose a liberty of contract.

A similar emphasis was clear in a 1927 case concerning leases, in which the Norwegian Supreme Court invalidated a law prolonging the leases of tenant farmers. The appellate Court, whose rationale was endorsed by the Supreme Court, conceptualised the case as a vested rights one and based its decision on the difference between the exercise of a right and its substance discussed in the context of licences. The court wrote:

> "This is not just a question of limiting the owner's possibility to exercise a right that he has by contract – as is the case when a contract is ended in accordance with its provisions after a prohibition of ending contractual relationships has been enacted. The owner has, in this case, exercised his right before the law was enacted and done absolutely everything that can be required of him to end the relationship. So he must have vested a personal right to get the farm vacated. A different conclusion would lead to very unreasonable consequences"[307]

Again, the conceptualisation is different from that in American cases; the Norwegian Court did not consider whether the situation of tenant farmers was such that it warranted public regulation. Instead, it invalidated the law as inconsistent with art. 97 because the owner had already taken steps to have the farm vacated. In sum, the decision was based on a classic vested rights rationale.

The difference illustrated by the rent regulation cases is also evident in cases concerning price regulations. Such cases were an important part of American substantive due process jurisprudence. Already in 1877, price regulations were upheld in *Munn* v. *Illinois*.[308] The case and the state's argument did not, however, purport to concern price regulations in general. The state argued only that it should be able to regulate prices in businesses affected with a public interest. From then until well into the 20th century, prices could be fixed in public enterprises and if the business in question was affected with a public interest,[309] but not for those

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[306] The dissent in the forestry case mentioned liberty of contract but the majority did not. *See also* notes 340–342, *infra* and accompanying text.

[307] Rt. 1927.1057, 1059 and 1063. One Justice dissented, noting that "[s]ince it is believed consistent with [art.97] to interfere with preexisting contracts in the manner done in the general law on apartment rentals, I do not see a reason to come to a different conclusion [in this case]. In both cases the consequence may be thwarting dispositions taken in relation to the contract before the law was enacted. There may be a difference of degree but in my opinion there is no difference of kind." *Ibid.,* p. 1060.

[308] *Munn* v. *Illinois*, 94 U.S. 113 (1877). On the jurisprudence concerning businesses affected with a public interest, and which businesses these were, *see* Cushman, *supra* note 26, pp. 48–52.

[309] C.J. Waite wrote in *Munn* that "[e]nough has already been said to show that, when private property is devoted to a public use, it is subject to public regulation." *Munn*, 94 U.S. p. 130. The next year, Justice Bradley wrote in the *Sinking Fund Cases* that "[t]he inquiry [in Munn] was as to the extent of the police power in cases where the public interest is affected; and we held that when an employment or business becomes a matter of such public interest and

enterprises that were purely private. It was not until *Nebbia* v. *New York* in 1934, that the distinction between what was considered public and what was considered private essentially disappeared and therefore stopped mattering in the context of what constituted permissible price regulation.[310]

There were exceptions from this in war-time. Price regulations were upheld in *Highland* v. *Russell Car and Snow Plow Co*.[311] on the basis that the president had extensive powers to exercise the power of eminent domain with regards to coal and that the seller in the case would be no worse off selling the coal at the prescribed price than he would have been had the coal been taken and had he gotten compensation according to the price regulations. The Court emphasised that the "[d]efendant was engaged in manufacturing snowplows for railroads. Unquestionably, the production of such equipment was in the state of war then prevailing a public use for which coal and other private property might have been taken by exertion of the power of eminent domain".[312] The Court then concluded that

> "the Act and orders will be deemed to have deprived him only of the right or opportunity by negotiation to obtain more than his coal was worth. Such an exaction would have increased the cost of the snowplows and other railroad equipment being manufactured by the defendant and therefore would have been directly opposed to the interest of the government."[313]

A case with a similar fact pattern had been decided by the Norwegian Supreme Court in 1925. The state had set maximum prices for most foods when World War I broke out, and some weeks later it took a shipment of grain under its power of eminent domain and paid compensation equal to the maximum price. The importer argued that this was not full compensation as required by the takings clause. The

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importance as to create a common charge or burden upon the citizen; in other words, when it becomes a practical monopoly, to which the citizen is compelled to resort, and by means of which a tribute can be exacted from the community, it is subject to regulation by the legislative power". *Sinking Fund Cases*, 99 U.S. 700, 747 (1878). On the history of the category of "business affected with a public interest" *see e.g.,* Scheiber, *supra* note 46, and Cushman, *supra* note 26.

[310] *Nebbia* v. *New York*, 291 U.S 502 (1934), upheld a statute fixing the price for milk. J. Roberts, speaking for the Court, wrote that "[t]hus understood, 'affected with a public interest' is the equivalent of 'subject to the exercise of the police power'; and it is plain that nothing more was intended by the expression". *Ibid.,* p. 533. He concluded that "[i]t is clear that there is no closed class or category of businesses affected with a public interest, and the function of courts in the application of the Fifth and Fourteenth Amendments is to determine in each case whether circumstances vindicate the challenged regulation as a reasonable exertion of governmental authority or condemn it as arbitrary or discriminatory. *Wolff Packing Co*. v. *Industrial Court, 262 U.S. 522, 535.* The phrase 'affected with a public interest' can, in the nature of things, mean no more than that an industry, for adequate reason, is subject to control for the public good." *Ibid.,* p. 536.

[311] 279 U.S. 253 (1929).

[312] *Ibid.,* p. 260.

[313] *Ibid.,* p. 262.

majority of the Norwegian Supreme Court believed that "the maximum prices do not in and of themselves unconditionally qualify as full constitutional compensation for the owner"[314] and decided that the amount of compensation should be determined by a judicial decision, as in most takings cases.[315] The majority, while not deciding on the constitutionality of the price regulations *per se*, thus did not believe that being paid the maximum price one could legally get for merchandise necessarily satisfied the takings clause's requirement for full compensation. This may have left the door open for the interpretation that price regulations were inconsistent with the takings clause on the grounds that an owner whose shipment was taken by the state should not be in a better position than an owner who "has the choice of selling at certain prices or keeping the products".

This doubt of price regulations' constitutionality – if doubt existed – was resolved in 1928, when the Norwegian Supreme Court endorsed an appellate court's opinion which stated that "[i]t is certain from theory and practice, especially during the World War, that the state has the right to decide a maximum price for products. The Paper Act . . . permitted such action concerning the paper it applies to and with limitations enacted for the benefit of the producers".[316] After this, there was no doubt about the constitutionality of such regulation.[317]

These cases support the theory that Norwegian jurisprudence was primarily oriented towards vested rights. Unless a contract had already been entered into, one had, according to these cases, no vested right to sell at a certain price. Takings at a fixed price could potentially be problematic – as indicated in the 1925 decision – but as long as the owner had the choice to sell or keep his products, price regulations did not pose a problem from a vested rights point of view. So while the focus in Norwegian jurisprudence was on vested rights – the rights one has already vested - and not on the liberty to contract prospectively, price regulations in general were unproblematic.

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[314] Rt. 1925.1014.

[315] The minority had a different view: "The maximum prices . . . constrain the owners' liberty, since they prevent them from realising the value that the products might have had but for these limitations . . . Export prohibitions and maximum prices lead to a situation where . . . the owner has a choice of selling at certain prices or keeping the products. It is clear that the ground is thus laid for a significantly different evaluation of the compensation due for a taking, especially when a product like grain is concerned ..." Rt. 1925.1014, 1016–1017. The Norwegian Supreme Court built on this in Rt. 1928.859, *see* note 337, *infra* and accompanying text.

[316] Rt. 1928.353, 356. The Supreme Court upheld a tax scheme to provide compensation for the paper producers forced to provide the state with cheap paper.

[317] Price regulations during World War II were upheld twice against challenges based on the fact that the maximum prices did not cover the merchants' cost. In the first case, a unanimous Supreme Court wrote that "general socially motivated regulations of commerce concerning necessities, such as the regulations at issue here, cannot be viewed as inconsistent with the Constitution's art. 105". Rt. 1940.401, 402. *See also* Rt. 1940.528, where the Court reached a similar conclusion.

If there was no substantive due process barrier to price regulation, because the business in question was affected with a public interest or – after *Nebbia* in 1934 – because the distinction between public and private entities had ceased to matter in the context of substantive due process, the jurisprudence in the U.S. and in Norway was remarkably similar. As an example of that, let us look at the regulation of milk prices. The U.S. Supreme Court noted in *Nebbia* "[s]ave the conduct of railroads, no business has been so thoroughly regimented and regulated by the State of New York as the milk industry . . . A perusal of the [relevant] statutes discloses that the milk industry has been progressively subjected to a larger measure of control."[318] It concluded that regulating the price of milk was constitutional.[319] Later that year, the U.S. Supreme Court doubted the constitutionality of a New York law fixing different prices for milk depending on whether the brand in question was a "well-advertised trade-name".[320] In 1936, however, a five-justice majority came to the conclusion that the law was consistent with the equal protection clause.[321] In *Mayflower* v. *Ten Eyck*, also from 1936, it was held inconsistent with equal protection to limit this differential to those milk dealers in business before a certain date. Responding to the argument that "a regulatory law may be prospective in operation and may except from its sweep those presently engaged in the calling or activity to which it is directed", such as licensing requirements for physicians, the Court noted that

> "The challenged provision is unlike such laws, since, on its face, it is not a regulation of a business or an activity in the interest of, or for the protection of, the public, but an attempt to give an economic advantage to those engaged in a given business at an arbitrary date as against all those who enter the industry after that date."[322]

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[318] *Nebbia* v. *New York,* 291 U.S 502, 521–2 (1934).

[319] *Ibid.* The Court wrote that "[p]rice control, like any other form of regulation, is unconstitutional only if arbitrary, discriminatory, or demonstrably irrelevant to the policy the legislature is free to adopt, and hence an unnecessary and unwarranted interference with individual liberty." *Ibid.,* p. 539.

[320] The Court held that it was an error to dismiss a bill arguing that the law was a violation of the Fourteenth Amendment, as insufficient on its face to state a cause of action. *Borden's Farm Products Co.* v. *Baldwin*, 293 U.S. 194 (1934).

[321] *Borden's Farm Products Co.* v. *Ten Eyck,* 297 U.S. 251 (1936). "We have held that article [the Fourteenth Amendment] does not prevent the fixing of maximum and minimum prices for milk, in the circumstances existing in the state of New York in 1933 [citing *Nebbia*]. We now hold that to provide that a differential of one cent maintained by the independent dealers shall continue does not deny their advertised competitors equal protection." *Ibid.,* p. 262.

[322] *Mayflower Farms Inc.* v. *Ten Eyck,* 297 U.S. 266, 273-4 (1936). Three justices dissented, protesting that "The judgment just announced is irreconcilable in principle with the judgment in Borden's case, *ante* p. 251, announced a minute or so earlier." *Ibid.,* p. 275. (Cardozo, J., dissenting for himself, Stone and Brandeis).

In 1939, the final step was taken, as the Court declared, in *U.S.* v. *Rock Royal Co-op.*[323] that "[t]he power of a state to fix the price of milk has been adjudicated by this Court" in *Nebbia* and that "[t]he power enjoyed by the states to regulate the prices for handling and selling commodities within their internal commerce rests with the Congress in commerce between the states".[324] In this case, federal price regulation for milk was upheld – and the rule set out in *Nebbia* was in effect federalised. By the mid 1930s, therefore, the due process barrier to milk price regulation had been lifted in the U.S. and after that, such regulations were consistently upheld.[325]

In a Norwegian case from 1933,[326] a fee, levied on all milk producers to fund compensation for those producers who sold their milk at a lower price for industrial use instead of for human consumption was challenged based on the takings clause.[327] The lower Court referred to the Supreme Court's dicta in the 1928 paper case,[328] and found the fee to be permissible under the taxing power. It refused to conceptualise the fee as a taking or analogous to a taking. The Supreme Court referred to the lower Court's rationale but added a few supplementary comments, emphasising the dismal state of the farming industry. Justice Lie wrote:

> "When the law's constitutionality is determined, it must, in my opinion, be viewed against the background of the agricultural crisis that provoked it. As far as the price-equalising fee is concerned, it is based on the difference in profits between milk sold for consumption and milk sold for production, introduced by this crisis. The relatively profitable position of the milk sold for consumption is due to various social circumstances but the personal circumstances of the farmers and the quality of the milk do not play a major role . . . There is . . . the obvious risk of the situation being undermined by increased supply of milk for consumption - because of how profitable it is – and a subsequent falling of the prices to the detriment of the whole

[323] 307 U.S. 533 (1939).
[324] *Ibid.,* pp. 570 and 571 (footnote omitted).
[325] Such regulation was also upheld in Iceland. In 1937, a farmer argued in vain that he was deprived of his freedom of enterprise by a law which prohibited selling unpasteurised milk in counties other than the county of origin. The Supreme Court rejected this argument, noting that "the legislature has determined that these actions are for the public good, and that evaluation will not be revised in this case". Hrd. 1937.332.
[326] Rt. 1933.1041.
[327] The situation was complicated by considerations of freedom of association because the fee was in fact determined by the regional associations of milk producers and varied, but all milk producers had to pay it, irrespective of whether they were members of the regional associations or not.
[328] Rt. 1928.353. *See supra* note 316 and accompanying text. The Supreme Court stated that "One agrees with the theory set out by our constitutional authors, which is also followed in practice, according to which it is possible to levy fees that do not go into the general state coffers but are used to a special end, without having to observe the time limit in the constitution's art. 75a". *Ibid.,* p. 356. The Norwegian constitution art. 75a provides that "[i]t devolves upon the Parliament [Storting]: a) to enact and repeal laws; to impose taxes, dues, customs and other public charges, which shall not, however, remain operative beyond 31 December of the succeeding year, unless they are expressly renewed by a new Parliament [Storting]".

> industry. Under these circumstances there can, in my opinion, be no doubt that the scheme, with its voluntary payments by the cooperatives to even out the prices between milk sold for production and milk sold for consumption and, in relation thereto, the levying of fees for the same purpose on those who do not voluntarily join, is a measure taken for social reasons in the interest of the milk industry under difficult economic conditions."[329]

After 1930, courts in both countries thus upheld such regulations. The due process clauses no longer applied and the doctrine of vested rights did not lead to the unconstitutionality of price regulations in the U.S. any more than it did in Norway.

The Norwegian reliance on the doctrine of vested rights is also evident from cases concerning hours and wages. Some of the most famous U.S. Supreme Court decisions of this period concerned such regulation and were decided on liberty of contract grounds.[330] In spite of legislation like the Norwegian *Fabrikktilsynslov* [The

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[329] Lie added: "As [the authorities] have appropriately said, the fee should be viewed as an insurance premium, that the producers of milk for consumption pay for securing a more or less fair price for their milk. This can also be described as being a return by the industry for avoiding competition that could be devastating to it as a whole. Of course, those producers who will not voluntarily join the scheme must be included if it is to reach its goals. I also believe there is nothing unnatural in making those producers carry part of the burden, when the goal is understood as I understand it. I will especially mention that individual producers, who do not voluntarily join do not have a legal claim to keep without limitation a profit of the kind secured by the position of milk for consumption, even though they may have put their trust in that situation e.g. by buying property or otherwise. When evaluating the circumstances, I also believe it must play a significant role that there are strong guarantees that the scheme will not be used needlessly and not be more burdensome than necessary." Rt. 1933.1041 pp. 1042–3. Justice Schelderup added in a concurrence that "the thought which is the basis of the implementation of this scheme which is socially absolutely necessary, seems to me to be equally pragmatic and fair". *Ibid.,* p. 1044. Earmarked taxes were similarly considered constitutional in the U.S. In an 1884 U.S. Supreme Court case, an earmarked "tax" for regulation of immigration – a matter within federal jurisdiction – was upheld. Justice Miller, speaking for the Court, wrote: "The money thus raised, though paid into the Treasury, is appropriated in advance to the uses of the statute, and does not go to the general support of the government. It constitutes a fund raised from those who are engaged in the transportation of these passengers, and who make profit out of it, for the temporary care of the passengers whom they bring among us and for the protection of the citizens among whom they are landed . . . If this is an expedient regulation of commerce by Congress, and the end to be attained is one falling within that power, the act is not void, because, within a loose and more extended sense than was used in the Constitution, it is called a tax." *Edye* v. *Robertson* (also called *Head Money Cases*) 112 U.S. 580, 596 (1884).

[330] *See e.g., Adkins* v. *Children's Hospital*, 261 U.S. 525 (1923) in which a minimum wage law for women was invalidated; *Lochner* v. *N.Y.*, 198 U.S. 45 (1905) in which a maximum hours law for bakers was invalidated (*see infra* note 358 and accompanying text); *Muller* v. *Oregon,* 208 U.S. 412 (1908) in which a maximum hours law for women in laundries was upheld; *Bunting* v. *Oregon*, 243 U.S. 426 (1917), where a maximum hours law for people in factories was upheld and *Chas. Wolff Packing Co.* v. *Court of Industrial Relations of the State of Kansas*, 262 U.S. 522 (1923), *infra.*

Control of Factories Act] of 1910, which prohibited *inter alia* young workers from working nightshifts and new mothers from working in factories in the first 6 weeks after delivery, there were no similar cases in the Nordic countries. By contrast, there were similarities in the fact patterns of Nordic and American cases concerning compulsory arbitration.

In 1923, the U.S. Supreme Court invalidated a Kansas law providing for compulsory arbitration in labour disputes.[331] The Court suggested that the packing company in question was not clothed with a public interest, and that the state could hence not legitimately regulate wages and terms of employment,[332] but the court found that it was "relieved from considering and deciding definitely whether preparation of food should be [viewed as a quasi-public business] because even so, the valid regulation to which it might be subjected as such, could not include what this act attempts".[333] So even if the business in question had been public, the Court found that compulsory arbitration, joined with forcing the employer to pay the wages thus determined and prohibiting strikes to protest against them, was not only "impossible to reconcile . . . with the freedom of contract and of labor secured by the Fourteenth Amendment" but also deprived the packing company of its "property ... without due process of law".[334] In 1925, the court invalidated provisions of this same Act, providing that the Court of Industrial Relations could regulate hours of labour, on the same grounds.[335]

In a 1928 Norwegian case, the constitutionality of compulsory arbitration was touched on indirectly. The administration had decided, based on an interim law,[336] that a particular labour dispute should be settled by arbitration. The workers went on a strike and in this case four MPs who had publicly and financially supported the strike were prosecuted. They argued that the arbitration law constituted a taking of labour in violation of art. 105 and that it "introduced forced labour as a legal basis

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[331] *Wolff,* 262 U.S. 522. The law in question attempted to stay clear of constitutional constraints by declaring "the following to be affected with a public interest: [1] manufacture and reparation of food [2] manufacture of clothing . . . [3] production of . . . fuel [4] Transportation of the foregoing [5] public utilities and common carriers".

[332] Speaking for the Court, Chief Justice Taft stated that "[i]t has never been supposed, since the adoption of the Constitution, that the business of the butcher, or the baker, the tailor, the wood chopper, the mining operator or the miner was clothed with such a public interest that the price of his product or his wages could be fixed by State regulation . . . nowadays one does not devote one's property or business to the public use or clothe it with a public interest merely because one makes commodities for, and sells to, the public in the common callings . . ." *Ibid.,* p. 537.

[333] *Ibid.,* p. 539.

[334] *Ibid.,* pp. 540 and 544. The following year, the Court reached the same conclusion concerning the Kansas Act's application to coal mines. *Dorchy* v. *Kansas,* 264 U.S. 286 (1924).

[335] *Chas. Wolff Packing Co.* v. *The Court of Industrial Relations of the State of Kansas*, 267 U.S. 552 (1925).

[336] Such laws are promulgated by the administration when Parliament is not in session.

for the settling of a labour dispute". The Supreme Court rejected the constitutional challenge, noting that

> "The [law] limits the opportunities to use strikes and lockouts as weapons but it does not compel the individual to work or to work for a certain salary. His legal situation is such that he is free to choose whether he works or not. If he is, in fact, forced to work, this is the same kind of coercion as is found in labour conditions where there is free competition. The arbitration act does not introduce a 'taking' of labour, nor does it legitimise 'forced labour'. But it does regulate labour conditions based on social considerations - a system that is most closely analogous to the recently enacted price and rent regulations."[337]

The focus was substantially different from that in *Wolff Packing*. The employer was completely absent, perhaps because of the facts of the case. As far as the employee was concerned, it was clear, once again, that there was no constitutionally protected liberty of contract in Norwegian law. The employee was free to stay and work for these wages or to leave, and while that was the case, there could be no question of a violation of the takings clause. Hence, the arbitration was constitutionally unproblematic in Norway.

In situations similar to those in which the American doctrine of liberty of contract was applicable, Norwegian courts thus applied traditional vested rights analysis.[338] In a 1926 case concerning an Act prohibiting the leasing of hunting and fishing rights for more than 10 years at a time, an appellate court pronounced with full certainty that "[i]t is clear and generally acknowledged that the constitution's art. 97 prevents the legislature from interfering with older contractual rights".[339]

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[337] Rt. 1928.859, 859-860. The echoes of Justice Holmes' *Adkins* rationale: "The statute does not compel anybody to pay anything" (*Adkins* v. *Children's Hospital*, 261 U.S. 525, 570 (1923)) and indeed of the opinion in Rt. 1918.401, "[t]he owner is not forced to transfer his property to anyone" are clear.

[338] Similar hints are noticeable in Danish cases of the same period. In 1911, the Appellate Court (Landsoverretten) refused compensation to a priest whose benefits had declined sharply when the tax system was changed. The Court wrote that "the relationship between the state and its servants is not identical to a contractual relationship and the legislature cannot be prevented from changing the laws concerning its servants' benefits". UfR. 1911.896, 897. The Supreme Court did not address this issue. It simply noted that, "[s]ince it can, after all, not be doubted that the legislature had the authority to make such a decision, especially in light of the fact that this is about the regulation of benefits that are changing and which have repeatedly been the subject of similar provisions," the constitutional challenge was rejected. UfR. 1912. 545, 546. The Court did, however, award half a point to the appellant by splitting the costs. In Denmark and Iceland, the losing party to a lawsuit generally pays the legal costs of both parties but the costs can be split or "erased" when the case has been justified or there has been considerable doubt over the outcome. This is particularly noteworthy because dissents were not published in the Danish Supreme Court until 1937, so the splitting of the costs could indicate differing opinions within the court.

[339] Rt. 1926.955, 961. At issue was a contract which rented out hunting and fishing rights for 20 years at a time and provided that the renter could prolong that period for 26 years at a time without the landowner's consent. The Supreme Court, while not questioning this dictum *per*

However, the Norwegian Supreme Court never acknowledged a liberty to contract prospectively.

The vested rights emphasis in Norwegian jurisprudence is especially clear in one of the most famous – and most vilified – Norwegian constitutional law cases of this period. It involved a firm, which had rented the right to fell all trees in the district over a certain height. When preservation regulation prohibited felling trees under a certain (considerably higher) height, the firm challenged the regulation based on art. 97. This is, of course, a contracts clause scenario. The Norwegian Supreme Court noted in its decision, that "[c]oncerning contractual relations in particular, Professor Aschehoug writes in his [treatise] . . . that they are one of the areas least able to tolerate being affected by later laws. I agree on that point. Neither the state nor the municipality should be able to limit the legally vested rights of the citizens without paying compensation."[340] The dissenters disagreed with the fundamental premise of this reasoning:

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se, rejected the constitutional challenge. It emphasised "the very nature of the right to renew the contract . . . When the law entered into force it was unclear whether [the renter] would, when the time came, decide to shoulder the related burdens and rent the rights for the whole renewal period. I believe that under these circumstances . . . applying the law entails no improper interference with a previously existing right" Rt. 1926.920, 958. *See also* Rt. 1926.294, in which the Supreme Court invalidated a lien on a ship seized for illegally importing alcohol. It rejected the argument that applying the Act allowing for seizures and for invalidations of contractual liens in such cases would be unconstitutional because the lien predated the law. The court wrote: "what [the provision] intends to strike at is not the legally established lien that is guaranteed also *vis-à-vis* later legal interferences, but the illegal behavior of the creditor once he has understood or should have understood that the ship is or has been used to contravene the prohibition law". *Ibid.,* p. 296. So by conceptualising the seizure as a punitive measure in response to a crime committed, the Court could square this with art. 97 just like fines and seizures in the criminal context had always been viewed as consistent with this article. A similar case was decided in Iceland in 1968, in which it was believed consistent with the constitution's takings clause to seize a ship, which had been leased and used for an illegal Act. Hrd. 1968.848.

[340] Rt. 1909.417, 418. By contrast, the minority was sceptical of the importance of the right's contractual origins: " I am of the opinion that the Constitution did not intend those having rights based on contract to be in a more secure position than those whose rights have other sources. Specifically, it seems unthinkable that a right should become more secure by being transferred to another by a contract." *Ibid.,* p. 425. The Norwegian Supreme Court applied the same standard in this case as it did in privilege cases until 1910 or so. The Court noted "There are certainly cases, where the owner can be constrained or regulated in his enjoyment of his property without compensation from the legislature. But the provisions in question are then supposed to otherwise and indirectly provide him with remuneration or benefits so that he is unharmed. In this case [because the plaintiff rented the logging rights and was not the owner] there is no question of ordering or regulating the use of a property or the exercise of a right. This is a question of the right's very substance." Rt. 1909.417, 418. The *quid pro quo* rationale for the regulating power explains why preservation rules were upheld against owners in Rt. 1911.38 and Rt. 1927.49, *see supra* note 265. A concurring opinion in the forestry case stated that "Such relinquishing of one's property to satisfy the public interest has a different character than just having to submit to new regulations that may have a negative economic

> "[T]hese provisions are not special rules concerning specific contracts or contractually acquired rights. The provisions concern the use of forested areas and apply, according to their intent and their letter, equally to all who can dispose of forests, no matter how they acquired that right . . .The issue of limitations placed by the Constitution's art. 97 on the legislature concerning provisions that are specifically concerned with contracts or certain kinds of contracts and the vested rights emanating from those does not arise in this case."[341]

Addressing the liberty of contract, the dissenter added:

> "Unless we want the legislature to be unable to make general rules in these fields – and the fields where people can contract at will are the rule – these rules must encompass circumstances previously regulated by contract."[342]

It is thus clear from the opinion that the dissenters presumed liberty of contract to be the main rule and limitations on it to be the exception. However, this is another example of the Norwegian courts invalidating retrospective legislation – the preservation laws could not be applied because the firm had a vested right to fell all trees over a certain height in a particular area. The dissenters spoke of freedom of contract being the main rule but it is clear that neither they, nor the majority, could envision constraints on prospective regulation. The liberty of contract inherent in the Fourteenth Amendment of the U.S. constitution, by contrast, constrained both prospective and retrospective regulation.[343]

Finally, a brief look at lending contracts in particular is in order, because it is one of the examples of American influence in the case law which can be clearly traced. Unsurprisingly, given the vested rights emphasis in Norwegian case law, the reference was to contracts clause jurisprudence. In *Sturges* v. *Crowninshield*, decided in 1819,[344] the U.S. Supreme Court invalidated a New York bankruptcy

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influence on the exercise of a right." Rt. 1909.417, 421. *See supra* note 264 and accompanying text.

[341] Rt. 1909.417, 424. The emphasis placed by the judge on showing that this is not special legislation is obvious in this passage. The dissent continued: "Concerning on the other hand laws, where - like here - the citizens' freedom is limited more generally, the undisputed theory has been that [regulations] can be applied also to circumstances regulated by contract . . . I believe this theory to be the right one. Whenever the legislature creates general rules in fields where people can contract at will, it must be prepared for the laws to collide with circumstances already decided by contract." *Ibid.*

[342] Rt. 1909.417, 424–5. So while the majority focused on the vested rights of the firm, the minority based its opinion on another tenet of 19th century legal thought; the difference between general and special legislation. They seemed to tacitly agree that applied only to those leasing logging rights, the law would be unconstitutional. However, they argued that since its application was general, the effect on rights under individual contracts should not have been the focal point of the argument.

[343] In sum, art. 97 of the Norwegian Constitution and the contracts clause of the U.S. Constitution constrained only retrospective legislation, unlike liberty of contract in American law.

[344] *Sturges* v. *Crowninshield*, 17 U.S. (4 Wheat.) 122 (1819).

statute as violative of the contracts clause. Speaking for the Court, Chief Justice Marshall noted that "[t]his act liberates the person of the debtor, and discharges him from all liability for any debt previously contracted, on his surrendering his property in the manner it prescribes".[345] Based on the fact that to the framers, "[t]he principle was the inviolability of contracts. This principle was to be protected, in whatsoever form it might be assailed",[346] the Court concluded that the contracts clause should be given its "full and obvious meaning" and the Act invalidated as impairing the obligation of contracts.[347]

Aschehoug's discussion of American law in this field was cited in a bankruptcy case decided by the Norwegian Supreme Court in 1928. The question was whether payment made by a third party could affect the debtor's duties under a lending contract, and no express provision on this point was in force until after the fact. Based on Aschehoug's writings on this point and the interpretation of the older law, the court concluded that it was "questionable" to apply the law at issue in this case.[348] In the paragraph cited, Aschehoug wrote:

> "If one assumes the opposite [i.e. that the newer law could be applied], one is forced to conclude that the legislature can, with binding effects for older creditors, allow debtors to free themselves of debt by declaring bankruptcy. But it is accepted by the American Supreme Court that by enacting such laws and applying them to existing debts, the legislature would overstep the limits of its authority."

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[345] *Ibid.,* p. 197.

[346] *Ibid.,* p. 200.

[347] Some of Marshall's arguments, as he renounced the idea that the contracts clause should not apply to bankruptcy laws, merit repeating here, since they show an emphasis quite similar to that of the Norwegian court some 90 years later. Concerning statutes of limitations, he noted: "If, in a State where six years may be pleaded in bar to an action of assumpsit, a law should pass declaring that contracts already in existence, not barred by the statute, should be construed to be within it, there could be little doubt of its unconstitutionality." *Ibid.,* p. 207. Similarly, concerning usury laws, he wrote that "[i]f the law be, that no person shall take more than six per centum per annum for the use of money, and that, if more be reserved, the contract shall be void, a contract made thereafter, reserving seven per cent., would have no obligation in its commencement; but if a law should declare that contracts already entered into, and reserving the legal interest, should be usurious and void, either in whole or in part, it would impair the obligation of the contract, and would be clearly unconstitutional." *Ibid.*

[348] This was based on the fact that Aschehoug had found that certain provisions in the 1863 bankruptcy law could not be applied to older debts because of art. 97. The majority wrote that "[t]o apply this retroactively appears questionable, *see Aschehoug: Statsforfatning III*, p. 231 (2nd ed.), according to whom the forced settlement introduced in the law of 1863 could not be applied to prior creditors." Rt. 1928.152, 154. In 1929, the Court refused to grant certiorari in a case where a new law on municipalities' debt was applied to an older lending contract. The Court found it "unnecessary to discuss further whether it is constitutional to apply the new rules to older debts . . . this question was discussed when the law was drafted and people believed it should certainly be answered in the affirmative . . . The committee on granting certiorari agrees with this." Rt. 1929.766, 766–7.

This was footnoted with Kent's *Commentaries* and to Pomeroy's *Introduction to Constitutional Law.* [349] Thus, Aschehoug's argument on earlier changes in the bankruptcy laws, supported by a reference to the American Supreme Court, probably to *Sturges* v. *Crowninshield,* and to American theory was one of the two main factors in the decision and the American citations were directly to the point.[350] Once again, the reference was to much older American legal thought.

In sum, the Norwegian Supreme Court apparently never doubted the constitutionality of regulation; the question was simply one of retroactivity. A similar rule was hinted at in Danish law. It was, in other words, unconstitutional to affect a vested property right under a contract. This seems to have been based, at least to some degree, on American vested rights doctrine, introduced into Norwegian law by Aschehoug. In the U.S., by contrast, the question was one of the scope of the regulatory power vis-à-vis the scope of liberty under the due process clause. The question was thus whether such regulations could be enacted at all. This liberty of contract proper – which did not become an important part of the due process clause until later in the 19th century – did not exist in the Nordic countries. There was no constitutional constraint on prospective regulation concerning contracts in Nordic law.[351]

The fact that the emphasis in Norway was on retroactivity was, of course, partly due to differing constitutional provisions. However, the web created by the different lines or modes of thought, as described in part 2, is important here – and it may have been different in the different countries. Contractual rights were viewed as a category of vested rights in Norway. In the U.S. on the other hand, liberty of contract was based on and related to the idea of a private sphere free of

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[349] Aschehoug, *supra* note 116, p. 231, citing Kent's *Commentaries I* p. 420 and Pomeroy's *An Introduction to Constitutional Law* pp. 392–3.

[350] References to Norwegian writings on American law are also found in Rt. 1916.381, which concerned the deduction of perceived benefits from compensation under the takings clause. In the passage cited by the court in that case, Aschehoug argued that when the owner of the taken property receives the same benefits as others in the neighborhood, the benefits should not be deducted from the compensation, but the "extra benefit that the action brings his property compared to others" should be deducted from the compensation. Many American jurisdictions followed a similar rule and Aschehoug supported this with a reference to *Constitutional Limitations* and Redfield's *Law of Railways*. Aschehoug's formulation of this point is very similar to Cooley's. Aschehoug, *supra* note 116, p. 66, citing *inter alia* Cooley's *Constitutional Limitations* p. 569 and Redfield's *Law of Railways,* section 71, No. 2–7. In a dissent in a 1934 case concerning the constitutionality of dividing the costs of a road between the owners of lots adjacent to it, irrespective of the benefits they stood to gain from the road, American law was mentioned, but was not directly to the point. The minority cited Aschehoug, who in turn cited Sedgwick and Rüttimann. *See* Rt. 1934.997 and Aschehoug, *supra* note 116, pp. 41–42 citing Sedgwick's *Constitutional and Statutory Law* p. 433 and Rüttimann's *Das Nordamerikanische Bundesstaatsrecht, II,* section 428.

[351] Vested rights were vested in accordance with the law on property. The Norwegian Supreme Court invalidated changes affecting vested property rights, whereas the U.S. Constitution invalidated both such laws and laws affecting liberty.

governmental interference, a changing concept of property and the traditional antipathy towards special legislation and special privilege. These differences may have been important in shaping the jurisprudence.

2.4.3. Pretextual Use of Governmental Power

The possibly pretextual use of governmental powers was an important issue in 19th and early 20th century American jurisprudence. Although this question arose in Norway too, there were important differences in the jurisprudence.

Already in *McCulloch* v. *Maryland*[352] the U.S. Supreme Court made the famous statement that:

> "Should Congress, in the execution of its powers, adopt measures which are prohibited by the constitution; or should Congress, under the pretext of executing its powers, pass laws for the accomplishment of objects not entrusted to the government; it would become the painful duty of this tribunal, should a case requiring such a decision come before it, to say that such an act was not the law of the land. But where the law is not prohibited, and is really calculated to effect any of the objects entrusted to the government, to undertake here to inquire into the degree of its necessity, would be to pass the line which circumscribes the judicial department, and to tread on legislative ground."[353]

In *Powell* v. *Pennsylvania*,[354] decided in 1888, the U.S. Supreme Court noted that it was

> "scarcely necessary to say that if this statute is a legitimate exercise of the police power of the State for the protection of the health of the people, and for the prevention of fraud, it is not inconsistent with [the Fourteenth] Amendment; for it is the settled doctrine of this court that, as government is organized for the purpose, among others, of preserving the public health and the public morals, it cannot divest itself of the power to provide for those objects; and that the Fourteenth Amendment was not designed to interfere with the exercise of that power by the States."[355]

The scope of the police power was thus supposed to stay basically the same after the adoption of the Fourteenth amendment and the development of the doctrine of liberty of contract. It has been noted that until the 1890s, "virtually all of the police power cases that struck down legislative regulations did so on the view that they were 'under pretence of regulation' and not 'real' exercises of the police power".[356] In any case, determining which regulations were *bona fide* police power regulations and which used governmental power as a pretext to reach impermissible ends was an

[352] 17 U.S. (4 Wheat.) 316 (1819),
[353] *Ibid.,* p. 423.
[354] *Powell* v. *Pennsylvania*, 127 U.S. 678 (1888) (upholding a Pennsylvania ban on oleomargarine).
[355] *Ibid.,* p. 683, citing *Mugler* v. *Kansas*, 123 U.S. 623, 663 (1887); *Butchers' Union Co.* v. *Crescent City Co*., 111 U.S. 746, 751 (1884); *Barbier* v. *Connolly*, 113 U.S. 27 (1885), *Yick Wo.* v. *Hopkins*, 118 U.S. 356 (1886).
[356] *See* Horwitz, *supra* note 27, p. 29.

important part of American late 19th century jurisprudence. The most famous case in which the U.S. Supreme Court concluded that a law was a pretextual use of the police power was *Lochner* v. *New York*,[357] decided in 1905. Justice Peckham, speaking for the majority, refused to view the maximum hours law in question as a health law,[358] characterising it instead as a "meddlesome interference with the right of the individual". Since the law was not an acceptable exercise of the police power, it was considered special legislation – by changing the terms of contract which bakers and their employees could agree on, the law benefited one group at the expense of another and was thus stereotypical special legislation.[359]

Questions of the pretextual use of government power were not limited to the police power. Similar questions arose with regard to the commerce and taxing powers.[360] In such cases, however, they were framed differently. In *McCray* v. *United States*[361] it was argued that an oleomargarine tax, which was 40 times higher for artificially coloured oleomargarine than other oleomargarine, was an

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[357] *Lochner* v. *N.Y.* 198 U.S. 45 (1905).

[358] *Ibid.* Peckham wrote: "The act is not, within any fair meaning of the term, a health law . . . Statutes of the nature of that under review . . . are not saved from condemnation by the claim that they are passed in the exercise of the police power and upon the subject of the health of the individual whose rights are interfered with, unless there be some fair ground, reasonable in and of itself, to say that there is material danger to the public health or to the health of the employees, if the hours of labor are not curtailed." *Ibid.,* p. 61.

[359] Other cases indicate a similar mode of thought. In *Mugler*, the Supreme Court emphasised that there was a difference between real use and use of the police power as a guise, even as it upheld the law. *Mugler* v. *Kansas*, 123 U.S. 623 (1887). In 1885, the New York Court of Appeals wrote: "Generally it is for the legislature to determine what laws and regulations are needed to protect the public health and secure the public comfort and safety, and while its measures are calculated, intended, convenient and appropriate to accomplish these ends, the exercise of its discretion is not subject to review by the courts. But they must have some relation to these ends. Under the mere guise of police regulations, personal rights and private property cannot be arbitrarily invaded, and the determination of the legislature is not final or conclusive. If it passes an act ostensibly for the public health, and thereby destroys or takes away the property of a citizen, or interferes with his personal liberty, then it is for the courts to scrutinize the act and see whether it really relates to and is convenient and appropriate to promote the public health." *In re* Jacobs, 98 N.Y. 98, 110 (1885). *See also People* v. *Marx*, 99 N.Y. 377 (1885) (invalidating a ban on the manufacture and sale of oleomargarine since it was believed to be an anti-competition measure and not a health law) and Jacobs, *supra* note 35, p. 86.

[360] *See Hammer* v. *Dagenhart*, 247 U.S. 251 (1918) and by contrast *U.S.* v. *Darby*, 312 U.S. 100,116 (1941): "The thesis of the opinion that the motive of the prohibition or its effect to control in some measure the use or production within the states of the article thus excluded from the commerce can operate to deprive the regulation of its constitutional authority has long since ceased to have force." *See* regarding the taxing power, *Bailey* v. *Drexel Furniture Co.*, 259 U.S. 20, 37 (1922): "the so-called tax is imposed to stop the employment of children within the age limits prescribed" and *U.S.* v. *Butler*, 297 U.S. 1 (1936) (invalidating the Agricultural Adjustment Act of 1933).

[361] 195 U.S. 27 (1904).

unconstitutional abuse of the taxing power because "the purpose of Congress in levying it was not to raise revenue but to suppress the manufacture of the taxed article".[362] The Court found it clear "[t]hat the acts in question on their face impose excise taxes which Congress had the power to levy",[363] and stated that

> "[t]he decisions of this court from the beginning lend no support whatever to the assumption that the judiciary may restrain the exercise of lawful power on the assumption that a wrongful purpose or motive has caused the power to be exerted . . . Since . . . the taxing power conferred by the Constitution knows no limits except those expressly stated in that instrument, it must follow, if a tax be within the lawful power, the exertion of that power may not be judicially restrained because of the results to arise from its exercise."[364]

The distinction between invalidating an otherwise valid tax because it was levied for the wrong reasons and invalidating laws which could only be enacted for certain purposes, because they were enacted for some other purposes, is thus an important element in the decision.[365]

This issue arose in a few Norwegian cases as well. In 1896, a concurring justice expressed doubt about upholding a prohibition on selling liquor in lesser quantities than 250L because "the provision at issue is formally a regulation of business, but as evidenced by the legislative history, it is intended as a significant limitation of the trade, for the benefit of the sales undertaken by cooperative, and the result will supposedly be almost the same as if the right had been revoked".[366]

The question of the state's motive when enacting the Act played a role in the *Waterfalls case* of 1918. It was argued that the legislature meant to appropriate the waterfalls and that the act was therefore inconsistent with art. 105. The majority stated that the fact "that it may be assumed that fiscal considerations were taken into account [when the legislation was enacted] does not strike me as having any conclusive significance",[367] suggesting that even if the legislature's decision had

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[362] *Ibid.,* p. 51.
[363] *Ibid.,* p. 50.
[364] *Ibid.,* pp. 56 and 59.
[365] The Court stated that "[a]s we have previously said, from the beginning no case can be found announcing such a doctrine [that it could strike an otherwise valid tax because of suspect motives], and on the contrary the doctrine of a number of cases is inconsistent with its existence. As quite recently pointed out by this court in *Knowlton* v. *Moore* . . . the often quoted statement of Chief Justice Marshall in *McCulloch* v. *Maryland,* that the power to tax is the power to destroy, affords no support whatever to the proposition that where there is a lawful power to impose a tax its imposition may be treated as without the power because of the destructive effect of the exertion of the authority. And this view was clearly pointed out… in *Gibbons* v. *Ogden" Ibid.,* p. 56, citing *Knowlton* v. *Moore,* 178 U.S. 41, 60 (1900); *Gibbons* v. *Ogden,* 22 U.S. (9 Wheat.) 1 (1824) and *McCulloch* v. *Maryland*, 17 U.S. (4 Wheat.) 316 (1819).
[366] Rt. 1896.609, 613. The regulations were upheld. *See also* Rt. 1910.181, *supra* note 266.
[367] Rt. 1918.401, 407. This was based on the reason that "the court must assume that the legislature based the legislation on those considerations it found most important. Specifically, I must assume that the legislature found it necessary to enact the limitations set out in the Act

been influenced by the wish to appropriate the waterfalls, this would not affect the legislation's constitutionality. Justice Berg stated even more clearly that "[t]he subject of inquiry by the courts is whether the law, objectively understood, is inconsistent with art. 105 or not. I believe it lies beyond the courts' competence to inquire into the motives behind the prohibition or the intent of the legislature".[368]

Justice Mejdell, who wrote the main dissent in the *Waterfalls case*, tried to draw a line between permissible and impermissible use of state power in a way reminiscent of American jurisprudence:

> "[t]he authorities must, in all cases, be required to act loyally. The state does e.g. not have the right to use the form of a licence to cover up an arbitrary act; an act that is not necessary at all. The state can not use a licensing requirement or other administrative procedures to force the individual to submit to something he should not have to submit to at all. And – to keep to the facts of the case at hand – all the consideration that the owner owes society when utilising his waterfall can be enforced through the state's licensing requirements. But the state can not, with the aim of claiming the property rights to a waterfall for itself, take property rights from a private owner – unless it pays compensation in accord with art. 105."[369]

Mejdell therefore concluded that

> "The whole scheme has no reasonable basis other than the desire to enact the same principle here as governs the utilisation of significant waterfalls in most other countries, namely that it is the state that shall have the sovereign right – the real property rights – over the waterfalls; a principle that can certainly be enacted in accordance with art. 105 but that is here enacted in violation of that provision because it is believed that to act otherwise would be too expensive for the state. But if it is the clear and only aim of the Act to bypass the conditions set out in art. 105, then the Act is unconstitutional."[370]

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because of the belief or fear that utilisation of waterfalls by [corporations or foreigners] entailed significant danger to future social and economic development; risks against which the legislature found it necessary to protect society. To which degree the legislature's views of these considerations and the real or possible risks for development are justified or not is a matter of judgment that cannot be reviewed by the courts." *Ibid.,* p. 406.

[368] Rt. 1918.401, 426.

[369] Rt. 1918.401, 411–412. Mejdell also suggested that the taxing power could no more than the regulatory power of the state be used to this end. He noted that were the state to tax the utilisation of waterfalls "for the purpose of simply making waterfalls devoid of value to the owner so that it could then force him to hand over his rights without getting compensated, that measure would be unconstitutional. It would be a measure for going around the Constitution's art. 105 and must therefore be invalidated by the courts." *Ibid.,* p. 415.

[370] *Ibid.,* pp. 416–417. Another dissenter noted: "It is clear from the legislative history that the Act's intent ... is, when all is said and done, to transfer the property rights to this country's waterfalls from individuals to the state" *Ibid.,* p. 421. These considerations also played a role in the grain seizure case, Rt. 1925.1014. The minority suggested that motives might play a role: "It is clear, that in this way [i.e. through price regulations], the ground is laid for a significantly different evaluation of the compensation due for a taking . . . This is true if the legal scheme is constitutional, it is enforced equally and the enforcement is otherwise legal.

The Norwegian cases in which pretextual use of governmental power was an issue all revolved around the question of an illegal motive making an otherwise legal action unconstitutional. Such claims were never accepted by the Norwegian courts. In the U.S., there were, as laid out in *McCray*, two kinds of cases: those in which the court was asked to invalidate an act that seemed, based on its "scope and effect", to be within the legislative power because of legislative motives, and those in which it was asked to invalidate an act because it did not fall within any governmental power, even though the state argued that it did. It was mostly in cases of the second type – in which the question was whether the regulation in question served a particular purpose, e.g., the protection of health and morals, at all or was enacted "under pretence of regulation"– that the courts sustained such claims.[371]

In sum, it was often doubtful in the U.S. whether regulation could be enacted at all – whether it fell within the scope of the powers of the states or the enumerated powers of the federal government. It therefore makes sense that cases of the second kind– *Lochner* being a case in point – should be more of an issue in the U.S. than in Norway, where governmental powers were believed to be plenary except when they collided with a concrete constitutional provision.

2.4.4. Antipathy towards Special Legislation

The influence of the abhorrence of special legislation in American constitutional law was discussed in chapter 2.2., *supra*. This idea played a role in Nordic jurisprudence as well. When Castberg wrote his 1920 dissertation on art. 97 of the Norwegian Constitution, he cited Aschehoug and Morgenstierne as authorities for "the following principle: If the law completely prohibits certain actions, the prohibition applies to everyone, irrespective of whether he has a vested right in being able to undertake such action or require them to be undertaken. Such a law does not violate art. 97 or art. 105."[372] In sum, whether the law could be understood as special legislation was an important factor in the constitutional evaluation of interference with privileges once granted.

On this last point . . . it is clear from the record that the road is clear . . . I especially note the fact that there is no evidence of any economic goal – like for instance lowering compensation for takings – in the law or the way it was enforced." *Ibid.,* p 1017. *See supra* note 315 and accompanying text.

[371] *See* McCray, 195 U.S. 27 (1903). There were exceptions, *see e.g., Bailey* v. *Drexel Furniture Co*., 259 U.S. 20 (1922) in which the Supreme Court invalidated the child labour tax, which taxed firms hiring children. The decision is arguably inconsistent with the statement in *McCray*, 195 U.S. 27 (1903) that "if a tax be within the lawful power, the exertion of that power may not be judicially restrained because of the results to arise from its exercise". *Ibid.,* p. 59.

[372] Castberg, *supra* note 166, p. 99. Castberg was clear on this point: "An Act can prohibit actions that existing rights or privileges permit on the condition that the prohibition is *complete,* in other words that the provision does not *prohibit* some privilegees but *allow* others to undertake such actions." *Ibid.,* p. 101.

The oldest Norwegian case in which such considerations are readily apparent is from 1875.[373] A forest was a common in the sense that, although it was jointly owned by some farmers, all farmers in the district had traditional logging rights in it. Under an 1863 law, such commons could be dissolved if one owner required it.[374] A municipality bought a small farm, which had a share in such a forest and, as an owner, the town council required a dissolution. The remaining owners argued that this was a scheme by the unpropertied majority to get its hands on the owners' property, and that their rights were being passed over in favour of the fictional rights of others, in violation of art. 105.[375] The majority of the Norwegian Supreme Court rejected the constitutional challenge, distinguishing clearly between such dissolution and a taking.[376] The dissenting justices, on the other hand, conceptualised the case as pure tug-of-war between two groups:

> "A right that can only be exercised at a loss or at least without any benefit is, if it should be called a right at all, a bad right devoid of any value and cannot be counted as one for which there should be paid compensation . . . But to go further and to give the users something without quid pro quo is, to my mind, inconsistent with the Constitution . . . When the committee treats all the farms that can use the forest equally, the scope of the rights of the users becomes greater than it really is. The users [as a group] thus get too much compensation. They should be compensated for their use of the forest but no more."[377]

It is interesting to note how strongly the minority opinion identifies the groups in question; the property owners on one hand and the users on the other. To the

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[373] Rt. 1875.289. This case was decided before Aschehoug's treatise was published, but long after his lectures on constitutional law, which contained the ideas later elaborated on in his treatise, were published. *See supra* note 113. It was argued as a takings case, under art. 105 of the Norwegian constitution.

[374] The users' rights were then evaluated and they were compensated, either in money, timber or land, and the remaining forest became the exclusive property of the owners.

[375] The 1863 law at issue provided that compensation should be based on "the farm's needs, though in such a way as to take reasonably into account any foreseeable increase in need due to increased cultivation or other circumstances". The committee charged with dissolving the common applied this rule to all 1100 farms in the district without inquiring whether they had in fact used the forest or would be likely to do so. It thus awarded equal compensation to farms close by, with no forests of their own, and forest farms dozens of miles away.

[376] The majority wrote: "This is no different than any dissolution of joint property. You give up your right to the whole – to the extent you have one – in return for getting a more extensive and clearly defined right to a part." Rt. 1875.289, 298. The majority added: "We must not be scared off because the law looks harsh and unreasonable but keep in mind that when the law was drafted it was based on a view, which has later gained general admittance from those who are involved in these matters, i.e. that the users' right is the most important one." *Ibid.,* p. 299. Even though the law was thus upheld, it is clear that this is nothing like the judicial deference to legislative decisions that was introduced decades later. The majority supported the legislative conclusion not as such, but because it is, to the best of judicial knowledge, the right one.

[377] *Ibid.,* pp. 294–5.

minority, the legislation was unconstitutional as applied because it took property from a group and vested it in another, exemplifying the 19th century fear of class, or special legislation.

Considerations of special or general legislation were also inherent in the standard by which interferences with privileges were evaluated. In a 1909 closing time case, for instance, it was stated that losses that licensees suffer because of regulations "of a general and regulating character" that do not impair the substance of the privilege will not be compensated.[378] This concern was evident in other cases as well.[379] The dissent in the 1909 forestry case emphasised that the preservation law at issue was a general law.[380] It is thus clear that in a number of cases laws were upheld, or the parties to the case sought to have them upheld, because they were of general application.

The Danish Supreme Court seems to have had similar ideas. In a 1921 case concerning land reforms, the Court noted that "[b]ased on the information before the court, one must assume that the law was based on considerations of the common good".[381] The reason for this comment was indicated in an explanatory footnote to

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[378] Rt. 1909.156, 162. In a 1919 case concerning prohibition in the first weeks of World War I, which only affected those pubs in Christiania which were most disorderly and where the cheapest wine was sold, a dissenting lower Court justice emphasised this aspect of the law in question: "This case might have looked different if there had been enacted a general temporary ban on selling cheap wine, either for the whole country or for Christiania alone. But instead, the authorities singled out, from the 100 beneficiaries of these rights, the 16 who have, based on their location, traditionally been unusually problematic. By this action there is in fact enacted a personal special law for a small limited group within the group of legally similarly situated privilegees. There is no doubt that this was based on careful and conscientious evaluation. But under the law, it is an arbitrary action when the authorities classify people and rights in this manner as a special class and it can not coexist with our legal system and which could have the most dire consequences. [The plaintiff] was not obliged to acquiesce in being treated in such an unequal way by a majority . . ." Rt. 1919.449, 460.

[379] In 1934, a lower Court, whose opinion was endorsed by the Supreme Court, wrote that the freedom of enterprise provision "is also viewed as limiting only those interferences with the freedom of enterprise, from whom an individual or a single organisation stands to benefit. That is not the case here." Rt. 1934.444, 449. This emphasis can also be seen in cases that do not concern privileges. In the paper fee case in 1928, the lower Court noted that the state could "levy special fees on certain industries . . . for a special purpose and to determine their amount accordingly". Rt. 1928.353, 358. *See also* the Supreme Court's opinion in Rt. 1928.353, 356. The wine monopoly case also illustrates this, the plaintiffs argued that the change was "unconstitutional and hence invalid since it really is aimed at a single corporation and constitutes special taxation of that corporation". Rt. 1929.529, 531.

[380] Justice Hagerup Bull wrote "I emphasise that these provisions are not special rules concerning specific contracts or contractually acquired rights. The provisions concern the use of forested areas and apply, according to their intent and their letter, equally to all who can dispose of forests, no matter how they acquired that right. These provisions limit the general liberty in this area and apply no less to owners than to those who rent logging rights." Rt. 1909.417, 424.

[381] UfR. 1921.168.

the summary of the case, usually written by the justices themselves. The footnote comments, *inter alia*,

> "[i]n the case at bar it was . . . argued on behalf of the appellant that the law was not enacted for the common good at all, but for the benefit of special interests related to the high prices of grain due to the war. That is why it is determined in the opinion that the rules of the Act must be viewed as being based on the legislature's consideration of what, in its opinion, was required by the common good. Whether these considerations led to a more or less correct result is not for the courts to decide."[382]

This comment is obviously important in the related contexts of special legislation and public purpose, and it makes it clear that at least this plaintiff thought this might be a useful argument. However, it also makes clear that the Court viewed the question whether legislation was in the public good to be a political question rather than a judicially enforceable limit on the legislative power.[383]

A certain hostility towards special legislation is also indicated by the decisions in the Icelandic prohibition cases in the 1900s and 1910s. In 1900, the Icelandic High Court rejected a claim by a licensee who argued that "the law . . . deprived him of equal protection by levying fees only on the business he is engaged in . . ." The Court noted that there were no provisions in the constitution that "prevent assessing a fee . . . or levying a tax, on certain kinds of enterprises only".[384] In 1918, the Danish Supreme Court upheld prohibition in Iceland because "the law [was] only an application of the legislature's mandate to enact general regulations concerning the economy".[385]

It thus seems clear from the assumptions made by litigants and courts in all three Nordic countries discussed here that class or special legislation was presumed to be illegitimate, just as it was in the U.S. There were no equal protection clauses in the Nordic constitutions at the time, so these arguments had no such textual foundation. Instead, they played a part in the constitutional doctrine concerning the constitutions' property clauses and, in Norway, the non-retroactivity clause in art. 97.

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[382] *Ibid.*

[383] This was the case in Danish and Icelandic constitutional law for most of the 20th century. In the late 1990s, the Icelandic Supreme Court started reviewing whether this requirement of the takings clause was fulfilled. *See* Hrd. 1937.332 (cited *supra* note 325); Hrd. 1998.4076 (invalidating part of the fisheries management Act) and Hrd. 2002.3686 (invalidating a law prohibiting a fishermen's strike as applied to those unions which had not declared a strike).

[384] Lyrd. VI.176, 177–8.

[385] Lyrd. X.601, 601–2. The High Court in Iceland had reached the same conclusion, on the basis that the privilege was not property and did therefore not fall within the scope of the takings clause and there was not believed to be enough reason to reason by analogy to the takings clause. Lyrd. IX.809, 812–13. In a later case, the Supreme Court added that "this prohibition is only an application of the authority or power vested in the legislature to make generally applicable rules about business matters". Lyrd. X.603, 603–4. *See also* Lyrd. X.20, 23–6 and *supra* note 258 and accompanying text.

2.4.5. Private and Public Spheres

It has been described in chapter 2.2.2 that the distinction between public and private spheres was immensely important in 19th century American constitutional thought. It served a key purpose in delimiting the powers of the state. One of the areas in which it played a role was substantive due process jurisprudence, where the constitutionality of price regulations depended on whether the business in question was viewed as private or public.

The rhetoric of public and private spheres did reach the Nordic countries, but very late in this period.[386] The only important case in that context concerned the Norwegian Wine Monopoly.[387] On this point, the Supreme Court commented:

> "[The provision] applies – in addition to shareholders in corporations that are not set up for business purposes – to 'shares in The National Bank, in those corporations or cooperatives whose purpose is the sale of liquor, wine, fruit wines, ale or beer, in railroads' – i.e. to those who hold shares in such corporations at any given time. As far as we know, no doubt has been raised concerning the constitutionality of this law as applied to shareholders in the National Bank and in railroad companies, and no one can doubt that the legislature must be permitted – if it believes it useful – to tax corporations of such a singular character differently than other corporations. The corporations, who are in their business outside regular competition, are hard to compare to normal business corporations in this country and it seems to me that it would be unreasonable if the legislature was not permitted to enact special legislation for these corporations in order to take into consideration their special circumstances… The fact that the law has found it reasonable to set up a special tax system for these companies as well as the National Bank and the railroad companies seems to me to be fully constitutional."[388]

Here, the Norwegian Court came very close to defining corporations affected with a public interest. Yet even though there were a few instances – like the case above – where considerations of public and private spheres were apparent,[389] this distinction

[386] For a discussion of Aschehoug's writings on the subject, *see* note 129 and accompanying text.

[387] *See supra* note 284. The rules governing its taxation were changed and the shareholders (apart from the state, which was one of the most important ones) argued that the change was "unconstitutional and hence invalid since it really is aimed at a single corporation and constitutes special taxation of that corporation." Rt. 1929.529, 531.

[388] Rt. 1929.529, 531–2.

[389] In Rt. 1935.467, the distinction between private and public law was clear when the Supreme Court noted that "in ordinary labour relationships, there is no doubt under Norwegian law that an employer can fire his people . . . at his own discretion and at will without having to explain or prove any adequate reason or any reason at all and without being subjected to criticism from the courts. [/]And when promoting the opposing economic interest one can, in my opinion, not under our current law apply considerations from administrative law . . . to the purely private law relationship between shareholders and their – the corporation's – officers." Rt. 1935.467, 471.

was generally absent in Nordic law and it was certainly neither pervasive nor viewed as key in protecting liberty.

It was described in part 2, *supra*, how the antipathy towards special legislation and the distinction between public and private spheres, in particular the public purpose requirement, were linked in the U.S., and how at least some American legal thinkers wanted to – and did – extend the public purpose requirement to apply to government powers other than the eminent domain power.[390] Although references to laws being general were prevalent in Nordic jurisprudence, references to public and private spheres were not. The question then arises whether there was a public purpose requirement in Nordic law. The takings clause of the Norwegian constitution speaks of property being taken "for public use". In spite of its wording, this clause was never understood as preventing takings for the benefit of private individuals or corporations.[391] This public use requirement has therefore never had any real influence, and there was never question of exporting that requirement to other fields of constitutional law.

The takings clauses of the Danish and Icelandic constitutions do not require a taking to be for the public use: it is sufficient if it is for the common weal and determined by law.[392] While individual statements in Danish court opinions suggest that there may have been some kind of common weal requirement for regulations as well, it is not clear whether that is an indication of a transfer of ideas from eminent domain jurisprudence or an expression of an older, and possibly vaguer, idea of the justification for governmental power. That discussion is, to a great degree, moot, because the Danish courts had stated already in 1921 (after having suggested a similar solution in 1913) that they did not view themselves as competent to review whether the common weal requirement in the takings clause was fulfilled or not – that it was in fact a political question.[393] The Icelandic courts followed suit in 1937.[394]

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[390] *See supra* chapter 2.2.2. Private and Public Spheres.

[391] *See* Aschehoug, *supra* note 116, pp. 42-4; Castberg, *supra* note 109, p. 327 and Helset & Stordrange, *supra* note 8, p. 394.

[392] On the development of the Whig idea of the commonwealth and its influence on the "fear of faction" that so influenced 19th century American law, *see* Benedict, *supra* note 26, pp. 314–327.

[393] As noted above, the Danish Supreme Court declared in 1921 that, even though it was argued that legislation was special legislation, it would assume that the legislature had based its decisions on considerations of what was for the common good. UfR. 1921.168. In 1913, it had expressed doubts that it was competent to review what was for the common good. UfR. 1913.457. In the *Edye* v. *Robertson* (*Head money cases*), decided in 1884, the U.S. Supreme Court gave a similar statement concerning the general welfare clause: "If it were necessary to prove that the imposition of this contribution on owners of ships is made for the general welfare of the United States, it would not be difficult to show that it is so, and particularly that it is among the means which Congress may deem necessary and proper for that purpose; and beyond this we are not permitted to inquire." *Edye* v. *Robertson*, 112 U.S. 580, 595 (1884). *See also Boom Co.* v. *Patterson*, 98 U.S. 403 (1878), where the Court stated that "when the

It was thus not an issue in the courts of any of the Nordic countries, whether a taking or other governmental action took place for a public purpose. In sum, the public/private division, which had such a tremendous influence on American constitutional thought in this period, played no role in Nordic constitutional law.

2.4.6. Conclusions Concerning the Jurisprudence

First of all, American law greatly influenced the rationale given for judicial review *per se*. It has been disputed whether the institution itself was actually borrowed from the U.S., but it is clear that the rationalisation for judicial review and ideas concerning the proper standard of review were greatly influenced by American law, primarily through Aschehoug's writings.

Vested rights were protected in American jurisprudence. At first, grants and privileges, tax exemptions and corporate charters were protected by the contracts clause, although the states were able to use reservation clauses to safeguard their powers. In the mid 19th century, it was established that the police power of the states was inalienable, so even those rights based on grants from the state were subject to the police power. Once the contracts clause ceased to be the key limitation on state power and the due process clauses began playing that role, the key question for American courts was still that of the line between valid exercises of the police power and the protection afforded by those constitutional provisions.

None of those developments happened in Norway or the other Nordic countries. Aschehoug introduced pre-Civil War vested rights doctrine into Norwegian law but, as is evident from the privilege cases, no doctrine of inalienable governmental powers developed there until much later. Quite on the contrary, rights once vested were inviolable, so if the legislature found it necessary to impair them to further the public weal, it had to pay compensation under the takings clause. For this reason, late 19th century and early 20th century Norwegian constitutional jurisprudence was more property-protective in this context than its American counterpart.

In spite of this fundamental difference concerning the scope of the vested rights doctrine, there were marked similarities in the jurisprudence. One of them was the resolution of the doctrine. Another was the relatively similar effect of the changing concept of property in the U.S. and the Norwegian Supreme Court's emphasis on the pecuniary losses of privilegees. Both carried the possibility of dramatically extending the reach of the protection of property. On the other hand, the Norwegian (or Nordic for that matter) concept of property did not develop as the American concept did. Instead, it stayed relatively narrow – meaning that plaintiffs had little chance of convincing courts that interference with their vested rights or property regulations should be viewed as takings. Art. 97, prohibiting retroactive legislation, was therefore the most important constitutional limitation.

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use is public, the necessity or expediency of appropriating any particular property is not a subject of judicial cognizance" *Ibid.,* p. 406.

[394] Hrd. 1937.332.

The influence of American law seems to have been strongest concerning vested rights. The American dislike of special or class legislation also had a certain analogue in Norwegian jurisprudence. By contrast, the division between public and private, which was very important in American law, did not impact Nordic constitutional law at this time. There was no concept of liberty of contract in Nordic jurisprudence either, even though that was an important doctrine in American constitutional law. However, there were seemingly random similarities in doctrine concerning individual kinds of contracts. It is likely that the difference is partly due to the lag in time between the emergence of theory in American law and its introduction to Norwegian law. Norwegian lawyers in the 1900s were reading Aschehoug, who in turn was citing American authors from before 1870. So the doctrines which were important in American jurisprudence in the period around 1900 simply had not crossed the Atlantic in the first decades of the 20th century – or if they had, it was not in a formal enough context or sufficiently reasoned to make them really influential. In some cases, the differences were also probably due to differing constitutional provisions, e.g., when it came to pretextual use of governmental powers.

2.5. CONCLUSIONS

During the period described here, American constitutional theory was very influential in Norwegian constitutional law. The influence in individual lines of cases – for example those concerning the deduction of gains from compensation paid for property taken under the eminent domain power, or the effects of the vested rights doctrine on bankruptcy laws – was secondary. What matters is that the fundamental doctrine of judicial review and limitations upon state power was adopted in all the Nordic countries with very few changes. The doctrine of vested rights, emphasising stable expectations, and the emphasis on laws being general was also shared. Hence the real similarity in American and especially Norwegian jurisprudence: namely the struggle of delimiting regulatory power and protecting the vested rights of individuals.

There were certainly dissimilarities as well, a notable one being the emergence of the American doctrine of liberty of contract, which did not emerge in the Nordic countries. Some such differences may be explained by the fact that the dominance of the constitutional ideas described here lasted longer in the U.S. than in the Nordic countries. Therefore, these ideas had more time to evolve in the U.S. than in the Nordic countries, and Norway in particular. In the case of liberty of contract, it has been argued that it developed in continuation of the "free-labour" ideology, which was a key part of Northern identity in the mid-19th century.[395] There were also many issues, especially concerning the pretextual use of governmental powers, that had less weight in Nordic than in American jurisprudence because of different constitutional ideas and provisions, especially because the legislatures in the U.S. were not viewed as having plenary regulatory powers like the Nordic ones. To be

[395] *See* McCurdy, *supra* note 81.

constitutional, regulations in the U.S. had to be enacted in accordance with one of the powers of government, such as the police power.

Given these differences, and the fact that Norwegian constitutional law has of course developed autonomously as well as imported aspects of French law,[396] is it possible to be certain that there was a relationship between American doctrine and doctrinal developments in Norway and – even further removed – Iceland and Denmark? Given the extensive citations to American theory in Nordic theory and the courts' reliance on that theory, that seems easy enough as far as individual questions of law are concerned. It becomes more complicated when the issues in question, such as suspicion of special legislation, are stated more abstractly. After all, these were not peculiarly American ideas. The only answer – and it is a tentative one – is that the fundamental system of judicial enforcement of limitations on government was, if not borrowed, at least rationalised and explained by reference to American ideas, and many areas of law were heavily influenced by American law. The adoption of various fields of law, where these ideas were key, presumably had some effect towards making these ideas principles in Nordic law as well.

Other issues are noteworthy in this context. First of all, the image of the courts during this period was quite similar in Norway and the U.S. The perceived similarity lay in the fact that the courts in both countries protected vested rights and business and property interests against regulation, often to the detriment of the population in general. This view of the courts' jurisprudence in both countries has since been revised, at least to a degree. It is still interesting to note that it was American-inspired constitutional history that described these similarities – for there is no doubt about the influence of progressive American legal thought in the Nordic countries around World War II.[397] The influence of American law was thus seen not only in the law itself, but also in how the law was viewed by the next generations of constitutional lawyers – this account included.

I believe that the similarity lies in the fact that courts in the U.S. and in Norway went to work in a time of great social, political and economic change with similar tools – i.e., concepts and traditions – to understand and categorise the cases they were called upon to decide. American courts developed and adapted early 19th century modes of thought until parts of that conceptual framework foundered in the 1930s and 1940s. The constitutional jurisprudence at the turn of the 20th century was thus a continuation of the American constitutional tradition. These modes of thought were then introduced into Nordic law by influential treatise writers, but there was a shorter time in which the 19th century ideas of vested rights and suspicion of special legislation were dominant in Norwegian constitutional thought before the double

[396] *See e.g.*, E. Smith, 'Rettslig håndheving av konstitusjonelle normer' [Judicial Enforcement of Constitutional Norms], *TfR*. (1983) p. 77.
[397] *See infra* part 3.

shock of World War I and the Great Depression coupled with progressivism and, most importantly, new legal and judicial attitudes led to the changes in constitutional jurisprudence that will be described in more detail in part 3. This is even more true in Denmark and Iceland, where there are only hints of these modes of thought in court opinions, but where they never led to a law being struck down, until the Icelandic tax exemption case in 1943.

PART 3. THE COLLAPSE OF 'CLASSICAL LEGAL THOUGHT' AND NEW VIEWS ON THE ROLE OF THE JUDICIARY

3.1. INTRODUCTION

In part 2, certain similarities in American and Nordic legal thought in the late 19th and early 20th century were discussed, notably judicial enforcement of constitutional limitations on legislative power and an emphasis on the protection of vested rights. In this part, we will look at American doctrinal responses to classical legal thought and the changes taking place in American legal theory and jurisprudence in the 1930s and 1940s and their influence in Nordic constitutional law. Scholars have disagreed on the existence and timing of a constitutional revolution in the U.S. and, to a certain degree, on the importance of this period in American constitutional history.[398] That debate will, to a great degree, be bypassed here, because the focus will be on the influence of American thought and developments from this period in Nordic constitutional law.

Since this part discusses the response to the constitutional theory described in the previous part, developments in the theory of judicial review and concerning the doctrine of vested rights will be examined, as these were the most important areas of American influence in Nordic constitutional law around 1900, and it is interesting to compare the sequel to that doctrine in Norway and in the U.S. The distinction between private and public spheres, which was also discussed in part 2, will not be discussed here, as it was never important in Nordic law. The aversion to special legislation, which was primarily important in Nordic jurisprudence in the context of vested rights, will not be discussed in this chapter either. The importance of both these ideas declined in the U.S. during this period.[399]

In addition to the doctrine of vested rights and theories of judicial review, including the emergence of bifurcated review in the U.S., ideas concerning constitutional interpretation and the delegation of legislative powers will be discussed. Administrative agencies had been part of the American legal landscape since the late 19th century, and both administrative law and the doctrine concerning the delegation of legislative powers were developing in the U.S. in the first decades of the 20th century.[400] U.S. Supreme Court cases in which parts of the first New Deal

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[398] *See* G.E. White, *The Constitution and the New Deal* (Harvard University Press, Cambridge, 2000) pp. 11–32 and the sources referred to therein, concerning both "the conventional account" and various "revisionist" theories.

[399] The abandonment of the public-private distinction in the due process context (in *Nebbia*) had huge implications for both due process and commerce clause jurisprudence in the U.S. *See generally* Cushman, *supra* note 26.

[400] *See* White, *supra* note 398, pp. 94–127.

were struck down on delegation grounds[401] garnered considerable attention in Norway, as did later cases in which the constitutional limitations on delegation to administrative agencies were set out.[402] In time, this part of the dissertation therefore stretches from the 1910s – when Theodore Roosevelt and other American court-critics argued for curbing the American courts – to the late 1950s, when the Nordic courts were still overruling earlier vested rights decisions and elaborating on the constitutional theory originally supported by reference to American decisions from the 1930s and 1940s.[403]

Based on the discussion of American constitutional law that took place in the Nordic countries, it will be argued that due in part to a perceived similarity between American and Norwegian constitutional jurisprudence of the previous decades, and in part to the rise of undemocratic regimes in Central and Southern Europe, Nordic lawyers were exceptionally receptive to American constitutional theory in the 1930s. The changes in American law in the 1930s and 40s were therefore quite influential in Nordic constitutional law.

First, Nordic lawyers' awareness of American constitutional developments in general will be discussed. Then, the focus will be on American influence concerning constitutional interpretation and ideas concerning various tiers of scrutiny, the doctrine of vested rights and, finally, American influence concerning delegation of legislative power.

3.2. AWARENESS OF AMERICAN DEVELOPMENTS

In the decades around World War II, American law was frequently used as a point of reference in Nordic legal discourse, and arguments from it were frequently used to support concrete jurisprudential stances. This will be described in more detail in the following sections. During the 1930s, however, Nordic lawyers were extraordinarily aware of American constitutional developments in general. The concrete utilisation of American arguments in Nordic legal discourse took place against a background of knowledge of American law and this lent to those arguments a depth they would otherwise have lacked. In this chapter, this more general awareness of American law will be described.

There was substantial popular dissatisfaction with the courts and individual court decisions in the U.S. in the decades around 1900, which led to various

[401] *See Schechter Poultry Corp*. v. *U.S.* 295 U.S. 495 (1935); *Panama Refining Co*. v. *Ryan*, 293 U.S. 388 (1935); *Carter* v. *Carter Coal,* 298 U.S. 238 (1936), discussed *infra*.

[402] At the time, these cases may have been less important to Danish and Icelandic lawyers than to their Norwegian colleagues. The first Icelandic case in which a delegation law was struck was Hrd. 1985.1544. Art. 63 of the Danish Constitution provides *inter alia* that "The courts of justice shall be empowered to decide any question relating to the scope of the executive's authority". Similarly, art. 60 of the Icelandic constitution provides that "Judges settle all disputes regarding the competence of the authorities". Possibly because of these provisions and their apparent guaranty of judicial review of administrative action, delegation of power to the executive was viewed as unproblematic in Denmark and Iceland.

[403] There will be no discussion of developments in American law after 1950 in this part.

confrontations between labour organisations, progressive politicians and lawyers on the one hand and the courts on the other.[404] It has already been mentioned that in 1912 Theodore Roosevelt proposed popular recall of court decisions,[405] and that legislative proposals were introduced that would have required a super-majority of the justices to invalidate an act of Congress.[406] In 1937, Franklin D. Roosevelt introduced the most famous of all court-curbing proposals, his court-packing plan, to Congress. It failed to be enacted and did not, according to polls taken at the time, enjoy the support of the majority of the people any more than it did the majority of senators.[407]

Legal historians disagree on the impact and importance of popular dissatisfaction with the courts and on the impact of the court-packing plan in particular.[408] However, fundamental changes occurred in American constitutional jurisprudence in the 1930s and early 1940s. The constitutional jurisprudence woven by the doctrine of vested rights, the abhorrence of special legislation, and a strict division between public and private unravelled. These doctrines were either expressly overruled or faded into the background.[409] It will be argued here that many of the arguments on both sides of the American debate over the proper role of the courts were influential in the Nordic countries.

These arguments were introduced into Nordic law as early as the 1920s. One of the first instances of their utilisation in Nordic legal discourse was Mikael H. Lie's *The Constitution and the Courts*, which was described in some detail in part 2.[410] Lie introduced many of the key arguments of American court critics into Norwegian law. Amongst those were the ideas that judicial review had originally had a much narrower scope, both in the U.S. and in Norway, and that the courts should apply a very relaxed standard of review. Lie also criticised the very idea of vested rights.[411] The idea that judicial policing of constitutional limitations on legislative power was relatively new and a distortion of the constitutional system was important, since it made it easier to argue for a changed jurisprudence. Jurisprudential changes were posited as a question of getting back on course instead of as a novelty. Apart from Morgenstierne's 1913 article and Castberg's dissertation from 1920, both discussed

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[404] This has been described by William Ross in his book, *A Muted Fury*. *See* Ross, *supra* note 163. *See also* on public constitutional opinion in the 1930s in particular, B. Cushman, 'Mr. Dooley and Mr. Gallup: Public Opinion and Constitutional Change in the 1930s', 50 Buff. L. Rev. (2002) p. 7.

[405] *See* Ross, *supra* note 163, pp. 130–154.

[406] On the proposals of Senators Borah, Woodruff and Frear, *see Ibid.,* pp. 218–232.

[407] Cushman, *supra* note 26, p. 21. On the court-packing plan and its fate in Congress, *see ibid.,* pp. 11–25.

[408] *See ibid.,* pp. 11–43 and the sources referred to therein.

[409] *See e.g.,* Kennedy *supra* note 44; Benedict, *supra* note 26; Cushman, *supra* note 26 and White *supra* note 398.

[410] Morgenstierne's article of 1913, where Roosevelt's 1912 proposal was briefly mentioned, was also discussed in that part.

[411] *See supra* chapter 3 in part 2.

in the previous part,[412] a 1930 Nordic conference discussing judicial review and the odd constitutional law casebook, little attention was paid to judicial review in constitutional theory until after 1935.[413] This is true in spite of the fact that judicial review was an important political issue in both Norway and Denmark in the 1910s and 1920s. Four constitutional amendments were proposed in Norway to curb the courts, amend either article 97 or 105 of the Constitution or both, or simply to prohibit judicial review. None of them was enacted, in spite of the fact that it is relatively easy to amend the Norwegian constitution,[414] as the required majority never supported such a change.

The attention paid to judicial review, and American law in particular, in legal literature increased once American constitutional cases and a possible response from the political branches made political history. In February 1937, President Roosevelt introduced his court-packing plan. In late April of that year, *Tidsskrift for Rettsvidenskap* (*TfR*) published a note by Oslo constitutional law Professor Frede Castberg on the plan entitled 'The Battle over the Supreme Court of the United States'.[415] In this note, Castberg gave a brief overview of American constitutional history, emphasising judicial review and the due process clauses. He discussed quite a few cases: *Marbury* v. *Madison*,[416] *Dred Scott* v. *Sandford,*[417] *Lochner,*[418] *Hammer* v. *Dagenhart* and *Bailey* v. *Drexel Furniture,*[419] *Schechter*,[420] and *Railroad*

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[412] *See supra* chapter 3 in part 2.

[413] The lectures were later published in *Statsvetenskaplig tidsskrift för politik – statistik – ekonomi* [The Journal of Political Science on Politics, Statistics and Economics], 1930.

[414] *See* art. 112 of the Norwegian constitution, which states that "If experience shows that any part of this Constitution of the Kingdom of Norway ought to be amended, the proposal to this effect shall be submitted to the first, second or third Storting [Parliament] after a new General Election and be publicly announced in print. But it shall be left to the first, second or third Storting after the following General Election to decide whether or not the proposed amendment shall be adopted. Such amendment must never, however, contradict the principles embodied in this Constitution, but solely relate to modifications of particular provisions which do not alter the spirit of the Constitution, and such amendment requires that two thirds of the Storting agree thereto.

An amendment to the Constitution adopted in the manner aforesaid shall be signed by the President and the Secretary of the Storting [Parliament], and shall be sent to the King for public announcement in print, as an applicable provision of the Constitution of the Kingdom of Norway."

[415] F. Castberg, 'Kampen om høyesterett i De Forente Stater, [The Battle over the Supreme Court of the United States]' *TfR*. (1937) p. 115.

[416] *Marbury* v. *Madison*, 5 U.S. (1 Cranch) 137 (1803).

[417] *Dred Scott* v. *Sandford*, 60 U.S. (19 How.) 393 (1857) (invalidating the Missouri compromise).

[418] *Lochner* v. *N.Y.*, 198 U.S. 45 (1905) (invalidating a maximum hours law for bakers in New York as inconsistent with the constitutionally protected liberty of contract).

[419] *Hammer* v. *Dagenhart*, 247 U.S. 251 (1918) (invalidating a law prohibiting the shipment in interstate commerce of goods made by children); *Bailey* v. *Drexel Furniture*, 259 U.S. 20 (1922) (striking down the child labour tax, which taxed firms hiring children).

Retirement Board v. *Alton Railroad Co.*[421] He presented arguments both for and against Roosevelt's proposal, noting in particular that there were those, "also within the president's party, who find it extremely worrisome that the executive power would try to change the composition of the Supreme Court with the intent of pushing judicial activity in the direction of the ruling party's politics".[422] The aim of Castberg's article seems to have been to give some of the jurisprudential background for a debate that was undoubtedly garnering attention, and to introduce Nordic lawyers to the legal arguments over the basic idea of the court-packing plan.

Developments in the jurisprudence and the arguments over the court-packing plan were subsequently followed closely in the Nordic countries. Legal commentators, both in Denmark and Norway, published articles and lectured on radio about the developments in the U.S. Given the volume and quality of discussion of American law in the mid- to late 1930s, it is safe to assume that Nordic constitutional lawyers were well versed in the American constitutional history of the previous few decades.[423]

The most important of these essays was a lecture given at the seminar of the Norwegian Judges' Association in the summer of 1937 by Norwegian Supreme Court Justice Ferdinand Schjelderup.[424] Schjelderup discussed constitutional developments in the U.S. in considerable detail. His main focus was on constitutional interpretation in the U.S. and the substance of his lecture will therefore be discussed in the next section. This lecture was important for a number

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[420] *Schechter Poultry Corp*. v. *U.S.*, 295 U.S. 495 (1935) (finding the National Industrial Recovery Act unconstitutional on commerce clause and non-delegation grounds).

[421] 295 U.S. 330 (1935) (striking down the Railroad Retirement Act of 1934).

[422] Castberg, *supra* note 415, p. 121. In the meantime, *West Coast Hotel* v. *Parrish,* 300 U.S. 379 (1937) had been handed down in late March and the *Wagner Act* cases decided in mid-April. (*See NLRB* v. *Jones & Laughlin Steel Corp.,* 301 U.S. 1 (1937); *NLRB* v. *Friedman-Harry Marks Clothing Co.,* 301 U.S. 58 (1937); *NLRB* v. *Fruehauf Trailer Co.*, 301 U.S. 49 (1937); *Washington, Virginia and Maryland Coach Co.* v. *NLRB*, 301 U.S. 142 (1937) and *Associated Press Co.* v. *NLRB*, 301 U.S. 103 (1937) upholding the Wagner Act.) On the relation between Roosevelt's court-packing plan and these cases, *see* Cushman, *supra* note 26, pp. 11–43.

[423] A non-exhaustive list of writings about American law in this period includes the aforementioned article by Castberg in *TfR* 1937 as well as his radio lecture from 1938; Ferdinand Schjelderup's lecture and articles on American constitutional law in *TfR* in 1938 and on the due process clauses in 1940; three articles by Poul Michael Sachs, published in 1937 and 1938; Bagge's article in *TfR* in 1937 on the effect of the *Gold Clause* Cases (TfR 1937, 158); Knoph's articles on the same topics in *TfR* in 1937 and 1938; Schjelderup's articles on the same topic in 1939 and Knoph's book *Legal Standards*, first published in 1939. With the exception of the articles dealing only with questions arising from the gold clause cases, all these articles will be discussed here. Other articles were published in *Svensk Juristtidning* – the main Swedish legal journal.

[424] F. Schjelderup, 'Det amerikanske demokratis fremvekst under konstitusjonen', [The Development of American Democracy under the Constitution] *TfR* (1938) p. 14 and *TfR* (1938) p. 121. This article in two parts was an updated version of Schjelderup's lecture at the 1937 50th Anniversary Seminar of the Judges' Association of Norway.

of reasons. First of all, Schjelderup was a Supreme Court Justice and the lecture was given to the majority of Norwegian judges. Secondly, it was thorough – it ran to about 74 pages when published. A large number of American court decisions, dissents and commentary, both from legal journals and newspapers, were printed in translation. Schjelderup thus made a wealth of American legal materials available to Nordic lawyers. He certainly put a certain slant on it; the declared purpose of his article was to "draw a picture of democratic ideas in American constitutional law and of their victories and defeats in their attempt to realise the goals of the Constitution",[425] but the fact remains that the text of various opinions was suddenly available. It adds to the article's impact that it was published in *TfR*, which is a joint Nordic journal, in the context of worries over the state of democracy and the rule of law in the region.[426] Last but not least, the lecture was a readable, convincing, and reasonably fair account of American constitutional history of the previous few decades, meticulously researched and written.

Although Schjelderup's article was arguably the most important one, there had been others. At the 1930 conference where judicial review was discussed in particular, Frede Castberg discussed American constitutional history and theory of judicial review, noting that it had consistently been argued in American constitutional theory that judicial review must be exercised very cautiously and that there should be a presumption of constitutionality.[427] However:

> "The picture drawn by case law is, as commonly known, different. Based on [the due process clauses] courts, led by the Supreme Court, have since 1880 struck many laws based on the reason that they do not satisfy this provision's requirements of

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[425] *Ibid.,* p. 122.

[426] The editor who introduced the anniversary volume of *TfR* in which Schjelderup published his lecture said, among other things: "The world is going through difficult times and the legal world is not excepted. Ideas and principles humanity fought for and which were, until recently, viewed as conclusive victories for the legal world and for civilization are violated and denied in one country after another. Here in the Nordic countries we have not seen much of this … but the time may come when the Review cannot simply be a peaceful medium for Nordic legal theory and ideas but must take an active part in defending *the rule of law* as we understand it … " (Editorial, 'Tidsskrift for Rettsvidenskap 50 År', [Tidsskrift for Rettsvidenskap 50] *TfR* (1938) pp. 1–2). Members of the editorial board expressed similar thoughts. Schjelderup's article, being the first article published in the volume, followed these thoughts.

[427] F. Castberg, 'Domstolenes myndighet til å tilsidesette grunnlovstridige lover', [The Court's Power to Invalidate Unconstitutional Laws], *Statsvetenskaplig Tidsskrift för Politik – statistik – ekonomi* [*The Journal of Political Science on Politics, Statistics and Economics*] (1930), pp. 326–327, citing H. Tingsten, *Statsvetenskaplig Tidskrift för Politik – Statistik – Ekonomi* [*The Journal of Political Science on Politics, Statistics and Economics*] in 1928 p. 146; and Charles Grove Haines' *A Government of Laws or a Government of Men, Judicial or Legislative Supremacy* from 1929. On American law, Castberg cited, in addition to Haines and Tingsten, Jon Skeie's *Den Norske civilprocess* [The Norwegian Civil Procedure] from 1929, which in turn cited *Marbury*, Cooley's *Constitutional Limitations,* Tingsten's article of 1928 and Haines' *A Government of Laws or a Government of Men. Ibid.,* pp. 325–7.

> equal protection of the laws and protection of freedom and property … The courts have gone so far that their role has practically been that of an upper Chamber of the legislature. It is possible that the courts have shown a more cautious tendency in the exercise of judicial review in the last 10–15 years. But as late as 1927, as wise a commentator as Haines calls the system a 'judicial supremacy' as opposed to the usual system in other countries, where the legislature is supreme."[428]

The main problem with judicial review, according to Castberg, was "[t]he argument – which is frequently heard – that judicial review has an inappropriately conservative effect and limits legal development in directions desired by a majority of the people".[429] Castberg compared Norwegian and American law and concluded that the power of Norwegian courts was considerably more limited than that of their American counterparts.[430] In his conclusion, he therefore noted that a system such as the American one "would … conflict too sharply with our ideas of majority rule to be acceptable".[431] Yet he added that

> "[i]f one believes that a majority in the legislature shall, at any given time, be fully sovereign in matters of laws and rights in the country, then there is no reason at all to have judicial review. [/] But no nation has wanted to implement such a pure majority rule … It is clearly a sound thought that certain fundamental principles should also be lifted out of political battles of shifting majorities and be unchangeable like the constitutive rules of the state itself. And if one wants to make sure that the provisions of the constitution are binding on the legislature in a parliamentary democracy like Norway where the legislature is not constrained by a royal veto and where there is no possibility of dissolving parliament, judicial review seems to be the only effective way."[432]

Progressive criticism of the *Lochner* era U.S. Supreme Court shone through in Castberg's picture of American law; American courts were engaged in semi-legitimate judicial activism, basing their opinions on their own views of what constituted reasonable regulation.

American law was also a point of reference in two articles and lectures by Poul Michael Sachs. In 1937, Sachs published an article in *TfR* on the American legal system.[433] He discussed constitutional limitations on legislative power in the U.S.

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[428] *Ibid.,* p. 327.

[429] *Ibid.* Castberg added in a footnote that this argument had been advanced much more forcefully in the U.S., naming Haines' article as an example. Castberg noted that this did indeed pose a problem.

[430] "Whereas a court in the Unites States can, for all practical purposes, invalidate a law because the court finds the interference with the rights of a citizen unjust, the power of the Norwegian courts is, as we have seen, much more limited." *Ibid.,* p. 335.

[431] *Ibid.,* p. 336.

[432] *Ibid.,* pp. 336–337.

[433] P. M. Sachs, 'Indtryk fra retslivet i USA', [Impressions of the Legal World in the U.S.A.] *TfR*. (1937) p. 246. Sachs pointed to three main characteristics that underlay some of the differences between European (including English) and American law: The legislature's efforts to flesh out and rationalise the legal system Americans had inherited, the dynamic between

and summarised dozens of American Supreme Court cases.[434] Sachs then discussed Roosevelt's court-packing plan,[435] noting that judicial review used to be exercised or "interpreted cautiously so that a law was not invalidated unless its unconstitutionality was without doubt, but that in modern times, it seemed that the Court does not entertain a presumption of constitutionality".[436] Sachs concluded that the real reason for the court-packing proposal was the power of the majority of the Court to defy the clearly stated will of the majority of the legislature. Due to the

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the Constitution and the legislature arising from this, and the courts' attempts to adapt the common law and equity to modern circumstances.

[434] Concerning the tension between the constitution and the legislatures, Sachs stressed the importance of federalism in the constitutional system, pointing out that even though the size and diversity of the country made federalism and decentralisation necessary, the limits that it placed on Congress' ability to act and the extent to which it complicated the legal system was a notable fact in American law. In this context, he cited dozens of cases: *Florida* v. *Mellon*, 273 U.S. 12 (1927) in which Florida could not challenge a federal inheritance tax; U.S. v. Butler, 297 U.S. 1 (1936) (invalidating the Agricultural Adjustment Act of 1933); two cases upholding the 1935 Social Security Act (*Steward Machine Co.* v. *Davis*, 301 U.S. 548 (1937) and *Helvering* v. *Davis*, 310 U.S. 619 (1937)); and *Bailey* v. *Drexel Furniture*, 259 U.S. 20 (1922) (invalidating a tax on goods made by children) in the context of the legislature using taxes to reach legislative goals. In the context of the commerce power, he discussed the Wagner Act (upheld in *NLRB* v. *Jones & Laughlin Steel Corp.,* 301 U.S. 1 (1937); *NLRB* v. *Friedman-Harry Marks Clothing Co.*, 301 U.S. 58 (1937); *NLRB* v. *Fruehauf Trailer Co.*, 301 U.S. 103 (1937); *Washington, Virginia and Maryland Coach Co.* v. *NLRB*, 301 U.S. 142 (1937); *Associated Press Co.* v. *NLRB*, 301 U.S. 103 (1937)). Sachs also discussed The Employers' Liability Act, upheld in 1912, (*Second Employers' Liability* Cases, 223 U.S. 1 (1912)); the Hawes-Cooper Act, which he noted had recently been upheld (in *Whitfield* v. *Ohio*, 297 U.S. 431 (1936)), and other examples. He noted, however, that there were limitations on the commerce power and that they were judicially enforced. As examples, he mentioned *Railroad Retirement Board* v. *Alton Railroad Co.*, 295 U.S. 330 (1935), in which the Railroad Retirement Act was invalidated; *Schechter Poultry Corp.* v. *U.S.*, 295 U.S. 495 (1935), which, "as everyone knows, unanimously invalidated" the NIRA; and *Carter* v. *Carter Coal*, 298 U.S. 238 (1936), in which the Guffey Coal Act was invalidated.

[435] After discussing the commerce clause, Sachs mentioned that it was not the only limitation on legislative power, and discussed the delegation doctrine, especially the delegation aspects of *Schechter*, 295 U.S. 495 and *Carter Coal*, 298 U.S. 238. He also discussed the Fifth amendment, describing *Louisville Joint Stock Land Bank* v. *Radford* 295 U.S. 555 (1935) (invalidating a farmer mortgage relief Act); *Alton*, 295 U.S. 330 and *The Gold Clause* Cases, 294 U.S. 240 (1935) (upholding the Joint Declaration of 1933 invalidating gold clauses in contracts). In the context of the Fourteenth amendment, Sachs mentioned *Morehead* v. *New York ex rel. Tipaldo,* 298 U.S. 587 (1936) in particular, citing Stone's dissent and adding: "In an – eagerly anticipated because of the proposal to renew the courts – decision of March 29, 1937 a similar law in the State of Washington was upheld by 5 votes against 4, since J. Roberts joined the prior minority of Hughes, Brandeis, Cardozo and Stone. Adkins, which the earlier majority had viewed as disposing of the case, was expressly overruled with a reference to changed societal circumstances. – The decision has already led to discussions of the possibility of passing a new minimum wage law in N.Y." Sachs, *supra* note 433 p. 257.

[436] *Ibid.,* p. 257, citing *Butler*, 297 U.S. 1. The citation seems hardly to support his conclusion.

indeterminacy of constitutional provisions, he concluded that any decision on a law's constitutionality had to be based on an assessment of the law's societal effects and the desirability of constitutional jurisprudence going in a certain direction.[437] Sachs commented briefly on American legal theory and "realism in jurisprudence".[438] After describing legal realism and its various schools briefly, Sachs concluded that these developments in legal philosophy and theory were the most important issues for Scandinavian lawyers to follow in American law.[439]

Later in the year, Sachs gave a lecture to Danish lawyers on "*The Conflict of Political Opinions in American Jurisprudence*".[440] In the lecture, Sachs emphasised the conflict between legislatures and the U.S. Supreme Court, describing *inter alia* *Dred Scott, Hepburn* v. *Griswold* and the *Legal Tender* Cases*,* the *Gold Clause* Cases and *Pollock* v. *Farmers' Loan and Trust*.[441] He noted that

> "[i]n particular, conflicts between political opinions in the courts have risen from the last generation's legislation aimed at the various forms of free competition – at the abuses of private property rights and the exploitation of the weakest members of society of which we have so many examples in American economic history. Even laws which modestly try to break away from the principles of traditional

[437] *Ibid.,* p. 258. Due to this, Sachs found it reasonable that Roosevelt would try to implement the New Deal by staffing the Court with younger men presumably more up to date in their views, but he also noted that it was understandable that this would scare those who viewed the proposal as an attempt to pack the Court with Justices who politically agreed with the administration and would therefore be willing to violate their oath to the Constitution. He suggested that the opposition to the court-packing plan was mostly based on an unnecessary fright of a new court limiting "the abstract constructions, which people generally believe to be key to their constitutional protection." *Ibid.,* p. 259.

[438] *Ibid.,* p. 262.

[439] *Ibid.,* p. 263. In an article published in *TfR* the following year, Sachs discussed legal realism in much more detail and pointed out that the realist jurisprudence was especially closely related to recent Scandinavian legal theory. P. M. Sachs, 'Retsvidenskabens stilling i U.S.A.', [The status of Legal Theory in the U.S.A] *TfR* (1938) p. 432. He described two competing modes of thought within legal realism, that which wanted to focus on the actual work and workings of courts (citing *inter alia Rational Basis of Legal Institutions* (Wigmore and Kocourek eds.) from 1923 (*Ibid.,* p. 442); Llewellyn's works, including Cases *and Materials on Law of Sales* from 1930 (*Ibid.,* p. 444); Frank's *Law and the modern mind* (which he refers to as Law on the modern mind) from 1930 (*Ibid.,* p. 445)); and the mode of thought which focused on the function of legal rules and institutions (citing articles by Felix Cohen, Yntema and Arnold (*Ibid.,* pp. 446–447)).

[440] His article was later published in the *Yearbook of the Legal Society*. P. M. Sachs, 'Politiske Anskuelsers Brydning i Amerikansk Domspraksis – Et bidrag til belysning af domstolenes statsretlige stilling', [The Conflict of Political Opinions in American Jurisprudence – An Attempt to Illustrate the Place of the Courts in the Constitutional Order] *Juridisk Forenings Aarbog [Y.B. of the Legal Society]* (1938) p. 12.

[441] *Dred Scott* v. *Sandford*, 60 U.S. (19 How.) 393 (1857); *Hepburn* v. *Griswold*, 75 U.S. (8 Wall.) 603 (1870); *Legal Tender* Cases, 79 U.S. (12 Wall.) 457 (1871); *The Gold Clause* Cases, 294 U.S. 240 (1935); *Pollock* v. *Farmers' Loan and Trust Co.*, 157 U.S. 429 (1895) (invalidating an income tax).

> individualism in these areas have aroused furious resistance from groups who feel they interfere with their vested rights."[442]

In this context, Sachs mentioned the due process clauses in particular, illustrating their application by reference to cases such as *Morehead* v. *Tipaldo* and *West Coast Hotel*.[443] He wrote, without elaborating, that the justices' economic and political prejudices emerged particularly clearly in federalism cases, citing *Hammer* v. *Dagenhart*,[444] in which an act prohibiting the transport in interstate commerce of goods made by children was invalidated. In order to prove his point concerning economic and political prejudice, he discussed the voting records of Justices McReynolds, Butler, Sutherland and Van Devanter. Sachs wrote:

> "That such a bitter conflict between political opinions should occur without completely eroding respect for such a fundamental body in the U.S. constitutional order as the Supreme Court, is due to the fact that the belief in the Court as an apolitical interpreter of a previously existing law is as deep-seated in the general consciousness in the U.S. as elsewhere … When president Roosevelt introduced his proposal to increase the number of Supreme Court Justices in 1937, it was astonishing to see how many people seriously argued that the Supreme Court's only role was and would be to objectively apply and interpret the inherited law and the Constitution."[445]

Sachs cited the American debate on various court-curbing proposals; from Theodore Roosevelt's message to Congress in 1908 to speeches given by the president of the American Bar Association on Franklin Roosevelt's court-packing plan.[446] His emphasis was clear: by necessity, the courts were engaged in vindicating their own policy preferences. Consequently there was very little acknowledgment of constitutional doctrine or theory in his writings. This view of the courts' role and of constitutional adjudication was clearly influenced by American court-critics and by the legal theorists Sachs referred to in his articles.[447] It was considerably different

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[442] *Ibid.,* p. 19.

[443] *Morehead* v. *New York ex rel. Tipaldo,* 298 U.S. 587 (1936) and *West Coast Hotel Co.* v. *Parrish,* 300 U.S. 379 (1937). *Morehead* was a particularly famous wages and hours regulations case in which a minimum wage law for women was struck down as inconsistent with the liberty of contract inherent in the due process clause. On the reasons for Justice Roberts' vote in this case, *see* Cushman 1998, *supra* note 26, pp. 92–104. Justice Roberts' vote has been crucial in accounts of the 1937 'switch-in-time' since he voted differently in *West Coast Hotel,* where a minimum wage law for women in Washington State was upheld. *See also* White, *supra* note 398, pp. 218–225.

[444] 247 U.S. 251 (1918).

[445] Sachs, *supra* note 440, p. 27.

[446] *Ibid.,* pp. 27–28.

[447] Sachs particularly linked two issues in Danish law to his discussion. Firstly, there was a constitutional committee sitting at the time, drafting a new constitution, which was not ratified. This committee made a report in 1938, without addressing the question of judicial review in particular. Secondly, dissents were published for the first time in Danish Supreme

from that of Schjelderup and Castberg, described above,[448] and to a degree these differences in opinion mirror differences of opinion on these issues in American law.

In 1938, Castberg discussed American constitutional law again, this time in a University sponsored radio lecture on British and American constitutional law,[449] which was later published. Once again, a brief overview of American constitutional history was a prelude to further discussion of American doctrine concerning the delegation of legislative power and *Schechter* in particular.[450] After discussing the provisions of the Bill of Rights briefly, in particular the *ex post facto* and contracts clauses, he concluded:

> "These provisions, which prohibit depriving anyone of property without due process of law, have been interpreted very broadly. Time and again, the Supreme Court has ... invalidated provisions that it has viewed as impairing the property and economic freedom of the citizens to a greater extent than the Court finds reasonable and just. It is unchallenged that the court has done this in a way that is strongly influenced by an old-fashioned liberal, so as not to say capitalist, view held by the court's majority. In reality, the American courts have, through their constitutional interpretation, provided extremely strong protection for the economic interests of the affluent. The Constitution has repeatedly been successfully invoked against legislation that is nowadays viewed as almost self-evident."[451]

Court cases in 1937, a change which considerably worried some commentators, including Sachs.

[448] In 1938, a conservative Danish politician, Victor Pürschel, wrote an article in *Juristen* on judicial review. He touched only very briefly on American jurisprudence and experience, and what he attributes to it is probably a misunderstanding. He wrote "[o]f course, the legislature will eventually emerge victorious if there is a conflict between the legislature and the courts. But in spite of that it is by no means meaningless that the courts show resistance. It means, amongst other things, that it becomes clear to the public what is happening and it is possible that a majority, which agrees on all kinds of other things, will retreat from amending the constitution in order to limit or eliminate the courts' independence and that is, if the representatives of the judicial power are men, the only way." V. Pürschel, 'Domstolenes prøvelsesret', [Judicial Review] *Juristen* (1938) pp. 325–334. Most of Pürschel's arguments are classical liberal arguments. In Danish theory, his emphasis on political majorities and minorities was a novelty. He argues more clearly than most other Nordic writers at the time that it's pointless to say that the current majority wouldn't pass unconstitutional laws; "another majority will succeed this one and no one knows how a new majority will think or act. The rule of law shall rest on the law and not on people." *Ibid.,* pp. 331–332.

[449] F. Castberg, *Parlamentarisme og Maktfordeling – Britisk og Amerikansk Forfatningsrett* [*Parliamentary Government and Separation of Powers – British and American Constitutional Law*] (Universitetets Radioforedrag [Radio Lectures from the University] series, Norsk rikskringkasting, Oslo, 1938).

[450] *Ibid.,* pp. 43–44. That aspect of his lecture will be discussed in more detail in the chapter on delegation doctrine, *infra*.

[451] *Ibid.,* pp. 45–46.

Castberg finally summed up the developments of the previous years, noting that the cases invalidating the first New Deal had been the cause of the court-packing plan and concluding that "[t]his proposal was not enacted. But in 1937 the Supreme Court decided many cases in which it sustains the reform acts, which seems to show that the majority of the court has found it necessary to exercise the broad powers vested in the court in a way not too inconsistent with the majority of the people's sense of justice."[452] Once again, the views of American court-critics shone through.

Justice Schjelderup wrote once again about American law in 1940, focusing on 'The Principles of Justice in American Constitutional Law'.[453] In the first pages of his article, he published a translation of Harlan F. Stone's lecture on 'The Common Law of the United States' given in 1936.[454] Schjelderup introduced this lecture by stating that "the constitutional theory described by Justice Stone is, as one will see, closely related to the Norwegian constitutional doctrine advanced by Frederik Stang more than a century ago and which has, in the last quarter of a century, emerged victorious amongst Norwegian lawyers, last and in most detail in Ragnar Knoph's essay".[455] In a footnote, Schjelderup added that "this essay, which should be read by every Nordic lawyer, forms the basis of *Legal Standards*".[456] Schjelderup thus endorsed a version of the idea introduced by Lie, that active judicial policing of constitutional limitations on the legislature was a relatively new phenomenon in Norway.[457]

Schjelderup also discussed the incorporation of the first eight Amendments so that they applied to the states – discussing primarily *Palko* v. *Connecticut*,[458] in which the main question was whether the Fifth Amendment's prohibition of double jeopardy was applicable to the states. Schjelderup reprinted most of the decision in translation. In that case, Justice Cardozo had said for the Court:

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[452] *Ibid.,* p. 47. In the conclusion of his lecture, Castberg cited *Lochner,* and Schjelderup's discussion of American law. He reiterated that there had been a change in constitutional jurisprudence once "the question of the Supreme Court's reorganisation was raised by president Roosevelt, following the hard blows that the Supreme Court had dealt his reform legislation." *Ibid.,* p. 55. Castberg compares the American and Norwegian Supreme Courts' constitutional jurisprudence and states: "Our Supreme Court has been much more cautious. Our legal theory and case law have been much more sceptical of the purely subjective, political considerations that are so insistent in constitutional theory. And the Norwegian Supreme Court has never been the focal point of political battles like the American Supreme Court has frequently been." *Ibid.,* p. 57. The accuracy of this statement may be questionable, *see supra* part 2.

[453] F. Schjelderup, 'Rettferdsgrunnsetningen i Amerikansk konstitusjonell rett', [The Principle of Justice in American Constitutional Law] *TfR.* (1940) p. 145.

[454] H. F. Stone, 'The Common Law of the United States', 50 Buff. L. Rev. (1936), p. 4. This lecture will be discussed in more detail in the following section.

[455] Schjelderup, *supra* note 453, p. 145.

[456] *Ibid. Legal Standards* was published in 1939. It dealt with the interpretation of art. 97 of the Norwegian Constitution and will be discussed in detail in the next chapter.

[457] *See supra* note 411.

[458] 302 U.S. 319 (1937).

> "The right to trial by jury and the immunity from prosecution except as the result of an indictment may have value and importance. Even so, they are not of the very essence of a scheme of ordered liberty. To abolish them is not to violate a 'principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental' … Few would be so narrow or provincial as to maintain that a fair and enlightened system of justice would be impossible without them …
>
> We reach a different plane of social and moral values when we pass to the privileges and immunities that have been taken over from the earlier articles of the federal bill of rights and brought within the Fourteenth Amendment by a process of absorption. These in their origin were effective against the federal government alone. If the Fourteenth Amendment has absorbed them, the process of absorption has had its source in the belief that neither liberty nor justice would exist if they were sacrificed … This is true, for illustration, of freedom of thought and speech …
>
> Our survey of the cases serves, we think, to justify the statement that the dividing line between them, if not unfaltering throughout its course, has been true for the most part to a unifying principle."[459]

This and much more of the opinion was printed in translation. Justice Schjelderup explained that he translated the opinion because "the very principles that Cardozo emphasised are also fundamental under the Nordic constitutions".[460] The important thing to note here is that Schjelderup's article presented an angle that differed from that of previous essays on American law. While he extolled the virtues of interpreting the constitution as a standard – in the way described in Knoph's *Legal Standards*- he accepted the investment of an enormous power in the courts. In the 19th century, legal writers from Cooley to Aschehoug had particularly emphasised that laws should not be invalidated unless they were inconsistent with a particular clause of the constitution – that no law should be struck down as inconsistent with the principles or the spirit of the constitution. But by 1940 the U.S. Supreme Court was deciding – and influential Norwegian writers admired – cases in which "the principle of justice" was an important factor.

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[459] *Ibid.,* pp. 325–328. The Court continued: "On which side of the line the case made out by the appellant has appropriate location must be the next inquiry and the final one. Is that kind of double jeopardy to which the statute has subjected him a hardship so acute and shocking that our polity will not endure it? Does it violate those 'fundamental principles of liberty and justice which lie at the base of all our civil and political institutions'? … The answer surely must be 'no' … If the trial had been infected with error adverse to the accused, there might have been review at his instance, and as often as necessary to purge the vicious taint. A reciprocal privilege, subject at all times to the discretion of the presiding judge … has now been granted to the state. There is here no seismic innovation. The edifice of justice stands, its symmetry, to many, greater than before." *Ibid.,* p. 328.

[460] Schjelderup, *supra* note 453, p. 157. Schjelderup referred *inter alia* to art. 112 of the Norwegian constitution, which prohibits contradicting "the principles embodied in this Constitution".

A similar acceptance was evident in an article written in 1950 by Danish attorney Th. Thorsteinsson.[461] He focused on cases decided in the U.S. Supreme Court in 1935 and 1936 on the one hand,[462] and 1937–1941 on the other, and speculated on the reason for these changes. He discussed the court-packing plan in some detail and linked the jurisprudential changes to the plan, citing President Roosevelt on that point. He wrote that

> "[t]he Court's spasmodic attempts to rationalize the argumentation and to combine different decisions have been unable to hide the truth, that the task, as it was formerly defined, is too big for a court and that conceptually, it is inappropriate to leave it to a court … If one could view the admission of that point as one of the results of this period, so that the Supreme Court will now limit itself to examine justice and reason, which are not fixed concepts either, and avoid masking political evaluation by false legal arguments, much would be gained ... "[463]

It is clear that there was considerable discussion of American constitutional law and the changing emphases in American jurisprudence in Nordic law journals and in lawyer's societies and meetings right before World War II. Nordic lawyers had access to a surprising volume of materials and commentary on American constitutional law in their languages. The participants in the discussion suggest that

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[461] Th. Thorsteinsson, 'The New Deal i Amerikas Højesteret', [The New Deal in the U.S. Supreme Court] *Juristen* (1953) p. 153 at pp. 158–169.

[462] Thorsteinsson discussed a series of cases which had been discussed before by Nordic writers: *Panama Refining Co.* v. *Ryan,* 293 U.S. 388 (1935); *Schechter Poultry Corp.* v. *U.S.*, 295 U.S. 495 (1935); *The Gold Clause* Cases, 294 U.S. 240 (1935); *Railroad Retirement Board* v. *Alton Railroad Co.*, 295 U.S. 330 (1935); *Louisville Joint Stock Land Bank* v. *Radford*, 295 U.S. 555 (1935); *U.S.* v. *Butler*, 297 U.S. 1 (1936); *Carter* v. *Carter Coal Co.*, 298 U.S. 238 (1936); *Morehead* v. *New York ex rel. Tipaldo,* 298 U.S. 587 (1936); *U.S.* v. *Darby*, 312 U.S. 100 (1941); *NLRB* v. *Jones & Laughlin Steel Corp.*, 301 U.S. 1 (1937); *Steward Machine Co* v. *Davis*, 301 U.S. 548 (1937); and *Helvering* v. *Davis*, 301 U.S. 619 (1937); and some cases which had not been discussed previously in Nordic literature: *Ashwander* v. *T.V.A.*, 297 U.S. 288 (1936) (upholding the building of a dam under Congress' war and commerce powers); *Ashton* v. *Cameron County Water Improvement District No 1*, 298 U.S. 513 (1936), in which the Court held that it had no jurisdiction over a bankruptcy action involving a state entity, since applying bankruptcy laws to political subdivisions of the states would limit the states' control over their fiscal affairs, and then, by contrast: *Kentucky Whip & Collar Co.* v. *Illinois Central Railroad*, 299 U.S. 334 (1937), in which the Hawes-Cooper Act, prohibiting shipment of convict-made goods was upheld against a due process challenge; *U.S.* v. *Bekins*, 304 U.S. 27 (1938) in which an amended bankruptcy law was applied to state entities since it was carefully drawn not to impinge upon the sovereignty of the states; *Tennessee Electric Power* v. *T.V.A.*, 306 U.S. 118 (1939), in which the Supreme Court held that neither the charter of the corporations distributing electricity nor their local franchises involved a grant of monopoly or rendered competition illegal; *Sunshine Anthracite Coal Co.* v. *Adkins*, 310 U.S. 381 (1940) in which the Bituminous Coal Act of 1937 was upheld against *inter alia* a delegation challenge, and *Opp Cotton Mills Inc.* v. *Administrator of the Wage and Hour Division of the Dept. of Labor*, 312 U.S. 126 (1941) in which an order of the administrator fixing a minimum wage for the industry was upheld.

[463] Thorsteinsson, *supra* note 461, p. 170.

discussion of American constitutional developments was part of the Nordic legal mainstream. Amongst those publishing articles on American law in a journal edited by Nordic Supreme Court Justices were a Supreme Court Justice and the professor of constitutional law at what was then the only law school in Norway. It therefore seems safe to assume that many lawyers were, to some degree, aware of American constitutional developments, and that the concrete utilisation of American arguments to serve particular jurisprudential purposes took place against this background.

3.2. CONSTITUTIONAL INTERPRETATION

In this section, American influence in the field of constitutional interpretation will be examined. The Nordic developments in constitutional interpretation were linked to the decline of the doctrine of vested rights, which will be discussed later in this part. The link is probably due to the fact that vested rights cases were the most numerous and the most important.

It was mentioned in the previous chapter that a great number of Nordic journal articles on American law were written around 1940. It will be argued in this chapter that, in conjunction with the lessons drawn from the U.S. Supreme Court's apparent 'switch-in-time' in 1937, these writings on American law laid the foundation for Nordic theory of judicial review and played an important role in constitutional interpretation for decades after 1945. The theory in each of the Nordic countries will now be considered in turn. The case law will then be discussed, but the changes suggested in theory in the 1930s did not appear in the jurisprudence until after World War II, and then only in Norway and Iceland.[464]

3.2.1. Norwegian Theory

Norwegian writers wrote frequently on constitutional interpretation in the years around the Second World War. In his 1938 article, which was briefly discussed above, Justice Schjelderup argued for a changed constitutional interpretation and for judicial deference, based on American law and experiences. He reasoned that the American Constitution had lasted for 150 years because of the indeterminacy of many of its provisions and because the U.S. Supreme Court had adapted it to changing circumstances. To illustrate this, he quoted Justice Marshall's "famous and I dare to say universally applicable statement of the principles of constitutional interpretation: 'we must never forget it is a constitution we are expounding'".[465] He also quoted Justice Holmes: "The provisions of the constitution are not mathematical formulas having their essence in their form; they are organic, living

[464] These developments occurred in an unusual order in Iceland, for theory there succeeded the change in the jurisprudence. *See infra* the section on Icelandic case law.
[465] Schjelderup, *supra* note 424, pp. 20–21.

instruments transplanted from English soil. Their significance is vital, not formal".[466]

While Schjelderup described the history of the U.S. Supreme Court and its key decisions briefly, his main emphasis was on "the last generation's tug-of-war between democracy and property rights". The biggest part of his article was therefore dedicated to discussing 20th century commerce clause and due process cases with the purpose of informing Norwegian jurisprudence.

In his historical introduction,[467] Schjelderup discussed the doctrine of vested rights and substantive due process in American law, noting that the Fourteenth amendment "became very important in the battle between big capital and social legislation".[468] He translated parts of Waite's opinion in *Munn* v. *Illinois*, where the court described the police powers and developed Lord Hale's view that "when private property is 'affected with a public interest, it ceases to be *juris privati* only'", and followed up on cases concerning businesses affected with a public interest through *Nebbia.*[469] Schjelderup also mentioned another aspect of Waite's opinion in *Munn.* Waite had written:

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[466] *Ex parte* Grossman, 267 U.S. 87, 116 (1925), citing *Gompers* v. *U.S.*, 233 U.S. 604, 610 (1914).

[467] In his introduction, Schjelderup discussed the history of the U.S. Supreme Court under Marshall, Taney, Chase and Waite. He discussed *inter alia Marbury* v. *Madison*, 5. U.S. (1 Cranch) 137 (1803); *McCulloch* v. *Maryland*, 17 U.S. (4 Wheat.) 316 (1819); *Cohens* v. *Virginia*, 19 U.S. (6 Wheat.) 264 (1821); *Gibbons* v. *Ogden*, 22 U.S. (9 Wheat.) 1 (1824); *Brown* v. *Maryland*, 25 U.S. (12 Wheat.) 419 (1827), in which the Supreme Court held that states could not tax items in interstate commerce while they remained in their original packages; *Trustees of Dartmouth College* v. *Woodward*, 17 U.S. (4 Wheat.) 518 (1819); *Proprietors of Charles River Bridge* v. *Proprietors of Warren Bridge*, 36 U.S. 420 (1837), in which it was established that corporate charters should be strictly construed; *Bank of Augusta* v. *Earle*, 38 U.S. 519 (1839); *The Licence* Cases (*Thurlow* v. *Commonwealth of Massachusetts*) 46 U.S. (5 How.) 504 (1847) in which restrictions on the sale of liquor were upheld; *Dred Scott* v. *Sandford*, 60 U.S. (19 How.) 393 (1857); as well as *Munn* v. *Illinois*, 94 U.S. 113 (1877); Field's dissent in *Munn; Stone* v. *Mississippi*, 101 U.S. 814 (1880), in which it was held that the police power was inalienable; *Butcher's Union* v. *Crescent City Co*., 111 U.S. 746 (1884)*; The Legal Tender* cases (*Juilliard* v. *Greenman*) 110 U.S. 421 (1884) and others.

[468] Schjelderup, *supra* note 424, p. 32.

[469] Schjelderup cited *Munn* on the fact that "[w]hen, therefore, one devotes his property to a use in which the public has an interest, he, in effect, grants to the public an interest in that use, and must submit to be controlled by the public for the common good, to the extent of the interest he has thus created. He may withdraw his grant by discontinuing the use; but so long as he maintains the use, he must submit to the control." *Ibid.,* p. 33, citing *Munn* v. *Illinois*, 94 U.S. 113,126 (1877). He then commented that even though "[Waite's] form of expression seems affected, the thought is clear. As strikingly expressed by Justice Roberts in *Nebbia* v. *New York*: 'It is clear that there is no closed class or category of businesses affected with a public interest, and the function of courts in the application of the Fifth and Fourteenth Amendments is to determine in each case whether circumstances vindicate the challenged regulation as a reasonable exertion of governmental authority or condemn it as arbitrary or

> "For our purposes we must assume that, if a state of facts could exist that would justify such legislation, it actually did exist when the statute now under consideration was passed. For us the question is one of power, not of expediency. If no state of circumstances could exist to justify such a statute, then we may declare this one void, because in excess of the legislative power of the State. But if it could, we could presume it did. Of the propriety of legislative power, the legislature is the exclusive judge.[470]
>
> We know that this is a power which may be abused; but that is no argument against its existence. For protection against abuses by legislatures the people must resort to the polls, not to the courts."[471]

In the context of constitutional interpretation, Schjelderup used American materials to illustrate the importance of judicial deference. In addition to discussing *Munn*, he described the theory of Justice Holmes in the matter, stating that "Holmes' judicial philosophy was akin to Marshall's" while noting that society in Holmes' day was considerably more complex than in Marshall's time.[472] Schjelderup then excerpted some of Holmes' opinions and speeches.[473] Perhaps most pointedly, he cited Holmes in *Baldwin* v. *Missouri*: "As the decisions now stand I see hardly any limit but the sky to the invalidating of those rights if they happen to strike a majority of this Court as for any reason undesirable. I cannot believe that the Amendment was intended to give us carte blanche to embody our economic or moral beliefs in its prohibitions."[474] Schjelderup also cited various speeches and opinions by Justice Brandeis, for the same purpose.[475]

Schjelderup reprinted many decisions concerning New Deal legislation almost in full, including their discussion of the deference due to the legislature and their attention to economic and social arguments. He noted that in 1934, due process arguments had been unsuccessful in *Nebbia* v. *New York,* the *Gold Clause* Cases,

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discriminatory.'" Schjelderup *supra* note 424, p. 34, citing *Nebbia* v. *N.Y.,* 291 U.S. 502, 536 (1934).

[470] Schjelderup *supra* note 424, p. 34, citing *Munn*, 94 U.S. pp. 132–133.

[471] *Ibid.,* citing *Munn* 94 U.S., p. 134.

[472] Schjelderup *supra* note 424, p. 136.

[473] *Ibid.,* pp. 37–39, 123–126 and 141–144. Schjelderup quoted Holmes' dissent in *Lochner*; in *Ex parte* Grossman, 267 U.S. 87 (1925); his dissents in *Hammer* v. *Dagenhart,* 247 U.S. 251 (1918); *Adkins* v. *Children's Hospital*, 261 U.S. 525 (1923); and *U.S.* v. *Schwimmer*, 279 U.S. 644 (1929), reprinting most of the latter two dissents in translation. This is important because it laid the foundation for some knowledge of Holmes' work, at least in Norway. Having read Schjelderup's account of American constitutional developments during Holmes' tenure, it is less surprising to see Norwegian Chief Justice Carsten Smith refer to "my role model, Holmes" in a speech, decades later.

[474] Schjelderup, *supra* note 424, p. 145, citing *Baldwin* v. *State of Missouri,* 281 U.S. 586, 595 (1930).

[475] Schjelderup quoted Brandeis' dissent in *New State Ice Co.* v. *Liebmann,* 285 U.S. 262 (1932), in addition to the cases discussed in note 645, *infra*.

and *Blaisdell*,[476] and mentioned many other cases concerning New Deal legislation[477] before focusing on the 1937 cases. He reprinted a great part of Hughes' opinion in *West Coast Hotel*, in which a minimum wage law for women was upheld, both concerning liberty of contract in particular and the idea that "[e]ven if the wisdom of the policy be regarded as debatable and its effects uncertain, still the legislature is entitled to its judgment".[478] Schjelderup also translated great parts of the opinions in *Helvering* v. *Davis* and *Steward Machine Co*.[479] which concerned the Social Security Act and discussed the cases concerning the Wagner Act, translating numerous pages of the majority opinion in *Jones & Laughlin Steel* as well as Justice McReynolds' dissent.[480] Schjelderup commented that "[t]he minority was clearly right in pointing out that … the Supreme Court broke with a long line of cases … [T]he whole switch was really caused by the Supreme Court applying – once again – the principles of constitutional interpretation that Marshall and Holmes had adhered to."[481] Once again, *Lochner* era jurisprudence is described as an aberration – a move first seen in Norway in Lie's essay from 1923. Schjelderup also quoted *The Nation*, stating that the "cases are a triumph for democracy in its constant battles against irresponsible capitalism".

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[476] *Nebbia* v. *New York,* 291 U.S. 502 (1934), was decided in 1934 and upheld milk price regulations in New York. It effectively ousted the distinction between public and private in due process jurisprudence. In the *Gold Clause* Cases*,* 294 U.S. 240 (1935), – which were actually decided in 1935 – the Joint Declaration of 1933 invalidating gold clauses in contracts was upheld. *Home Building Loan Ass'n* v. *Blaisdell,* 290 U.S. 398 (1934), upheld a Minnesota moratorium on mortgage repayments.

[477] Amongst the cases he discusses are *Louisville Joint Stock Land Bank* v. *Radford,* 295 U.S. 555 (1935), in which a farmer mortgage relief Act was invalidated; *U.S.* v. *Butler*, 297 U.S. 1 (1936) in which the Agricultural Adjustment Act of 1933 was invalidated; *Carter* v. *Carter Coal*, 298 U.S. 238 (1936) which found the Bituminous Coal Conservation Act of 1935 (the Guffey Coal Act) to be unconstitutional; *Railroad Retirement Board* v. *Alton*, 295 U.S. 330 (1935), which invalidated the Railroad Retirement Act; and *Morehead* v. *New York ex rel. Tipaldo*, 298 U.S. 587 (1936), in which a minimum wage law for women was invalidated.

[478] Schjelderup, *supra* note 424, pp. 151–153, citing *West Coast Hotel* v. *Parrish*, 300 U.S. 379, 399 (1937).

[479] *Steward Machine Co.* v. *Davis*, 301 U.S. 548 (1937) and *Helvering* v. *Davis*, 301 U.S 619 (1937). By comparison, he cited *Ives* v. *South Buffalo Railway*, a 1911 case in which the New York Court of Appeals commented, when striking New York's worker's compensation statute as a violation of due process, that "If such economic and sociologic arguments as are here advanced in support of this statute can be allowed to subvert the fundamental idea of property, then there is no private right entirely safe … " Schjelderup, *supra* note 424, p. 135, citing *Ives* v. *South Buffalo Ry. Co*, (201 N.Y. 271 (1911)). On *Ives* in particular, he commented that it was "viewed as a pity" – presumably by legislatures and progressives – that the Supreme Court "which is more independent and could therefore make decisions in better step with real life" than the New York court, could not review the case. Schjelderup, *supra* note 424, p. 135. The U.S. Supreme Court could not review the case because the federal claim had been sustained.

[480] *NLRB* v. *Jones & Laughlin Steel Corp.*, 301 U.S. 1 (1937), (upholding the Wagner Act).

[481] Schjelderup, *supra* note 424, p. 160.

In sum, Justice Schjelderup used American case law to make three related points concerning constitutional interpretation. First of all, that it was necessary for the courts – also the Norwegian courts – to interpret the constitution flexibly. His second point was that constitutional interpretation needed to be in accordance with the times. His third was that the courts must give the legislature leeway to determine the proper response in various situations. It is noteworthy that many of the cases mentioned by Schjelderup did not have any parallels in Norwegian jurisprudence – there was nothing in Norwegian jurisprudence corresponding to the commerce clause or the liberty of contract. In light of Norwegian vested rights jurisprudence in the previous decades, however, his article's focus on the ability of legislatures ("democracy" in Schjelderup's terminology) to enact economic regulations without having to take vested rights into account was relevant in Norway just as in the U.S., as he pointed out. He simply used a variety of cases, some of which had no mirror image in Norway, to make his point concerning desirable ways of constitutional interpretation.

According to Schjelderup, the two main threats to democracy were "the disadvantages of our economic system" described by Brandeis, and an overly strong executive power. This latter aspect of his article will be discussed in more detail in chapter 3.6., below. In response to these threats, he suggested now familiar remedies: judicial deference to legislative choices, which will be discussed in more detail later, and a flexible non-originalist interpretation of the constitution.

In *Legal Standards*, published in 1939,[482] Professor Ragnar Knoph pursued this thought further concerning art. 97 of the Norwegian Constitution in particular. His theory was that the non-retroactivity clause, which had been the main limitation on the legislature in the previous decades, must be viewed as a legal standard in the sense that Roscoe Pound used that concept.[483] To Knoph, it was critical that the courts "clearly understand that it is a standard they are applying". In the context of constitutional interpretations, this meant that judges must, when applying art. 97,

> "never take the provisions literally, and let the constitutionality depend on a semantic interpretation of the word "retroactivity". Never get stuck in patterns and precedents but remember that the standard of justice is dependent on the times and circumstances and not static. Never let purely legal arguments overpower the practical-economic ones, and above all not believe that the Constitution meant to

[482] R. Knoph, *Rettslige Standarder – særlig Grunnlovens § 97 [Legal standards – in particular art. 97 of the Constitution]* (Oslo, 1939). Knoph died in 1938 but this book was published posthumously with a preface by Justice Schjelderup.

[483] Knoph cites Pound's *Introduction to the Philosophy of Law* on the three main characteristics of legal standards: "1) They all involve a certain moral judgment upon conduct … 2) They do not call for exact legal knowledge exactly applied, but for common sense about common things or trained intuition about things outside of everyone's experience. 3) They are not formulated absolutely and given an exact context, either by legislation or by judicial decision, but are relative to times and places and circumstances and are to be applied with reference to the facts of the case in hand … " *Ibid.,* p. 4, citing Pound's *Introduction to the Philosophy of Law*.

> acknowledge a particular political belief or economic theory as an eternal and absolute truth."[484]

Knoph argued that this mode of interpretation was a necessity and some of his arguments were based on American law. He wrote:

> "If art. 97 is interpreted literally it will easily halt all social and economic reforms – especially if the courts look at the provision from the perspective of 1814 and believe it constitutionalized an extreme individualist understanding of society. In a democracy, the legislature will not accept judges halting legislative progress in this manner, and this will easily create a rift between the legislative and judicial powers, which is not a good thing … To illustrate this difference with Norwegian examples is impossible; I guess one should say luckily … To a greater or lesser degree, the Supreme Court has shown it understands that art. 97 is flexible and has great potential for development … On the other hand, the developments in the United States prove that I'm not being unduly pessimistic."[485]

Knoph discussed American constitutional history briefly.[486] He concluded that until 1890 "the Constitution's guarantees were interpreted cautiously and it was clear they had an elastic and 'vital' nature.[487] The new movement took them literally, on the other hand, and believed that the promise of liberty gave the citizens an unlimited right to contract without the law's interference … Based on this understanding, the Supreme Court's decisions effectively halted almost all social legislation … "[488] In spite of the differences between the two countries, he pointed out:

> "The development in the United States is very instructive to us Norwegians. Even though the form is different, the guarantees of the Constitution have the same practical goals and nature and they can be interpreted in two different ways, no matter on which side of the Atlantic: Either as rigid, absolute legal rules trying to fence in legislation once and for all or as flexible standards that are capable of evolving and try, in changing times and changing circumstances, to realize the ideal of justice between the state and the people. With plastic clarity, the American developments show us the results of these two alternatives: While the Constitution was interpreted as a standard everything was peaceful. But when the other understanding won a majority in the Supreme Court and was practiced for years, with dire results, the picture changed … Certainly, art. 97 is not as good a weapon to sabotage social reform as the due process clause, but if it is applied sufficiently literally … by judges sufficiently deaf to the requirements of legal progress, then also art. 97 has definite potential in that direction. The interpretation in 'classical' constitutional theory shows this clearly and [the dissents in the *Waterfalls* case and

[484] *Ibid.,* p. 182.
[485] *Ibid.,* pp. 183–184.
[486] Knoph discussed American cases both in the context of American constitutional history and constitutional interpretation. The cases he referred to were also discussed by Schjelderup, so they will not be discussed further here.
[487] A word Knoph acknowledges he borrowed from Justice Holmes.
[488] Knoph, *supra* note 482, p. 185.

the rent cases around WWI] do so to no lesser degree."[489]

The classical theory Knoph referred to is mainly the constitutional theory of Aschehoug, which was discussed in detail in part 2[490] and the cases are all vested rights cases decided by the Norwegian Supreme Court.[491]

Knoph went further than Schjelderup did in that he argued for a concrete method of interpretation of the Norwegian Constitution's art. 97 using American constitutional history, theory and examples to support his argument. He thus made more specific and goal-oriented use of American law than did Schjelderup, who discussed American constitutional law partly as an object of intellectual curiosity but mostly to draw from it more general guidelines on constitutional interpretation, the proper stance of courts towards the legislature, their proper attention to changing social and economic circumstances, and their role in promoting social and economic justice. On the other hand, Knoph's version of American constitutional history was much more schematic than Schjelderup's.[492]

Knoph also went further than Schjelderup in that he used American constitutional history to make a threat: were the courts to interpret the constitution rigidly, they would come into a conflict with the legislature that they could only lose, possibly at great loss to the constitutional order as well.[493]

Knoph concluded that the Norwegian Supreme Court had applied art. 97 relatively flexibly and that it had therefore not been the hindrance to progress that it could have been. However, as we have seen in part 2, the Norwegian courts had been accused of interpreting that article too rigidly, being insensitive to changes in society and too solicitous of the interests of property owners. These accusations

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[489] *Ibid.,* pp. 189–190, referring to Aschehoug's *Present Constitution of Norway*; dissents in Rt. 1918.401 (a law regulating the utilisation of waterfalls upheld) and Rt. 1919.742 (rent regulations in Christiania during WWI upheld). Both cases are discussed in part 2, *supra*. In a footnote, Knoph also referred to Rt. 1931.865 (an allodial property case in which such rights were treated as vested rights whereas the dissenters assailed the vested rights doctrine *per se*) and Rt. 1927.1057 (an act prolonging the leases of tenant farmers invalidated) in this context.

[490] *See supra* chapter 3 in part 2.

[491] The *Waterfalls* case was Rt. 1918.401, in which a law restricting the right to sell harvestable waterfalls was upheld. Some of the rent cases are Rt. 1919.742, Rt. 1920.909 and Rt. 1921.721. *See supra* note 304.

[492] To take an additional example of the different tones in the works, Schjelderup had stated that "one may say that in conjunction with the election returns the [Court-packing] plan probably contributed to individual Justices' reviewing their opinions of the relationship between the Supreme Court and congressional laws". Schjelderup, *supra* note 424, p. 151. Knoph, on the other hand, wrote that "if … the Supreme Court started interpreting art. 97 as an absolute and immutable legal rule, it would certainly have the same dire consequences as in America … we would be in the same revolutionary situation as the U.S.A. found itself in a few years back. In such a conflict the courts would surely draw the shortest stick unless they changed course in time, just as the Americans did. The forces on the other side are, all things considered, so much stronger in the long run that they cannot be halted." Knoph, *supra* note 482, pp. 190–191.

[493] *Ibid.*

were levied in political discussion and legal theory – Lie's essay from 1923 is just one example – and they led to constitutional amendments being proposed to either expressly prohibit judicial review or to repeal the prohibition of retroactive laws in art. 97, the takings clause in art. 105, or both. The amendments ultimately failed.[494] So given that context, Knoph's book seems more of an exhortation to the judiciary than he was willing to admit.

It was mentioned above that Justice Schjelderup published an article on *The Principle of Justice in American Constitutional Law* in 1940. He printed in translation a great part of Justice Stone's lecture on *The Common Law of The United States*, published in 1936. In this lecture, Justice Stone discussed the adaptability of the common law and the importance of the common law tradition to, *inter alia*, constitutional adjudication. Justice Stone wrote on the selection of precedents in general:

> "It is just here … that occurs the most critical and delicate operation in the process of judicial lawmaking. Strictly speaking, he is often engaged not so much in extracting a rule of law from the precedents … as in making an appraisal and comparison of social values, the result of which may be of decisive weight in determining what rule he is to apply."[495]

After discussing the manner in which courts applied statutes and lamenting that "[t]he fact that the command involves recognition of a policy by the supreme lawmaking body has seldom been regarded by courts as significant, either as a social datum or as a point of departure for the process of judicial reasoning by which the common law has been expanded",[496] Stone stated that the "better organization of judgemade and statute law into a coordinated system is one of the major problems of the common law in the United States".[497] He explained that he considered the various failures of the system to be "outgrowths of a legal philosophy which was too little concerned with realities, which thought of law more as an end than as a means to an end, and assigned to the judicial lawmaking function a superficial and mechanical role, very largely unrelated to the social data to which the law must be attuned if it is to fulfill its purpose".[498]

Stone opined that one of the factors which made the constitutional scheme workable was "that its framework has admitted of the solution of the clashing

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[494] There has been no analysis of why these amendments failed to be enacted, given that the Norwegian Supreme Court's exercise of judicial review was criticised quite harshly at the time. In spite of that, the required two-thirds majority did not support the amendments.
[495] Stone, *supra* note 454, p. 10. The text of Stone's lecture is taken from Harv. L. Rev. directly, in order to avoid losing nuances in the language through double translation, but all that is cited here was translated in Schjelderup's article.
[496] *Ibid.,* p. 13.
[497] *Ibid.,* p. 15.
[498] *Ibid.,* p. 19.

demands of the interest which it has created by judicial decision in conformity to the methods of the common law".[499] He continued:

> "the great constitutional guarantees and immunities of personal liberty and of property, which give rise to the most perplexing questions of constitutional law and government, are but statements of standards to be applied by courts according to the circumstances and conditions which call for their application. The chief and ultimate standard which they exact is reasonableness of official action and its innocence of arbitrary and oppressive exactions. They are not statements of specific commands … There is neither scope nor historical support for the expansion of the constitutional exaction of reasonableness of official action implied in the use of phrases 'liberty', 'property', 'due process', 'unreasonable' and the like, into a body of detailed rules attaching definite consequences to definite states of fact."[500]

Stone concluded that "there is nothing either in the spirit or the technique of the common-law method of expanding and applying judge-made law which need stand in the way of the creative development of doctrines and principles adequate to all the demands which may be made upon them and suitable to the judicial interpretation of the prohibitions of the Constitution which will enable that instrument to operate as a workable chart of government, responsive to social and economic conditions".[501] Schjelderup's linking of American and Norwegian theory of constitutional interpretation in this essay was discussed in chapter 3.2.[502] He suggested that the principles of interpretation used early in the 19th century were more flexible than those used in the decades around 1900, both in Norway and in the U.S., and noted with approval that they were "emerging victorious".

In the wake of the war in 1945, Chief Justice Berg and Professors Castberg and Steen published a book on the Norwegian constitutional tradition.[503] In that book, Berg described the American Bill of Rights and gave a brief overview of American

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[499] *Ibid.,* p. 22. Schjelderup translated most of the discussion which followed. Stone had written*:* "It is true that in this field somewhat varying and larger considerations must enter into the judicial process than those with which it is occupied in the field of private law … The issue too, more often than in private law, is between the conflicting interests of the individual and of society as a whole. There is much in our history, which has found expression in the law and the Constitution, to inspire a passion for the protection of individual right against encroachment by the arbitrary exercise of power by government, much to justify our faith that the adequate protection of individual right and freedom is itself of incalculable social worth. But man does not live by himself and for himself alone. There comes a point in the organisation of a complex society where individualism must yield to traffic regulations, where the right to do as one will with his own must bow to zoning ordinances, or even on occasion to price-fixing regulations. Just where the line is to be drawn … is the perpetual question of constitutional law … " *Ibid.*

[500] *Ibid.,* pp. 22–23.

[501] *Ibid.,* p. 26.

[502] On this article, *see supra* note 453 and accompanying text.

[503] P. Berg, 'Eidsvoll-grunnloven og menneskerettene', [The Eidsvoll Constitution and the Human Rights] in *Arven fra Eidsvoll – Norges Grunnlov [The Inheritance from Eidsvoll – The Constitution of Norway]* (Sverdrup Dahls forlag, Oslo, 1945) p. 147

constitutional history. He focused on the abolition movement, discussing its constitutional arguments briefly, concluding that "Lincoln won his battle for the ideal of human rights … but it cost a bloody Civil War".[504] Berg discussed economic rights in detail, noting that

> "the men of the Enlightenment and the liberals believed that social ills could be cured by securing personal liberty for each person, legal security and the right to choose one's calling … But life taught humanity otherwise. The industrialism of the 19th century, with its proletariat, and the capitalist modes of production with their regular economic crises and periods of unemployment created social circumstances which denied everything called the right to living with human dignity. For the worker without property, who had nothing to support himself and his family, the right of free enterprise and free personal life had little value. To have work, from which he could make a decent living, was for him the most important thing of all."[505]

Berg elaborated on the importance of economic rights, discussing the role of Woodrow Wilson, who argued - wrote Berg - that society had "taken a form that did not fit the ideas of human rights set forth in the Declaration of Independence".[506] A just social and economic balance required a "new freedom". Berg reprinted in translation a speech by "one of [Wilson's] best advisers … Louis Brandeis, one of America's great jurists",[507] where Brandeis argued for the importance of economic independence.[508] Berg also discussed Franklin D. Roosevelt's policy and constitutional arguments in this respect, concluding that

> "the idea of human rights was to Roosevelt, like to Wilson and Lincoln, the foundation of American society. The founding fathers in 1776 had not frozen evolution with the declaration, but had, as Lincoln put it, given future generations a guide as to how to solve contemporary problems.
>
> Roosevelt knew that his New Deal was an interference with the old individualist liberty in the American economy. But to him, it was in accord with the fundamental thought of the Declaration of independence. It had the goal of securing individual liberty for the biggest classes of people.
>
> Roosevelt's New Deal was a grandiose attempt to mix liberalism's individualist

[504] *Ibid.,* p. 170.
[505] *Ibid.,* pp. 186–187.
[506] *Ibid.,* p. 192.
[507] *Ibid.,* pp. 192–194.
[508] The speech quoted was given at Harvard in 1905. Berg also cited a letter from 1922, where Brandeis wrote on democracy: "But democracy in any sphere is a serious undertaking. It substitutes self-restraint for external restraint. It is more difficult to maintain than to achieve. It demands continuous sacrifice by the individual and more exigent obedience to the moral law than any other form of government. Success in any democratic undertaking must proceed from the individual. It is possible only where the process of perfecting the individual is pursued. His development is attained mainly in the processes of common living. Hence the industrial struggle is essentially an affair of the church and its imperative task." Here taken from *Brandeis on democracy*, pp. 34–5 (Philippa Strum, ed., 1995).

> concepts of freedom with modern human rights requirements. He rejected classical liberalism's individualism. But he also rejected rising absolutism with its contempt for the individual's human dignity and human rights. He was looking towards a new social system in the name of the human rights ideals, not inconsistent with it."[509]

It is questionable to which degree this was meant as an observation concerning constitutional law and to which degree this was an ideological agenda for the post-war society, for Berg was, at the time, very powerful in Norwegian politics.[510] The Norwegian Supreme Court later built on this emphasis on minimum economic rights for everyone.[511]

In sum, key actors in Norwegian constitutional law in this period wrote about American law and history and used arguments from American constitutional law when arguing for a certain mode of constitutional interpretation in Norway.

3.3.2. Danish Theory

It has already been mentioned that *TfR*, in which many of the articles written in Norwegian were published, is a joint Nordic journal. Danish authors were amongst those who published articles about American law in *TfR* – Poul Michael Sachs' articles were discussed briefly in chapter 3.2., *supra.* The first Nordic book concerned only with judicial review and constitutional interpretation was published in Copenhagen in 1947, Ernst Andersen's *Constitution and Customary Law*.[512] Andersen's main theory was that, although Nordic theory on judicial review was mostly adopted from the U.S., there was a clear distinction between 'the American way' in reviewing the constitutionality of legislation – *i.e.* for Courts to be the ultimate arbiters of laws' constitutionality in all cases – and the 'Danish-Norwegian' way of striking laws only when their unconstitutionality was beyond doubt.[513] This led him to the conclusion that all discussion of the proper role of judicial review must centre on constitutional interpretation, since judicial review would only be an issue when the courts and the legislature reached different conclusions in that interpretation. To illustrate different approaches to constitutional interpretation, Andersen discussed American constitutional theory; giving an overview over the theories of Story, Cooley and finally "a more alive historical-realistic view of legal

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[509] Berg, *supra* note 503, pp. 195–196.

[510] I have not pursued this because I believe that the increased emphasis in the Nordic countries on minimum economic rights for all is a complicated history in itself and doesn't particularly belong in this context, except when it shows up in a purely legal context. It seems that this was written more as an ideological agenda for how post-war society should look than as legal theory – if it is at all possible to make that distinction.

[511] *See infra* the discussion of Rt. 1959.33.

[512] Andersen, *supra* note 3.

[513] "Danish-Norwegian" is a misnomer, for although it was clear from 1921 that Danish courts would not strike down laws unless it was "certain" that they were inconsistent with the constitution, Norwegian courts did not, as we have seen, consistently apply such a low level of scrutiny.

developments" embodied in the works of Corwin, Haines, Swisher and, in the Nordic countries, Knoph.[514] He described the period "from Marshall's death in 1835 to *West Coast Hotel* in 1937 [as] characterised by a gradual but sure retreat of the views of constitutional interpretation set out by Marshall, which were elastic and tolerant towards the legislature",[515] and discussed a number of American cases, from the 19th century and through the New Deal.[516] He referred to Schjelderup and Lambert[517] with regard to substantive due process jurisprudence but added to Schjelderup's writings by discussing newer cases.[518]

Although Andersen mentioned some developments in American constitutional law after 1937, he did not analyse them or incorporate them into his arguments, nor did he take much note of Norwegian jurisprudence. For the most part, he relied on the work of American court-critics and gave a surprisingly schematic picture of American constitutional thought and theory. For these reasons his book did not really add to what had already been written about the interaction between American and Nordic constitutional law, nor give a better picture of American law than had previous writings. It was important, however, because its discussion of American law was widely available to Nordic lawyers, and because Andersen synthesised the available information on American law and referred to additional information. His book was widely known in legal circles, as evidenced by the fact that it was

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[514] Andersen, *supra* note 3, p. 20, discussing and referring to Cooley's *Constitutional Limitations*, Corwin's *John Marshall and the Constitution, A Chronicle of the Supreme Court* from 1919, *The Twilight of the Supreme Court, A History of Our Constitutional Theory* from 1934 and *Court over Constitution* from 1938; the 2nd edition of Haines' *The American Doctrine of Judicial Supremacy* from 1932 and his *The Role of the Supreme Court in American Government and Politics* from 1944; Carl B. Swisher's *American Constitutional Development* from 1943 and Knoph's *Legal Standards.* Andersen noted that "one can, by comparing the older and newer books by Corwin and Haines, see how they swing further and further away from the dogmatic views of, *inter alia*, judicial review". *Ibid.,* p. 19. It is noteworthy that Andersen cites many other American sources, including Beard's *The Supreme Court and the Constitution* (dated 1926 in Andersen's bibliography, but should probably be 1916), a four-volume biography on John Marshall (Beveridge's *The Life of John Marshall* from 1916–1919), books by Jerome Frank and John Chipman Gray, as well as Robert H. Jackson's *The Struggle for Judicial Supremacy* from 1941 and Charles Warren's *The Supreme Court in United States History* of 1924.

[515] Andersen, *supra* note 3, p. 28.

[516] *Ibid.,* pp. 29–41.

[517] E. Lambert published *Le Gouvernement des Juges et la Lutte contre la Législation Sociale aux États-Unis - L'expérience Américaine du Controle Judiciaire de la Constitutionnalité des Lois* [*The government of Judges and the Battle Against Social Legislation in the United States - The American experience of judicial review of legislation's constitutionality*] in Paris in 1921. *See* also *supra* note 179.

[518] Andersen, *supra* note 3, p. 39 and note 28.

reviewed in the main legal reviews at the time[519] and was cited in Nordic constitutional law for decades.[520]

Professor Alf Ross, one of the luminaries of the Scandinavian legal realist movement, reviewed Andersen's book in *TfR* and made two important points. He criticised Andersen for not focusing on the counter-majoritarian problem, which had been mentioned in connection with American law in Nordic legal theory from the mid-1930s. Ross stated that Andersen just mentioned

> "that Parliament, which is directly responsible to the people, has a natural claim to being the one to decide the scope of indeterminate constitutional provisions (71). But what does 'a natural claim' mean? It sounds like something from natural law. The idea must be that it is most consistent with the dominant democratic ideology that it should be elected representatives and not 13 lawyers who authoritatively steer constitutional developments."[521]

Secondly, Ross challenged Andersen's analysis of post-1937 American constitutional jurisprudence:

> "The author interprets [this jurisprudence] as meaning that the Supreme Court has now abandoned its earlier narrow principles of interpretation and adopted new principles that are so elastic that they will in most cases enable the Court to justify the changing of the Constitution by interpretation done by Parliament – i.e. that the courts have in fact abandoned trying to exercise effective judicial review of legislation. Surely, this is completely wrong. The right of courts to exercise judicial review and the principles of constitutional interpretation are completely unchanged. What has happened is simply that a new social philosophy (which is in better harmony with the legislature's philosophy) has emerged victorious in the Supreme Court … That the Supreme Court has not for a moment abandoned the view that it is its own evaluation which is final, whether or not it is in harmony with Parliament's view, is evident from the fact that outside the economic sphere the Supreme Court still exercises effective review, especially to protect personal liberty in various fields."[522]

The higher level of scrutiny for non-economic rights is an important point of Ross' and one that was reiterated in a 1953 book on American law.[523]

American constitutional law was thus discussed by those in the mainstream of Danish constitutional thought just as it was in Norway, and arguments from it were used to argue for a particular mode of constitutional interpretation.

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[519] *See* Alf Ross, Book Review, *TfR* (1947) p. 447 and Stig Jägerskiöld, Book Review, *Svensk Juristtidning* (1948) p. 661.

[520] Jóhannesson frequently cited Andersen's book in his article on judicial review in Iceland from 1953 and in his constitutional law treatise in 1960. *See* Jóhannesson, *supra* note 5, and Ó. Jóhannesson, *Stjórnskipun Íslands [The Icelandic Constitution]* (Hlaðbúð, Reykjavík, 1960). Jörundsson also cited Andersen frequently, *see* G. Jörundsson, *Um eignarnám [On takings]* (Menningarsjóður, Reykjavík, 1969).

[521] Ross, *supra* note 519, p. 453.

[522] *Ibid.*

[523] *See infra* note 608 and accompanying text.

3.3.3. Icelandic Theory

Discussion of American legal theory in Icelandic legal writings did not take place until later, even though the language in court decisions and the understanding of the different roles of the judiciary and the legislature had already changed by around 1950. Icelandic legal theory was scarce in the early years of the republic; Danish and Norwegian writings made up the bulk of law libraries and were the best teaching materials available. It therefore seems likely that those who sought out theory concerning judicial review read Danish and Norwegian theory, especially because the Danish and Icelandic constitutions were almost identical at the time.

The first article on judicial review in Iceland was written in 1953 in Danish and relied heavily on *Constitution and Customary Law* from 1947.[524] While older writings focused on the constitutionality of judicial review *per se*, Professor Ólafur Jóhannesson quickly disposed of that question.[525]

The main emphases of this article were therefore methods of constitutional interpretation. Based on *Constitution and Customary Law*, two main methods of interpretation were described: a flexible view of the constitution, and originalism. In order to explain the latter, Jóhannesson cited Thomas Cooley:

> "A cardinal rule in dealing with written instruments is that they are to receive an unvarying interpretation, and that their practical construction is to be uniform. A constitution is not to be made to mean one thing at one time and another at some subsequent time when the circumstances may have so changed as perhaps to make a different rule in the case seem desirable. A principal share of the benefit expected from written constitutions would be lost if the rules they established were so flexible as to bend to circumstances or be modified by public opinion. It is with special reference to the varying moods of public opinion, and with a view to putting the fundamentals of government beyond their control, that these instruments are framed; and there can be no such steady and imperceptible change in their rules as

[524] Jóhannesson, *supra* note 5. Also in 1953, an article was published on the freedom of speech issues raised by a 1943 case where a law was invalidated. The author, a former Supreme Court justice, did not discuss other aspects of the case in any depth. He simply commented that "there seems to have been no doubt in the justices' minds that the judiciary should decide whether laws are constitutional and that courts should and could ignore statutory provisions that are inconsistent with the constitution. This is clear from the minority opinion as well. This is also consistent with a few cases and the opinion of at least some of the people who have written on this topic." E. Arnórsson, 'stjórnarskráin og Hrafnkötlumálið', [The Constitution and the Hrafnkatla case] 3:1 *Tímarit lögfræðinga [T.L.]* (1953) p. 14.

[525] He wrote that the necessity of protecting constitutional rights "as well as the views of Nordic scholars, especially from Denmark and Norway, have led Icelandic law to adopt its current position on this point. There are now so many clear precedents in this field that there can be no doubt as to the principle in Icelandic law." Jóhannesson, *supra* note 5, p. 17. In a 1962 article, Jón E. Ragnarsson discussed this "change of mind" evident in Jóhannesson's writings from 1948, when he published a treatise on constitutional law to 1953 and attributes it to Ernst Andersen's *Forfatning og sædvane* and Castberg's *Norges Statsforfatning* [*The Constitution of Norway*], both published in the late 1940s. Ragnarsson, *supra* note 5, pp. 101–116.

inheres in the principles of the common law."[526]

He compared this view with that advocating flexible constitutional interpretation,[527] before concluding that while valid arguments could be advanced in favour of both positions: "the middle road is presumably the best, as is frequently the case".[528]

Jóhannesson described Icelandic jurisprudence and reached two main conclusions: firstly, "it cannot be denied that the courts have interpreted the constitution very liberally. It may be argued that the interpretation was a bit too liberal in some cases … Even though it is reasonable that the courts should be able to adapt individual constitutional provisions, they must keep in mind that they cannot amend the constitution. That is the sole province of the constituent power."[529] Secondly, he rejected the so-called 'clear case theory' which had been dominant in Denmark.[530] This may suggest a greater reliance on Norwegian and American theory than would otherwise have been expected.

It was not until the early 1960s that American theory and jurisprudence were discussed further in Icelandic legal journals. In 1962, Jón E. Ragnarsson published an article on judicial review, where he focused on its history in Iceland, tracing its roots to the U.S. via Norway.[531] He mentioned American jurisprudence from the 1930s to the 1960s briefly.[532] That discussion was fleshed out in Gaukur

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[526] Jóhannesson, *supra* note 5, pp. 14–15. Cooley is cited from Ernst Andersen's *Forfatning og Sædvane*, p. 18 and footnotes in Cooley's original text are omitted. Here taken from Thomas M. Cooley, *A treatise on the constitutional limitations which rest upon the legislative power of the states of the American union*, pp. 123–4 (8th ed. 1927). Jóhannesson also says without elaborating or commenting that "In the U.S. there is a number of examples of the Supreme Court changing its mind on questions of constitutional interpretation. The Court has frequently found that provisions were consistent with the constitution after having previously found them unconstitutional." Jóhannesson, *supra* note 5, p. 13.

[527] "Others believe that when interpreting constitutions, we must pay attention to changed circumstances and the needs of society just as we do when interpreting other statutes. They believe new perspectives and social circumstances matter and point out that some constitutional provisions are statements of intent that should not be interpreted literally but must adapt to changing views and new needs." *Ibid.,* p. 15.

[528] *Ibid.*

[529] *Ibid.*

[530] As an explanation of this theory, which is referred to in the Danish text as "clear case theory", he cited a Danish Supreme Court opinion from 1921 where a law was upheld because the law's unconstitutionality had not been shown "with the certainty required for the courts to be able to set aside the provisions of a law adopted in pursuance to the constitution" UfR. 1921.644, 646. Jóhannesson, *supra* note 5, pp. 15–16.

[531] Ragnarsson, *supra* note 5.

[532] He wrote "there have often been fierce disagreements over the Supreme Court's constitutional interpretation, especially over its judgments based on the due process clause. The court has often been viewed as very liberal in such judgments. From 1935–37 the Court opposed Roosevelt's administration and it has since been extremely careful in striking laws in the economic field. On the other hand, it has handed down many important decisions lately, especially concerning the Bill of Rights. The case on the legal status of blacks in 1954 and the

Jörundsson's *Um eignarnám* [*On Takings*] published in 1969. His account – like Ragnarsson's – tied together the American developments and Nordic theory, but did so in much more detail. After describing Cooley's theories briefly, Jörundsson commented that

> "[t]hese principles of interpretation became highly contentious when the U.S. Supreme Court adopted them after 1870, linked to a very broad interpretation of the so-called due process clauses … The courts were extremely inflexible towards the social legislation enacted by Congress after 1890. Some laws were struck because they interfered with people's liberty of contract or otherwise affected their economic conditions. These principles of interpretation had an especially harsh effect on legislation intended to protect workers and unions, like minimum wage and maximum hours laws etc. This attitude did not change even when social opinion and society itself changed in fundamental ways … "[533]

Jörundsson mentioned the American 'constitutional revolution' of the 1930s briefly: "The U.S. Supreme Court fundamentally changed course in 1937 and started upholding laws that regulated the economy in various ways. It thus rejected its earlier principles of interpretation and started taking into account changed societal circumstances and the views evident in many laws passed by Congress."[534] He described the Nordic attempts to answer the question of how flexibly to interpret the constitution and linked them to American theory:

> "In Norway and Denmark there is general consensus that the takings clauses of the constitution should be treated as legal standards ... The concept of 'legal standard' … first gained acceptance in American legal theory. It is there that one finds the first writings to discuss these rules in particular. One can e.g. name a book by the famous American writer Roscoe Pound, *An Introduction to the Philosophy of Law* and also *Standards of American Legislation* by Ernst Freund, which deals with constitutional bills of rights … Here in the Nordic countries legal standards were first discussed in depth by the Norwegian Ragnar Knoph . . . "[535]

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cases on free exercise of religion and prohibition of school prayer decided this year are examples of this." *Ibid.,* p. 105-6. The description of the U.S. Supreme Court around 1900 as "liberal" is unusual – irrespective of whether one understands the words in a political sense or as a description of a jurisprudential stance. It seems likely that Ragnarsson was speaking of the court's attitude towards constitutional interpretation and suggesting that it was flexible. Even so, I am sceptical towards this statement. The U.S. Supreme Court cases Ragnarsson is referring to are *Brown* v. *Board of Education of Topeka*, 347 U.S. 483 (1954) (holding that racial segregation in education violated the equal protection clause) and *Engel* v. *Vitale,* 370 U.S. 421 (1962) (finding school prayer inconsistent with the First Amendment).

[533] Jörundsson, *supra* note 520, pp. 42.

[534] *Ibid.*

[535] *Ibid.,* p. 43.

Jörundsson then summed up Knoph's discussion of legal standards and compared the views of Knoph and Pound.[536] He then went on to the main gist of his treatise which was the interpretation of the takings clause of the Icelandic constitution.[537] Icelandic theory of judicial review and constitutional interpretation was thus scarce in the first decades of the republic, which makes it more likely that judges and practitioners relied on theory from the other Nordic countries. The Icelandic theory that existed acknowledged the influence of, and sometimes built directly on, American theory.

3.3.4. Nordic Theory – Conclusions

In sum, there was considerable discussion of American constitutional law in Norway and Denmark in the 1930s. The articles and lectures were good enough to ensure that those who read them had some idea – and in the case of some articles, a working knowledge – of American constitutional history and constitutional law. In addition, the discussion was broad enough to presumably reach a large percentage of Nordic lawyers. Schjelderup's lecture reached more or less all Norwegian judges, and the articles were so numerous and spread so evenly in various journals that one can assume they were read. All in all, and taken together with the constitutional

[536] American law was also mentioned in a discussion of judicial review at the Nordic assembly of lawyers in 1966. The Icelandic presentation was later published in the law review *Úlfljótur*. The speaker, Páll S. Pálsson, cited Lewis Mayers and Charles Beard as authorities for the fact that the U.S. constitution provided for judicial review. Concerning recent developments he said that the U.S. Supreme Court's jurisprudence had greatly influenced the drafting of constitutions in many new and reorganised states after the Second World War In order to illustrate this, he cited Chief Justice Warren: "We are oathbound to defend the constitution. The provisions of the constitution are not time-worn adages or hollow shibboleths. They are vital living principles that authorise and limit governmental powers in our Nation. They are rules of government. When the constitutionality of an Act is challenged in this Court, we must apply those rules. If we do not, the words of the constitution become little more than good advice … " Pálsson referred to *Quarrels that have shaped the constitution* (John A. Garraty, ed.) from 1964 as a good source of information on American law. Páll S. Pálsson, 'Domstolarnas lagprövningsrätt', [Judicial review] in *Förhandlingarna vid Det tjugofjärde nordiska juristmötet i Stockholm 31. augusti – 2. september 1966 [The Discussions at the 24th Nordic Lawyers' Conference in Stockholm August 31, – September 2, 1966]* (Isaac Marcus, Stockholm, 1967), p. 4.

[537] Based on his research concerning Icelandic regulatory and tax legislation affecting property rights and on constitutional theory, Jörundsson's main conclusions were that all attempts to draw a clear line between exercises of the power of eminent domain and regulation were bound to be unsatisfactory. Yet he also argued that while it was useful to view the takings clause as a legal standard, there was a tendency to overemphasise the differences between legal standards and other provisions, concluding that "the takings clause must, to a great degree, be interpreted with a view to reaching a fair and just result ... On the other hand there is perfect reason to believe that this evaluation is limited by various traditional considerations, which have been expressed in legislation and in interpretive methods." Jörundsson, *supra* note 520, p. 403.

discussion after the war, this suggests that Nordic lawyers had many of the arguments in the American constitutional debate at their disposal. Maybe – if they had chosen their reading material unwisely – in schematic form, but the ideas were widely known.

Most of the Norwegian and Danish articles on judicial review were published between 1937 and 1939. Some reasons for this surge of interest have already been suggested. The shared historic roots of the constitutions in question have been discussed above.[538] It was well-known that Aschehoug and his contemporaries had relied on American constitutional law as a foundation for their theories, so it makes sense that it would interest those working within the tradition built on those theories how they fared in other countries and in the U.S. in particular.[539] A perceived similarity in the jurisprudence around 1900 – a feeling expressed by later historians that Norway had its very own *Lochner* era – may also have played a role. Finally, the Nordic countries were feeling increasingly isolated and threatened as undemocratic forces gained strength in the region.[540] Their worries proved well-founded. In April 1940, German forces invaded Denmark and Norway, and in May of that year, British forces occupied Iceland. The history of the years from 1940–1945 is therefore peculiar to each of these three countries. Until 1943, the Danish legal system was relatively untouched,[541] but after 1943, it seems to have been more or less suspended until 1945. The occupation of Norway was particularly brutal and for a while the Norwegian Supreme Court played an important role in the resistance movement. In late 1940, however, the Justices resigned because of threats to their independence from military authorities.[542] It seems that Norwegian constitutional

[538] *See* the discussion in the introduction, *supra*.

[539] *See* the discussion of Aschehoug and other writers of this period in chapter 3 of part 2, *supra*.

[540] It is almost impossible to find a constitutional law essay written from 1935–1940 in which the rise of totalitarianism is not mentioned.

[541] There are exceptions; the "Communist Act" of 1941 was a clear violation of the constitution. It was upheld by the courts, which seem to have tried to compromise – to attempt to safe-guard some rights by retaining some of their authority while compromising on other issues. On the occupation in Denmark and its effects on the legal system, *see* O.A. Borum, 'Okkupationen og Retsstaten', [The Occupation and the Rule of Law] *Juristen* (1945) p. 124.

[542] In November 1940, the Justice Minister in Quisling's government, Riisnæs, gave an executive order allowing the ministry to hire and fire judges and jurors. The Supreme Court wrote him a letter noting that this was beyond his constitutional powers and the powers of the occupying forces under the Hague convention of 1907, and was "in clear conflict with the principles underlying our judicial system". In reply, the *Reichskommisar* [Governor] wrote a letter saying *inter alia* that it "was recommended" for the Supreme Court to stay out of political matters and stating his view that neither the Supreme Court nor other courts could review the validity of acts or regulations promulgated by the military authorities. In response, the Supreme Court resigned in December 1940, noting in its letter to the military commander that "the courts have, under Norwegian constitutional law, a duty to review the validity of laws and regulations … We cannot conform to the view of judicial power expressed in the *Reichskommisar's* letter without violating our duties …" The Chief Justice, Paal Berg, was a leading figure in the resistance movement for the duration of the war and a national figure.

law was simply interrupted during those years. Already in 1945 there seems to have been broad consensus that things should now resume as they had been in 1940 and the period in between ignored.[543] After Denmark was invaded in 1940, the Icelandic government assumed full powers – including those powers previously exercised by the Danish government. In spite of the British occupation which took place a month later, Icelandic law remained in full force and more or less unchanged throughout the war and through the establishment of the republic in 1944.

Due to these events, the years from 1940 to 1945 form an interlude in Norwegian and Danish law, which will be overlooked here. The courts were not functioning independently and the constitutions were more or less explicitly set aside. This period has therefore very little to offer in the context looked at here. In Iceland, on the other hand, there was no obvious break with tradition and cases decided during this period will be discussed here.[544]

3.3.5. Changes in Norwegian Case Law after World War II

In this section, the jurisprudence of the Norwegian courts in the two decades after World War II will be examined. During this period, the mode of constitutional interpretation that writers had argued for in the years immediately prior to the war became the dominant one.

Once the courts were up and running after the war, it was not long before the constitutional interpretation Schjelderup, Knoph and others had argued for before the war showed up in court decisions. A clear illustration of flexible interpretation is found in a 1948 Norwegian Supreme Court case, which overruled a 1918 decision concerning the constitutionality of a 1907 law on allodial property. Allodial right is a peculiarly Norwegian legal institution that provides a farmer's family with a sort of pre-emptive right. In order to maintain a class of land-owning farmers, the law of allodial property provides that when land subject to these provisions is sold, the

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Justice Schjelderup held a unique combination of leading positions in the resistance movement and had to flee to Sweden in 1944. When the Supreme Court reconvened in 1945, the Justices sitting in 1940 took up their seats again and those who had been on the Court in the meantime – at the request of the Quisling government - were tried for collaboration. *See* Norges Høyesterett, [The Supreme Court of Norway], Juristen 1945, p. 121, where the speech of Chief Justice Berg at the reconvening of the Supreme Court in May 1945 is reprinted.

[543] Rt. 1948.1147, which will be discussed in detail *infra*, had been decided by the Supreme Court in 1943. However, the case was retried when the Supreme Court from 1940 reconvened. Cases decided by the Supreme Court from 1940 to 1945 are specially marked and categorised in Norwegian legal databases and journals as decisions of the "*kommisariske høyesterett*" or the Commander's Supreme Court.

[544] It has already been mentioned that the Icelandic Supreme Court decided a tax exemption case on vested rights grounds in 1943. *See* note 287, *supra* and accompanying text. Also in 1943, a law prohibiting the publication of sagas written before 1400 unless by licence from the ministry of culture, was invalidated as inconsistent with the freedom of speech clause's prohibition of prior restraints. Hrd. 1943.237.

members of the family having the allodial right have, in a certain order, a right of first refusal.[545]

The facts of the 1918 case were that a man had offered to sell land to the state in 1906 but the contract was not closed until 1909. The 1907 law on allodial property provided, in contrast to older law, that the state should be able to use land without restrictions based on the family's allodial right. Based on this provision, the state declared the land it had bought free of allodial encumbrances and sold a part of it. The seller's son then challenged the law, arguing that there were still allodial encumbrances on the land so it could not be divided and that he had a right of first refusal.

The majority of the 1918 Supreme Court came to the conclusion that it would be inconsistent with the Constitution's prohibition of retroactive laws in article 97 to apply the law of 1907 in this case.[546] The Court believed the seller's son had an allodial right from his birth in 1894 and was of the view "that the right of the owner's family secured by art. 2. in the [1821 law on allodial property] and given special importance by the Constitution's art. 107, is of such a character that the Constitution's art. 97 protects its beneficiary from being deprived of it by a later law".[547] It did not matter that the right could be exercised, as a right of first refusal, only when the land was sold in 1909 – two years after the new law entered into force. The majority stated

> "[t]he fact that the allodial right can not be exercised until the land has been sold to an outside person or a relative further removed does not influence its character or its substance. The allodial right's characteristic of a legal right of first refusal in the prescribed circumstances is a fundamental part of the right. The right must therefore be viewed as vested and existing also before it could be exercised."[548]

This case is clearly in tune with the vested rights cases discussed part 2: rights once vested could not be impaired by later legislation, and the key issue was whether the substance of the right was impaired.[549] In 1948, the 1907 law was again challenged in the Supreme Court. The appellant challenged his brother's right to have a parcel

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[545] To take an example: A has allodial right to his land. He sells part of it to a friend to build a cabin. When the friend gets an offer from a third party to buy the parcel and the cabin, A's oldest child or, if that child is not interested, his next to oldest child, can buy the parcel of land from the friend at the same price he would be able to get from the third party.

[546] Art. 97 of the Norwegian constitution states that "[n]o law must be given retroactive effect".

[547] Rt. 1918. II. 47, 48. In 1925, the Supreme Court found, which is consistent with this case, that the 1907 law could be applied to a person born after it entered into force without coming into conflict with art. 97. (Rt. 1925.298). Art. 107 of the Norwegian constitution states: "Allodial right and the right of primogeniture shall not be abolished. The specific conditions under which these rights shall continue for the greatest benefit of the State and to the best advantage of the rural population shall be determined by the first or second subsequent Storting."

[548] Rt. 1918. II. 47, 48–9.

[549] *See* the discussion in part 2, *supra.*

of land declared free of allodial encumbrances. He argued, like the appellant in the 1918 case, that the law of 1907 could not be applied since he was born before it entered into force. This time, the Supreme Court played a different tune. On the constitutional question it said:

> "The Court has reached the conclusion that the 1907 law can be applied in this case without hindrance of the Constitution's art. 97. According to the Constitution's art. 107, allodial right and the right of primogeniture may not be abolished but "the conditions under which it will be most useful for the state and beneficial to the rural population" shall be decided by law. There has been before, and will also be in the future, a need to change the law of allodial right as new social and economic circumstances require. When the 1907 law permitted removing industrial lots and residential lots from this system, it was to satisfy a need that had arisen.
>
> The beneficiary of the allodial right has no claim to keeping his right unaffected by this law unless he had an actual right to exercise his allodial right [i.e. by exercising his right of first refusal] when the law entered into force."[550]

The Court thus upheld the law although it did not clearly distinguish the case from the 1918 case. Concerning that precedent, the Court noted: "The Supreme Court took a different view of the constitutional question in 1918. That case concerned for that matter circumstances where the state acquired property and decided, with reference to the [law's] article 7 that it should be free of allodial encumbrances."[551] While the 1918 case did concern a different provision of the 1907 law than the case in 1948, the Court's opinion in 1918 left little room for doubt about the constitutionality of applying any provisions of the 1907 law to people born before it entered into force. There seems to have been consensus among the justices in 1948 on the need to overturn the 1918 case and uphold the law.[552] What is important is not

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[550] Rt. 1948.1147, 1149.

[551] *Ibid.*

[552] One justice did comment on the draft judgment that he had "a tendency to agree with [the opinion's author] that the 1918 case is wrong and does not deserve to be upheld … " Notes of Justice Bonnevie, dated 22 August 1946 *in Dommernes bemerkninger i Sak* nr. 160/1943 [The Comments of the Justices in Case no. 160/1943] 11. Another added that "the appellate Court of Eidsivating has found in its cases – without, as far as I know, having had to base a conclusion solely on this point – that the legal situation must be described as being such that it is permissible to sell lots, as prescribed in the 1907 law." The other Justices simply stated that they agreed with the majority opinion. A minority of 7 justices found it unnecessary to reach the constitutional question. However, they declared that alternatively they agreed with the majority on the constitutional question. The decision was therefore unanimous on this point. The parties to the case did not emphasise the constitutional question in the proceedings either. The appellant simply referred to the 1918 case, while the respondent argued that the appellant could not exercise his right in 1907 and that hence, the law of 1907 deprived him of no right. To support this he pointed to a 1936 amendment of the law on allodial property which stated that it would not be applicable to situations where a holder of the allodial right could exercise it at the time when the law came into force. The Court based its opinion on this view. Innlegg nr. 1 fra ankemotparten til Høyesterett [Pleading from the Appellee to the Supreme Court] dated 25 April 1944, 4.

the extent to which the 1948 case overruled the 1918 precedent, but the constitutional interpretation that formed the basis of the court's unanimous decision.

In the original draft of the decision, the author had noted, immediately following the comment that the law was amended to satisfy a need that had arisen, that "[i]t would indeed be completely unreasonable if this amendment did not apply to anyone who acquired an allodial right, by birth or otherwise, before the amendment entered into force. The implementation of the reforms would be inappropriately delayed." Similarly, the draft later stated that "[w]hen speaking of residential lots, the Supreme Court believes it is so natural and reasonable to exempt them from allodial encumbrances that it would be an affront to one's sense of justice to view the precedent from 1918 as binding".[553] These comments were not part of the final opinion but they hint at the reasons behind the court's decisions. Justice Schjelderup, who wrote important articles on American law, sat on the Court during this period and took part in deciding this case.

There are important novelties in this decision. The necessity of being able to adapt the law to changing circumstances is the only stated reason for the Court's conclusion. That emphasis and the flexibility it brings to constitutional interpretation is very different from the emphasis in constitutional jurisprudence before World War II.[554] The interpretation of the Norwegian Constitution's art. 97 in the 1948 allodial property case was thus in step with the ideas and conclusions on constitutional interpretation that had been discussed in Nordic law *inter alia* on the basis of American law. In addition it was in step with changing constitutional theory concerning the doctrine of vested rights, which in turn relied heavily on American theory.[555]

It is probable that this case was a transitional one. That is quite clear concerning constitutional interpretation and the doctrine of vested rights. The case clearly indicated that the legislature had greater leeway than before to take necessary measures in concrete circumstances. On the other hand, the reasoning was unusual in that there was no clear acknowledgement of any deference due to the legislature's evaluation of these circumstances. The decision was so cryptic that it was hard to tell whether the Court based its decision on an independent evaluation of the need at hand or left that to the legislature – the decision was, in other words, unclear as to the level of scrutiny applied.

In 1952, a tax law was upheld against an art. 97 challenge. The tax was levied only once, on those who had gained property during the war. The opinion that was endorsed by the majority referred to a 1924 case on the taxing of gains from property sales[556] as authority for the proposition that art. 97 did not prohibit taxing

[553] Dom [Decision] in Case no. 160/1943, 5–5a.
[554] *See* the discussion in part 2, *supra*.
[555] The constitutional interpretation in this case was for instance in accord with the writings of both Schjelderup and Knoph. Knoph in particular attacked the doctrine of vested rights, and this case is also in agreement with his writings on that point. *See supra* the section on Norwegian theory.
[556] Rt. 1924.12, *see* note 106.

on the basis of actions taken before the law was enacted.[557] Most importantly, however, the majority commented about a provision which counted gifts given during the war as property of the giver,[558]

> "I am clear on the fact that [this provision] could, in individual cases, have an unreasonable effect. But firstly, the requirement in the Constitution's art. 97, especially in tax cases, cannot be stretched so far that no law which finds prior events relevant must ever lead to an unjust result in a single case. A direct tax must obviously be levied according to general rules and then it is self-evident that it will be unreasonable in some individual case. Secondly, I want to point out that the [law] excepts many 'regular' gifts and that [it] allows the authorities to leave out certain … gifts and in cases in which taxing the giver would be obviously unreasonable, all gifts. With these provisions, the Act has, in my opinion, sufficiently tried to remedy possible unreasonable consequences of [this provision]."[559]

The focus on the reasonableness of the law was clear – the very focus that Schjelderup had argued for. So while the court relied on the precedents from 1924 and 1927, it also looked at art. 97 as a standard of justice and reasonableness.[560]

The two pharmacy cases from 1917 were discussed in part 2.[561] In those cases, the Norwegian Supreme Court invalidated laws requiring pharmacists to pay a yearly fee for their licences and limiting the time their heirs could run the pharmacies after their death to two years. The court found that these burdens would decrease the licences' value to such a degree that it would be inconsistent with the non-retroactivity clause in art. 97 of the constitution. In 1959, the Court revisited the constitutionality of laws changing the conditions of pharmacist's licences.[562] The challenged Act mandated that pharmacists contribute to their employees' pension funds. Pharmacists with licences predating the law's entry into force argued that it was inconsistent with art. 97 of the Constitution to place this burden on them since their licences said nothing about such a duty – in sum that it impaired their vested right to run the pharmacy in a certain manner. The Supreme Court upheld the law

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[557] The Court also cited a 1927 case on the principle that "the taxing power has the right to determine the rules based on which the direct personal taxes will be levied and to determine their reasonability. The constitution's art. 97 is not in and of itself a limit on these rules being drafted with regard to actions or situations predating the taxing law. It is not determinative in this context whether the tax lies beyond what the taxpayer could have expected [at the time]." Rt. 1952.31, 34 citing Rt. 1927.677. The Justice added: "I refer in this context to professor Aschehoug's statement cited on page 20 in [Rt. 1924.12]." *Ibid.*

[558] An Icelandic provision stating that gifts and advancement given during the previous years should be counted as the property of the giver for tax purposes was invalidated in Hrd. 1959.759.

[559] Rt. 1952.31, 35.

[560] It seems strange that while court-critics in the first decades of the 20th century complained about the U.S. Supreme Court, in particular, deciding cases on the basis of whether laws were reasonable, the arguments that constitutional provisions should be understood as standards led to precisely such an emphasis.

[561] Rt. 1917.392 and Rt. 1917.402. *See supra* note 291 and accompanying text.

[562] Rt. 1959.33.

because it did not view the law as retroactive "in a way that renders the law incompatible with the constitution's art. 97".[563] The Court elaborated:

> "[t]he running of pharmacies is particularly closely related to a social public interest. The law has therefore placed a variety of special duties on pharmacists and the trade is very strictly controlled … All this shows the preeminent role considerations of public interest play in the law on pharmacies. The 1953 Act, which established a pension scheme for the pharmacies' staff, is from my point of view just a natural part of the controlling and regulating power vested in the state ... in the interest of society – a development the licensees should have been prepared for and that is in their own interest. A pension scheme is not only a natural and reasonable thing according to the view of society prevalent in our times, but will also make it easier for pharmacists to hire qualified staff and to get rid of employees who may not, after a certain age, fulfil the strict requirements of their profession. The pension system will therefore contribute to guarantee an orderly and safe working environment in pharmacies."[564]

Three things are important concerning the Court's reasoning in this case: Firstly, the level of scrutiny, which will be discussed in more detail in the section on tiers of scrutiny, below. Secondly, the decision was in step with the emphasis on economic freedom and security for which many Norwegian writers had argued, and which some, including both Schjelderup and Chief Justice Berg, had illustrated in their writings by citing Roosevelt's speeches and Justice Brandeis' speeches and opinions.[565] Thirdly, the Court's decision was precisely the kind of decision that Knoph was arguing for. The Court focused on the public interest in the running of pharmacies, the fact that the pension scheme was "a natural and reasonable thing according to the view of society prevalent in our times" and on other socio-economic arguments, such as how the scheme would contribute to an orderly and safe working environment in pharmacies. In sum, the interpretation of the non-retroactivity clause, the Court's reasoning and its conclusion were all consistent with Knoph's theories. The Court distinguished the older cases on the grounds that they concerned an interference with a pre-existing right while the 1959 case did not.[566]

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[563] *Ibid.,* p. 35

[564] *Ibid.,* pp. 35–36.

[565] *See* Schjelderup, *supra* note 424, pp. 126–134 and Berg, *supra* note 503. *See also* note 508, *supra*.

[566] The author of the majority opinion wrote: "I will finally mention the special weight that the appellant suggests should be given to the fact that the executive and legislative powers have acted in the belief that pension schemes could only be implemented *vis-à-vis* those pharmacists whose licences postdate the provisions in question. The response to this is the fact that in these days – I'm thinking of the 1877 Act and the 1926 Resolution – the question was a different one. In 1877 a widow's right under older law, to run the pharmacy after her husband's death was limited, in accordance with the implementation of a widows' pension scheme. In 1926, the change concerned a requirement that pharmacists retire at a certain age, whereas their right had previously been unlimited in time. In both these cases a previously existing right was interfered with. By these comments, I have not opined on the correctness of the view that was prevalent in these cases. I believe it sufficient to emphasise the difference

In sum, Norwegian constitutional interpretation changed after World War II, in precisely the ways argued for by those commentators who based their writings on American law just before 1940. The three cases discussed in this section illustrate that clearly.[567] The causal link between the legal writings of the 1930s and later jurisprudence seems quite clear.

3.3.6. Danish Case Law: a Short Note

There was less discussion of judicial review in Danish than in Norwegian theory in the years around World War II. Part of the reason is suggested by the fact that Danish commentators, unlike their Norwegian counterparts, did not feel any particular affinity with American jurisprudence. The Danish courts stated clearly that they would exercise judicial review only in the 1910s and already in 1921, in the first important group of cases to reach the courts, the Supreme Court made clear that it would apply a very low level of scrutiny. The Court upheld a land reform law because its unconstitutionality had not been proven "with the certainty required for the courts to be able to set aside the provisions of a law adopted in pursuance to the constitution".[568] No law was invalidated by the courts until in 1971,[569] and then not again until 1999.[570]

The Danish courts had always interpreted the constitution flexibly and given the legislature considerable leeway to react to new circumstances, so there was no question of major changes in constitutional interpretation after World War II. Due to this, Danish jurisprudence concerning constitutional interpretation will not be discussed further here.

3.3.7. Icelandic Case Law – Changes Preceding the Theory

Changing ideas concerning constitutional interpretation and the role of the judiciary began to appear in Icelandic court opinions around 1950. It is likely that the jurisprudential changes occurred mainly on the basis of the evolving Norwegian and Danish theory which was, as we have seen, influenced by American theory and jurisprudence. This is likely because of the lack of Icelandic theory in the early years

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between these questions and the one we are answering today. For similar reasons I do not find it necessary to discuss the 1917 cases." Rt. 1959.33, 36-7.

[567] Many other opinions could have been mentioned here, some of which will be discussed in other sections. The cases here were chosen as examples because they mirror earlier cases.

[568] UfR. 1921.644, 646.

[569] In UfR. 1971.299H, the majority of the Supreme Court found that a law which forced a public institute to hand over manuscripts from the middle ages and part of its funds to a sister institute in Iceland was inconsistent with the Constitution's property clause as far as the transfer of funds was concerned.

[570] In UfR. 1999.841H, a law cutting off funds to certain (named) private schools was invalidated. Parliament had enacted it because of a belief that the schools were abusing public funds. This was invalidated on separation of powers grounds with the Supreme Court noting that the decision had been, in fact, a judicial one.

of the republic and the corresponding reliance on Danish and Norwegian theory.[571] This theory is also supported by the makeup of the 1950s Supreme Court, because a majority of the Justices had studied in Denmark and in the U.S.[572]

The first Icelandic case, in which a shift in constitutional interpretation was apparent, was decided in 1951. From the point of view of American law, this case was a classical contracts clause scenario: an act to rebuild and reorganise the economy was enacted in 1950, and it invalidated contract clauses that linked payment of debts to other currencies.[573] It also devalued the Icelandic crown by about 45 per cent and was therefore challenged by a Danish citizen who had recently sold real estate in Iceland and contracted to have the remainder paid in Copenhagen, where he lived, and in Danish crowns. The seller argued that the statutory provision invalidating contract clauses that linked payments to other currencies was inconsistent with the property clause.[574] The facts in this case are quite similar to the

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[571] Lárus H. Bjarnason wrote already in 1913, that Icelandic law could not be taught from Danish books, but apart from successive constitutional law text-books, very little was written on Icelandic constitutional law through the 1950s. *See supra* the section on Icelandic theory.

[572] Three of the five justices on the court in 1952–1958 had spent at least a few months doing graduate studies in law in Denmark in the late 1920s and early 1930s. Jónatan Hallvarðsson studied criminal procedure and criminal law in Copenhagen and Berlin from 1933–1934. Gizur Bergsteinsson studied in Berlin and Copenhagen in 1927–1928 and Þórður Eyjólfsson studied in Berlin 1928–1929 and in Copenhagen in 1929–1930. *See* biographies of individual justices: <www.haestirettur.is>. In addition, one of the other justices was, in many of the most important constitutional cases, replaced by Ármann Snævarr, a professor of jurisprudence who studied in Copenhagen, Oslo and in the U.S. He pursued graduate studies in Copenhagen in 1946–1947, in Oslo from 1947 through 1948 and at Harvard in 1954–55 when *Brown* v. *Board of Education* (347 U.S. 483 (1954)) prompted a discussion of the role of the judiciary in the constitutional system and of judicial review in particular. He was in Denmark and Norway when Johs. Andenæs published his constitutional law treatise (*Statsforfatningen i Norge* from 1948, which was cited in an important case in 1952, *see* note 693, *below*), and when Castberg's and Andersen's books were published. Biography of Ármann Snævarr: <www.haestirettur.is>. The lower court judge who decided the first property cases and argued the later ones for the state had also studied in Denmark in 1947–1948.

[573] A seller of Icelandic real estate, who lived in Denmark, had made a contract providing that the remaining debt should be paid in instalments in Copenhagen unless currency regulations made that impossible. In that case, each payment should be made in Reykjavík with a corresponding sum in Icelandic crowns. Currency regulations did indeed make that impossible so the buyer paid the first instalments in Icelandic crowns.

[574] Due to the Act, the buyer paid the same amount as before in Icelandic crowns, effectively reducing each instalment's amount in Danish crowns by half. Art. 67 of the Icelandic Constitution no. 33/1944 provided: "The right of property shall be inviolable. No person shall be ordered to cede his property except where required by the common good. It can be done only as provided by statute and against full compensation." The seller didn't elaborate, he simply argued that "Art. 8 of [the 1950 statute] does not apply, since the debt is calculated in Danish crowns and not in Icelandic crowns. Besides, art. 8 of the aforementioned statute is unconstitutional and can for that reason not be applied in this case." Greinargerð verjanda í bæjarþingsmálinu Strandgata 34 h.f. gegn Sören R. Kampmann [Pleading of Defendant in the Case Strandgata 34 h.f. v. Sören R. Kampmann] dated Oct. 25, 1950. The lower court upheld

facts in *The Gold Clause* Cases[575] in which the Joint Declaration of 1933 invalidating gold clauses in contracts was upheld. *The Gold Clause* Cases had received great attention in Nordic theory; two articles on them were published in *TfR*, and in 1937, the Norwegian Supreme Court decided a case in which it applied the Joint Resolution upheld in the *Gold Clause* Cases to bonds issued in New York by the Norwegian state and owned by Norwegian citizens.[576] In that case, the Norwegian Supreme Court cited *the Gold Clause* Cases directly, before finding that the Resolution could be applied in Norway.[577] This is the only Nordic instance of a direct cite to American court decisions in this period.

The question facing the Icelandic Supreme Court in 1951 was thus not an absolute novelty. The Supreme Court upheld the Act, stating that it "has the purpose

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the law with the rationale that it was "of general application and enacted in order to prevent certain consequences of the law's art. 1. I can therefore not accept the argument that the provision is inconsistent with the constitution's art. 67." Hrd. 1951.268, 272.

[575] 294 U.S. 240 (1935).

[576] Rt. 1937.888. In this case, Norwegian creditors sued the state, which had borrowed approximately 123 million USD in New York from 1922–1928. The lending contracts all included gold clauses, which were then invalidated by the Joint Resolution of 5 June 1933. The Norwegian creditors argued that Norwegian law should apply to debts of the state to creditors within the country and that American law could not be applied. They also argued that it would be inconsistent with the *ordre public* principle in conflict of laws to apply the Joint Resolution in Norwegian courts, because it was obviously unjust. Finally, they argued that art. 97 of the constitution prevented the application of the Joint Resolution as between Norwegian creditors and Norwegian debtors, since it would change the obligations and rights that the parties had under the contracts.

[577] The Court stated: "The Supreme court of the United States has determined that the provisions of the resolution are not a violation of the U.S. constitution and that the resolution shall thus be applied also to obligations incurred prior to the passing of the resolution … The resolution must be understood as applying to every creditor, irrespective of his nationality, residence and without taking into consideration whether he was the original creditor or has acquired the obligation later.

It has been argued that the provisions of the Joint Resolution could not under any circumstances be applied to the detriment of Norwegian creditors who acquired the obligations prior to the resolution's enactment, since that would be viewed as so unjust by the general opinion here, that the courts must hesitate to accept such a result.

I will only note in that context that in my opinion, neither the social goals sought by the provisions, as evidenced by the preamble previously cited, nor the way in which the goal is sought attained in the law, provides an acceptable basis for setting the law aside in this country. I will not forget to mention that the crisis period after the World War led in our country to similar problems to those addressed by the Joint Resolution and that these problems could be solved only by the legislature stepping in with very broad regulatory measures.

It has … especially been argued that the Norwegian Constitution's art. 97 prevents the application of the provisions of the joint resolution here. I find it unnecessary to speculate whether a Norwegian law with the same substance would have to be set aside as violating art. 97. Even if that was the case, this cannot, in and of itself be conclusive for the question whether Norwegian courts should ignore a law enacted in another country." *Ibid.,* p. 891.

of stabilising the country's economy. One cannot believe that [the takings clause] prevents the legislature from regulating currency matters related to the devaluation of the crown as done" in the Act.[578] In sum, the contract, which provided that the remainder of the price was a particular sum in Danish crowns and should be paid in Danish crowns, could be effectively impaired by the legislature, because it was done for a particular purpose.[579] The Supreme Court's opinion thus suggested that legislative goals and purposes played a role in the constitutional evaluation,[580] which was a novelty in Icelandic constitutional law.[581]

The most important Icelandic constitutional cases in this period concerned property taxes levied in the 1950s.[582] Under the 1950 Act reorganising the economy, those who had personal property exceeding a certain value paid a special property tax. Shares in corporations and parts in cooperatives were taxed according to peculiar rules, at rates of up to 25 per cent of the value of the property.[583] Similar taxes were levied again in 1957. All in all, the 500 or so Icelanders who owned the most property and the corporations in which they owned shares were taxed up to 25 per cent of their property's net worth twice in a seven year period. Obviously,

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[578] Hrd. 1951.268, 269-70.

[579] It is noteworthy in this context, that there is neither a contracts clause nor a non-retroactivity clause in the Icelandic constitution. However, the tax exemption case from 1943 was also based on the takings clause, so it was clearly viewed as protecting vested rights, at least to some extent. *See* Hrd. 1943.154.

[580] A lower court had referred to a law's purpose as a redeeming feature in 1944. It upheld an uncompensated taking because "the legislature must be allowed to make the decisions concerning land necessary in order to guarantee that socially useful things like a harbour get built". Hrd. 1944.365, 369. The decision was remanded for procedural reasons. When it reached the Supreme Court again the law was struck down without any reference to the purpose of the taking. That is hardly surprising given that the case was such a quintessential taking. Hrd. 1946.345.

[581] Icelandic Supreme Court decisions are, like their Danish counterparts, extremely brief, often less than a page. The majority of arguments are often omitted and the court states only that which it considers absolutely necessary to reach a conclusion. The very fact that the purpose of the law was mentioned is therefore significant.

[582] These property taxes bore a certain resemblance to the war tax levied in Norway and upheld in Rt. 1952.31. *See supra* note 559 and accompanying text.

[583] The act did not tax shares at their market value but provided instead that for the purpose of the tax, all property belonging to the corporation or cooperative (including machinery, inventory, goodwill, etc.) should, once debts had been subtracted, be divided between the share-holders and viewed as their property. It also provided that corporations and cooperatives would not be taxed but should pay the tax levied on their shareholders because of their shares. The effect of that rule was evident in the case of the plaintiff in Hrd. 1952.434. The plaintiff's company had to pay the part of his tax that was based on his shares in the company. In effect, the company (of which he owned 80 per cent) had to pay a quarter of its property to cover "his" property tax but similarly situated companies owned by a larger or less affluent body of share-holders - where each shareholder was below the property limit - and cooperatives did not.

questions were raised, not only about the line between taxation and takings, but also of equal protection.

In these cases, the courts followed the lead given by the Supreme Court in 1951. In its opinion in the first property tax case, the lower court stated that the 1950 Act

> "radically changed the country's economy in order to stabilize it. The currency was drastically devalued which presumably led to a sharp rise in the value of property. A number of provisions were enacted to prevent inflation due to the devaluation. This purpose of the law must be kept in mind when its constitutionality is reviewed."[584]

Based on this, the law was upheld. The Supreme Court affirmed this, but without explicitly endorsing the rationale of the lower court.[585] In another property tax case, decided the next year, the lower court again discussed the legislature's intent,[586] and this time around, the Supreme Court endorsed the lower court's rationale.[587] Thereby, it stated clearly for the first time that the purpose of the law played an important role in the constitutional analysis.[588] The trend towards looking to the necessity for laws as a redeeming feature when evaluating their constitutionality continued through the 1950s. In a 1958 case concerning the second property tax, the law's purpose was discussed by the Supreme Court, which noted the law's characteristics and its similarity to the 1950 statute in considerable detail. The court seemed more sceptical about the measures' necessity than it had been in the first property tax cases:

> "The first property tax law was in part a response to the economic upheaval caused by the war. The tax was partly based on the devaluation of the crown undertaken by the 1950 statute, but the crown was devalued about 42.6% with that law. The

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[584] Hrd. 1952.434, 443.

[585] The Court noted that "The tax system [set out in the Act] is not discriminatory to such a degree that it violates [the takings clause]." *Ibid.,* p. 435. The Court then discussed the validity of various claims made by the plaintiff, but did not refer to the Act's purpose in this case.

[586] It reiterated that "this purpose of the law must be kept in mind when its constitutionality is reviewed" and added that "it is clear that the property tax will considerably diminish the property of those who have to pay it. In spite of this, I do not believe, when considering the factors already mentioned, that the tax provisions … are, as a whole or in principle, inconsistent with the constitutional provisions that purport to protect private property." In addition to the law's purpose and the circumstances under which it was passed the facts referred to were the following: The tax was based on economic criteria, the statute was enacted in the prescribed way and finally the fact that under the Icelandic constitution the legislature "seems to have a great leeway to decide how to generate income". The lower court also considered the constitutionality of each provision of the Act separately, always taking legislative intent and motives into account. Hrd. 1954.73, 76–7.

[587] The Supreme Court emphasised a fact of the case mentioned in the lower court's opinion and stated that "in accordance with this and otherwise with reference to the rationale of the lower court's decision, it will be affirmed". Hrd. 1954.73, 74.

[588] The court did not explain why it endorsed this rationale at this time when it had not done so before, which suggests that the court did not view this as a substantive change.

> history of the statute now at issue and its economic underpinnings are in many ways different from the 1950 statute's ... "[589]

Icelandic courts had always been resistant to accepting claims that taxation was inconsistent with the takings clause or, more generally, that laws were inconsistent with the constitution, so these cases might not have been decided differently around the turn of the century.[590] The important thing to note is therefore the fact that the rhetoric in court opinions changed in the 1950s, signalling a different emphasis in constitutional interpretation.

There were various statements concerning flexible constitutional interpretation in Icelandic court decisions in the 1950s and 60s.[591] All in all, there were thus quite a few examples of flexible constitutional interpretation where the circumstances surrounding a law's enactment and its purpose played a role in the constitutional analysis – the most notable ones being the property tax cases. This was, as has been described above, exactly the kind of interpretation Nordic scholars argued for based on the New Deal. This rationale had not been evident in older cases.

There were considerable rhetorical changes in Icelandic constitutional decisions in the years after 1950. It is also clear that Icelandic constitutional theory was scarce until the 1960s and that Icelandic lawyers, and judges in particular, were familiar

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[589] Hrd. 1958.753, 755.

[590] While the property taxes might seem unreasonable, and arguably inconsistent with the takings clause, they were certainly no more so than the parish tax which was upheld in 1886, in spite of the fact that the plaintiff was not a member of the church and had no contact with his parish priest at all. *See* Lyrd. II.455.

[591] In the early 1960s, there were various statements on constitutional interpretation in arguments and decisions. In a 1965 tax case, the state argued succinctly against originalism: "If such a statute really violates the principle of the property clause, when 'inalienable property rights' are understood like they were in the constitution's infancy, then time has changed this foundation as already shown by [other laws]. In this century, legal scholars have accepted that the property clause must be understood as permitting the state to limit people's right to acquire and keep property by general regulations and duties, i.e. taxation, given that there is no discrimination." Hrd. 1965.424, 435. The lower court, whose opinion was endorsed by the Supreme Court, stated that "when [the] purpose of the law is taken into consideration as well as the fact that this is a small percentage fee asked of many people" the tax was consistent with the constitution's property clause. *Ibid.,* p. 438. Finally, a version of these same arguments appeared in a 1963 case. A law that authorised the seizing of horses running wild was upheld with a reference to the opinion of the farmers' union. The union had found that the law was not coercive and that it had been written and "enacted for the benefit of Icelandic farmers and … been useful wherever it is respected and followed". The lower court, whose opinion was endorsed by the Supreme Court, commented, "Even though the law's regulations and constraints limit farmer's liberty to treat their livestock at will, I must agree with the [union] that the law purports to benefit farmers. There is no reason to believe those [provisions] are inconsistent with the cited constitutional provisions." Hrd. 1963.319, 323. This rationale seems to be a reference to the necessity and purpose of the law, but the court relied on the opinion thereof expressed by the majority of those being taxed instead of relying on the legislature's evaluation.

with Danish and Norwegian theory. Due to this and the fact that changes in the constitutional jurisprudence predated Icelandic theory on this point, it is probable that the jurisprudential changes were due to the influence of Nordic theory. The strong tradition of looking to Nordic theory and jurisprudence makes this almost a certainty. It is therefore likely that Icelandic jurisprudence was, just like Norwegian jurisprudence, influenced by American theory and American constitutional history.

3.4. LEVELS OF SCRUTINY – CONFLICTING INFLUENCES AND TENDENCIES

As well as changing emphases when interpreting the constitution, Nordic courts were, in the decades following World War II, grappling for the proper level of scrutiny. Their decisions in this area, as well as the American theory on this point that was known in the Nordic countries, will be discussed in this section.

3.4.1. The Conceptual Problem and the American Solution

We have seen that two conflicting ideas gained strength in Nordic constitutional adjudication after World War II. The first is the one discussed in chapter 3.3.: judicial deference to legislative choices and to the constitutional interpretation of the legislature, which generally translates into a low level of scrutiny when legislation's constitutionality is assessed. This is clear from mid-20th century constitutional cases, both in Norway and in Iceland.[592] We have also seen where this thought came from: the jurisprudential changes which allowed people to think of judges as having a choice instead of merely being '*la bouche de la loi*' and from there, the arguments of American court-critics that invalidation of legislation was undemocratic since a few people could prevent the majority of elected representatives from implementing their will.[593] This is why Schjelderup focused on "the last 30 or 40 years battle between democracy and property rights".

In its 1920s and 1930s form, this line of thought, which proved attractive to many people at the time and has continued to do so, had distinctly unattractive aspects. The flip side of leaving the job of interpreting the constitution primarily to the legislature and of adapting the constitution's commands to changing times is a corresponding decrease in the constitutional protection of the rights of the individual and minority groups. When Schjelderup spoke of the battle of democracy and property rights, skewing the game towards "democracy" meant decreasing the protection of property rights. In some of its more extreme expressions, this idea went quite far in supporting unchecked majority rule.[594]

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[592] *See e.g.,* Rt. 1952.1089 and Hrd. 1952.434.
[593] *See e.g.,* White, *supra* note 398, pp. 198–201.
[594] *See e.g.,* Sachs, *supra* note 433, who argued that law's constitutionality depended on an assessment of its societal effects and the desirability of constitutional jurisprudence going in a certain direction.

On the other hand, World War II and the events leading up it to led, as evidenced by the writings of Berg and Castberg after the war, to an increased emphasis on human rights and a fear of unchecked majority rule and its effect on minorities in particular. This development was not specifically Nordic or Nordic and American – the codification of human rights norms and the emphasis on securing those for all gained universal momentum after 1945.[595]

So the key ideas in constitutional adjudication in the wake of World War II were to some extent in conflict. On one hand the courts were to be very deferential to the legislature and let it adapt the constitution to changing times; on the other hand, the rights of individuals were to be sacred. Well before World War II, these conflicting tendencies were synthesised in American law; in the 'preferred position' cases concerning the First Amendment[596] and then in the famous footnote four in *Carolene Products,*[597] decided in 1938. In that case, Justice Stone wrote for the Court that

> "the existence of facts supporting the legislative judgment is to be presumed, for regulatory legislation affecting ordinary commercial transactions is not to be pronounced unconstitutional unless in the light of the facts made known or generally assumed it is of such a character as to preclude the assumption that it rests upon some rational basis within the knowledge and experience of the legislators."[598]

To this declaration of a very low level of scrutiny, Justice Stone attached a footnote. It stated that "[t]here may be narrower scope for operation of the presumption of constitutionality when legislation appears on its face to be within a specific prohibition of the Constitution" and suggested that "legislation which restricts those political processes which can ordinarily be expected to bring about repeal of undesirable legislation" might be subject to stricter scrutiny, as might statutes directed at "discrete and insular minorities".[599]

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[595] The U.N. Charter contains provisions on human rights, the Universal Declaration of Human Rights was adopted by the U.N. General Assembly in 1948, and the International Covenants on Civil and Political Rights and Economic, Social and Cultural Rights were adopted by the General Assembly and opened for signature in 1966. Regional efforts to secure human rights were implemented at the same time: The American Declaration of the Rights and Duties of Man was proclaimed in 1948, the Charter of the Organization of American States opened for signature in 1948 and entered into force in 1951. The Council of Europe started convening in 1949 and the European Convention of Human Rights was signed in 1950 and entered into force in 1953. The American Convention of Human rights opened for signature in 1969 and entered into force in 1978.

[596] *See* G.E. White, 'The First Amendment Comes of Age: The Emergence of Free Speech in Twentieth-century America', 95 Mich. L. Rev. (1996) p. 299 and White, *supra* note 398, pp. 128–163.

[597] *United States* v. *Carolene Products Co.*, 304 U.S. 144, 152–3 (1938).

[598] *Ibid.,* p. 152.

[599] In full, the footnote runs as follows: "There may be narrower scope for operation of the presumption of constitutionality when legislation appears on its face to be within a specific prohibition of the Constitution, such as those of the first ten Amendments, which are deemed

Partly based on this footnote and partly on earlier decisions,[600] judicial review in the post-war years has been bifurcated,[601] the idea being that courts should apply only a "rational basis" review in most cases but a heightened level of scrutiny in cases in which a fundamental, non-economic right is at stake and when the political process is likely to be insufficient to protect the minority in question.[602] So as far as American law was concerned, the bifurcation of judicial review essentially synthesised these two conflicting tendencies. In what follows, it will be examined how this idea fared in Nordic constitutional law in this period.

3.4.2. Levels of Scrutiny in Nordic Theory

It was discussed in chapter 3.2. that Nordic legal writers in the 1930s and 1940s focused on the need for judicial deference to the legislature. Schjelderup, for instance, summed up Holmes' view that "the choice [of goals and means] is in the first instance the legislature's. When the courts review that choice it is their duty to be extremely cautious",[603] and reprinted a great part of Hughes' opinion in *West Coast Hotel*, concerning the idea that "[e]ven if the wisdom of the policy be regarded as debatable and its effects uncertain, still the legislature is entitled to its judgment".[604] Indeed, one of his main points was that the courts must give the legislature leeway to determine the proper response in various situations. Most Nordic writers in the late 1930s and 1940s shared this view. Based on the early 1920s cases, the Danish courts were generally believed to adhere to the so-called "clear-case theory".[605] In *Constitution and Customary Law*, Andersen distinguished between the American model of judicial review and what he called, inaccurately, the Danish-Norwegian model, based on the level of scrutiny applied. By contrast,

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equally specific when held to be embraced within the Fourteenth … It is unnecessary to consider now whether legislation which restricts those political processes which can ordinarily be expected to bring about repeal of undesirable legislation, is to be subjected to more exacting judicial scrutiny under the general prohibitions of the Fourteenth Amendment than are most other types of legislation. On restrictions upon the right to vote, see … on restraints upon the dissemination of information, see … ; on interferences with political organisations, see … as to prohibition of peaceable assembly, see … Nor need we enquire whether similar considerations enter into the review of statutes directed at particular religious … or national … or racial minorities … whether prejudice against discrete and insular minorities may be a special condition, which tends seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities, and which may call for a correspondingly more searching judicial inquiry." *Ibid.,* pp. 152–153 (citations omitted).

[600] These decisions are described in more detail *infra* in chapter 4.3.

[601] *See* White, *supra* note 596. This term will be used henceforth.

[602] A coherent theory of judicial review has been built on bifurcated review – emphasising the political process or reinforcement of representation – and it aims to solve, at least to some extent, the counter-majoritarian difficulty. *See* J. H. Ely, *Democracy and Distrust: A Theory of Judicial Review* (Harvard University Press, Cambridge, 1980).

[603] Schjelderup, *supra* note 424, p. 138.

[604] *Ibid.,* citing *West Coast Hotel* v. *Parrish*, 300 U.S. 379, 399 (1937).

[605] Jóhannesson, *supra* note 5.

Jóhannesson was unwilling to accept a low level of scrutiny as the norm and he explicitly rejected the so-called "clear case theory".[606]

In spite of the emphasis that most theory placed on a low level of scrutiny, the bifurcation of judicial review in American law was mentioned in Nordic theory already in the 1940s. It was hinted at by Alf Ross in his critique of *Constitution and Customary Law* in 1947,[607] and in Torstein Eckhoff's *The Legal System and Legal Theory in the U.S.* which was published in 1953. Eckhoff wrote:

> "The due process clause has now little practical value as a limitation on the states' social or economic legislation. Conversely, the thirteenth, fourteenth and fifteenth Amendments have become increasingly important for protecting non-economic interests ('civil rights'). In the last few years, many laws which purported to keep blacks or other minority groups from voting or exercising other political rights have been struck … Additionally, the federal courts have in many cases struck state laws they believe limited the freedom of speech or the right to exercise one's religion or to take part in political activity. The Supreme Court's change of mind in these cases started in the mid 1920s when it decided – in contrast to its earlier decisions – that the freedom of speech was protected by the fourteenth Amendment."[608]

So while the emphasis in the Norwegian and Danish theory was on a low level of scrutiny and Icelandic theory rejected having a very low level of scrutiny as the norm, the American bifurcation of judicial review was known in Nordic theory. Let us now turn to the case law.

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[606] As an explanation of this theory, which is referred to in the Danish text as "clear case theory", Jóhannesson cited a Danish Supreme Court opinion from 1921 where a law was upheld because the law's unconstitutionality had not been shown "with the certainty required for the courts to be able to set aside the provisions of a law adopted in pursuance to the constitution" Jóhannesson, *supra* note 5, p. 15, citing UfR. 1921.644, 646. He added: "If the courts only strike down laws whose unconstitutionality is obvious, we run a regrettable risk of rendering judicial review meaningless in practice. Therefore, it is doubtful that we need to distinguish between obvious inconsistencies and other inconsistencies between the constitution and statutes. Where there is a discrepancy between the constitution and other laws, those other laws shall yield." *Ibid.,* p. 16. So while citing Danish scholars writing about Norwegian and American theory, as well as Norwegian writers directly, and while acknowledging the influence of Danish and Norwegian theory in Icelandic law, Jóhannesson disagreed with Danish jurisprudence. His discussion of the "clear case theory" may offer some suggestions as to why Danish and Icelandic constitutional law went their separate ways on judicial review. It may also suggest that Icelandic lawyers, particularly those following in Jóhannesson's footsteps, looked more to Norwegian theory than would be expected given the country's historical ties to Denmark.

[607] *See supra* note 522 and accompanying text.

[608] T. Eckhoff, *Rettsvesen og rettsvitenskap i U.S.A. [The Legal System and Legal Theory in the U.S.A]* (Akademisk Forlag, Oslo, 1953) p. 173

3.4.3. Norwegian Case Law

It was not until 1952 that the Norwegian Supreme Court took a clear stance on which level of scrutiny to use. In a case concerning the constitutionality of price-equalising fees levied *inter alia* on whalers, the majority of the Court took a very deferential stance towards the legislature.[609] In spite of the fact that the parties disagreed whether fees like the ones at issue could ever be a price-regulating mechanism, the majority opinion was based on their being price-regulating measures. The majority pointed out that "the attorney for the State has emphasised – and I must presume this was also the view of the legislature – that the price authorities need to be able to collect fees instead of, or in addition to, freezing prices".[610] The Court then stated that it would "not pursue this further, since I believe in any case that the Supreme Court has no reason to set aside the legislature's determination of the necessity of using this measure to control prices".[611] The Court also deferred to the legislature concerning the necessity of delegating legislative powers to administrative bodies.[612] In that context, the court noted that although delegation laws do concern the individual, they mainly regulate the division of labour between the branches of government. Therefore the courts have better reason to be careful in substituting their evaluation for the legislature's in these cases than when laws may be inconsistent with the provisions of the Constitution that are more directly concerned with protecting the individual "such as arts. 97 and 105".[613] So while there is a hint of different levels of scrutiny in this opinion, the differentiation was not between economic and non-economic rights but between those cases in which constitutional provisions oriented towards the individual are invoked and other constitutional cases.

Another delegation case was decided in 1956.[614] Like the 1952 case, the decision was characterised by deference to the legislature. Even though the delegation law at issue was broader than the law at issue in the 1952 case, the Court showed much less hesitation about upholding it. Once again, the Court emphasised that Parliament had made the assessment concerning the delegation's necessity and justifiability and that there was no reason to set that assessment aside. This case therefore supported and supplemented the 1952 opinion concerning judicial

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[609] Rt. 1952.1089. *See also* the discussion of this case in chapter 3.3.5. Changes in Norwegian Case Law after World War II, s*upra.* In this case, the Association of Norwegian Whalers claimed that a special fee on exported whale oil was unconstitutional. The fee was determined by the price authorities and went into a general "price-regulating" fund managed by the price authorities instead of being ear-marked for the whaling industry. The delegation aspect of the case is discussed in more detail in chapter 3.6., *infra*, *see* note 690 and accompanying text.
[610] Rt. 1952.1089, 1096
[611] *Ibid.,* pp. 1096–1097.
[612] *See infra* note 700 and accompanying text.
[613] Rt. 1952.1089, 1098.
[614] Rt. 1956.952. This case is discussed in more detail in chapter 3.6., *see infra* note 697 and accompanying text.

deference and as such it helped to make a low level of scrutiny the norm in economic rights cases in Norway.[615]

In the 1959 pharmacy case, by contrast, there was no question of judicial deference. It is one of the key characteristics of that decision, that the reasoning was the court's alone. The court did not refer to the legislature's view on the necessity of providing a pension fund or the legislature's view that this was a necessary part of keeping the working environment in the pharmacies orderly – it stated these reasons itself. In other words, there was no question of deference to legislative judgment – the court independently assessed the necessity of the legislative action in question.[616] Just like the delegation cases, this case concerned economic rights.

In sum, no level of scrutiny was consistently applied in Norwegian constitutional cases in this period. The level of scrutiny was often relatively low, but not always. It was not until decades later, in 1976, that the courts followed up on the idea of different levels of scrutiny hinted at in the 1950s delegation cases, and bifurcated review was introduced into Norwegian jurisprudence.[617]

3.4.4. Icelandic Case Law

One of the main changes in Icelandic constitutional jurisprudence during this period was an emerging differentiation between the role of the legislative and judicial powers, which is related to a search for an appropriate level of scrutiny. Prior to the first property tax cases, the different roles of the legislature and the judiciary had been acknowledged only when the constitutional challenge centred on whether laws were for the common good.[618] In other cases, court opinions did not differentiate between the opinion of the legislature and that of the courts.[619]

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[615] Rt. 1956.952. It is also noteworthy that the court reiterates that courts should be more cautious when reviewing legislation that does not directly affect the citizens' rights. There is thus a hint of different levels of scrutiny. The Court referred to the majority opinion in the 1952 case on the courts' duty to be more cautious in delegation cases than when the bill of rights is directly implicated and stated "I agree with this point of view and want to add: The delegation at issue here was determined by Parliament after thorough consideration of its constitutionality. It is based on the view, *inter alia*, that price regulation as prescribed by Parliament cannot be implemented effectively unless the administration has such a broad mandate. I want to point out in this context that what is at issue here is a temporary law, a crisis law … Parliament has thus assessed whether it was necessary and justifiable to delegate so much power to the administration and I do not believe the courts have a basis to set this evaluation aside." Rt. 1956.952, 960–61. As mentioned in connection with the 1952 case, Rognlien had described the increased tolerance of American courts towards delegation in "fields where the citizen's rights are relatively untouched".

[616] *See also* note 562, *supra* and accompanying text.

[617] *See* the discussion in part 4, *infra*.

[618] *See* note 383, *supra*.

[619] *See e.g.,* Hrd. 1943.154, in which a law revoking a tax exemption was invalidated on the basis of the constitution's property clause.

In the 1952 property tax case,[620] the Supreme Court unanimously stated that it did "not find the tax system set out in [the 1950 statute] so discriminatory as to be inconsistent with [the takings clause]".[621] By upholding the law even though it found it discriminatory, the Supreme Court suggested that it was using a low standard of review, which was a complete novelty.

In later cases the Supreme Court continued to use a low level of scrutiny. When speaking of the different treatment of corporations and cooperatives in 1953, it said that the rules embodied in the statute did "indeed entail a certain inconsistency in the taxation of companies but we do not find the discrimination to be such that it violates the Constitution's [takings clause], since the legislature did not target certain corporations in advance in order to make their lot worse than others".[622] This suggests an even more deferential stance than the first property tax case, since it seems to hint that only intentional discrimination would be unconstitutional. This application of the equality tenet believed to be inherent in the takings clause is similar to American equal protection doctrine. The U.S. Supreme Court held in *Washington* v. *Davis*[623] that discrimination needed to be intentional for a discrimination claim under the equal protection clause to be successful.[624] In the cases concerning the later property tax, the majority stated that one provision was "intended to discriminate between tax-payers. It has not been established that this was not based on an objective legislative evaluation and it is impossible to view the

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[620] Hrd. 1952.434, *see* note 583, *supra* and the accompanying text. Since there was no equal protection clause in the constitution at the time, the discrimination claim was tied to the property clause; the plaintiff argued that in order to be constitutional, taxes must place a general and equal burden on all who are financially similarly situated and that this was not the case with the property taxes.

[621] Hrd 1952.434, 435. Concerning individual provisions of the law, the court mostly did not address the constitutional questions raised. The only other mention of these arguments concerned the value of real estate. The Court found that the provisions were not "discriminatory to the extent that they should be invalidated by the courts". *Ibid.,* p. 436. A minority of two justices concurred with the majority on the main constitutional question, i.e. refused to strike the law as a whole, but based their opinion on the view that the rules governing the taxation of shares in stock were unconstitutional because shares could be taxed at a value much higher than their real value. *Ibid.,* p. 439.

[622] Hrd. 1953.142, 143–4. This was reiterated in Hrd. 1954.93.

[623] 426 U.S. 229 (1976).

[624] In *Washington* v. *Davis,* the court made it clear that intent to discriminate was necessary for a claim of racial discrimination under the equal protection clause to be successful. White wrote for the Court: "Nevertheless, we have not held that a law, neutral on its face and serving ends otherwise within the power of government to pursue, is invalid under the Equal Protection Clause simply because it may affect a greater proportion of one race than of another. Disproportionate impact is not irrelevant, but it is not the sole touchstone of an invidious racial discrimination forbidden by the Constitution. Standing alone, it does not trigger the rule, *McLaughlin* v. *Florida*, 379 U.S. 184 (1964), that racial classifications are to be subjected to the strictest scrutiny and are justifiable only by the weightiest of considerations." *Ibid.,* p. 242.

law as invalid because of this."[625] This provision was thus upheld because it was apparently based on an objective legislative evaluation. The deference to the legislature's decision is expressly stated, which it was not in the first property tax cases.[626]

Starting in the 1950s, the Icelandic courts were thus aware that their role when reviewing the constitutionality of legislation might not coincide with that of the legislature, but there was no hint of different levels of scrutiny in the jurisprudence.

3.4.5. Summary

The way in which American courts exercised judicial review in the post-war years was, at least to some extent, known in the Nordic countries, but that model was not followed. It has been discussed in the previous sections that partly because of American influence, the Nordic courts showed great deference to the legislature when reviewing legislation's constitutionality. By and large, the developments and rhetoric concerning human rights did therefore not affect the level of scrutiny in the Nordic countries in the 1940s and 1950s,[627] and the tension between the ideas of

[625] Hrd. 1958.753, 758. In this case, the state argued that "[i]n modern society, it is one of the state's duties to watch over the economy. Due to this the legislature may take a variety of measures that transfer capital between citizens. This has always been viewed as consistent with [the property clause] and the state has always been viewed as within its rights, indeed bound to, take some of the unreasonable benefit that some citizens gain by such actions."*Ibid.,* p. 765. The state argued that the property tax of 1950 could not affect the new tax's constitutionality and tried to refute the plaintiff's argument that the tax would not decrease inflation. Concerning the argument that the tax was unconstitutional because it would not lower inflation, the lower court remarked, "[i]t cannot be viewed as determinative in this context whether the goal that the legislature believes it is striving for, can be reached." *Ibid.,* pp. 767–768.

[626] The Supreme Court's conclusion was that even when considered together, the discriminatory provisions and the fact that this was the second such tax in a short period "there is not quite enough reason to find the tax system instigated by the law inconsistent with the constitution's [takings clause]". *Ibid.,* p. 760. However, the majority of the Supreme Court came to the same conclusion as the minority in 1952 concerning the taxation of shares in stock because "the rules … are inconsistent with the constitution's art. 67". A second provision of the law was struck in a later case. It provided that any advancement paid out in 1956 should be counted as the property of the legator. The plaintiff had handed his house over to his infant son in November 1956 as advancement. The lower court, whose opinion was endorsed by the Supreme Court, found that viewing the father as the property-owner for the purpose of the tax "was impermissible under the principle of [the property clause]". This is consistent with the deferential tone of the cases; choosing to tax affluent groups quite steeply is a legislative prerogative but when the provisions of the law led to the taxing of people who did not own enough property to belong to that group, the courts stepped in.

[627] It has been mentioned before that with the exception of a 1952 case concerning the responsibility of collaborators after WWII, no law was invalidated in Norway until 1976. In Denmark, no law was invalidated until 1971 and then not again until 1999. In Iceland, there

inviolable civil or human rights and the idea of judicial deference to the legislature, which was resolved in American law by bifurcating judicial review, was left unresolved.

3.5. ECONOMIC REGULATION AND THE DECLINE OF THE DOCTRINE OF VESTED RIGHTS

3.5.1. Norwegian Law

Norwegian vested rights jurisprudence before World War II was discussed in detail in part 2. Combined with art. 105 – the takings clause – the non-retroactivity clause in art. 97 was the key constitutional limitation on the Norwegian legislature. Dozens of cases were decided on vested rights grounds in the period from 1880 to 1940, and the doctrine of vested rights was well-settled, at least until around 1920. Supreme Court Justices started explicitly questioning it only in 1931.[628] The picture that emerged in the post-war years was substantially different. Apart from a 1952 case concerning back pay to civil servants who had been suspended for suspected collaboration with German authorities during the occupation – *i.e.*, provisions of a penal character – no law was found inconsistent with art. 97 in the 30 year period from 1945–1975.[629] We have seen in the previous sections how some older cases,

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were occasional cases invalidating individual provisions, *see e.g.,* Hrd. 1958.753 (where a provision of the second property tax law was invalidated) and Hrd. 1964.573.

[628] *See* note 264, *supra.*

[629] In Rt. 1952.932, the majority of the Court came to the conclusion that it would be inconsistent with the Constitution's art. 97 to apply a decree from the administration in London to the appellants. The decree provided that civil servants suspended because of their membership in Nasjonal Samling [essentially the Nazi party of occupied Norway during WWII] or other treacherous behaviour should not get paid while their cases were being adjudicated. The Court believed that the general rule was that suspended civil servants should get full pay until a final decision was made concerning their employment. The majority therefore found it inconsistent with art. 97 to apply the decree to the appellants who had resigned from N.S. before the decree was issued. A minority of four Justices believed there was no general rule that suspended civil servants should get paid. Four months later, in Rt. 1953.24, a majority of nine subscribed to that view in a similar case and thus did not reach the question of art. 97's effects.

A considerable number of cases concerning art. 97 were decided from 1945 to 1959. Apart from Rt. 1952.932, all claims that laws were inconsistent with art. 97 were unsuccessful in the Supreme Court. In 1945, the Supreme Court remanded a case in which the lower Court had applied a decree criminalising membership in Nasjonal Samling to circumstances which took place before its enactment. This was a pure issue of the principle of *nullum crimen sine lege* and did not concern property or vested rights. Many similar cases arose, but in all other cases such claims were unsuccessful. Rt. 1945.263, Rt. 1955.525 and Rt. 1954.232 also concerned possibly retroactive laws and the war.

The 1955 case upheld a 1942 law stating that the executive could limit the reimbursement claims of those who had, even in good faith, bought property which had been seized by the occupying forces or the Nasjonal Samling government. The Court noted that it could not

which were based on the doctrine of vested rights, were overruled in the decades after World War II. Such was the case both in the allodial property case from 1948 and the pharmacy cases from 1959.[630] Just as in the U.S., the doctrine of vested rights was never formally abandoned. The focus on the legislature's ability to react to various crises and on the deference due to legislative choices made a strict enforcement of art. 97 and a strong protection of vested rights seem less than palatable and vested rights claims based on art. 97 ceased being successful.

This did not happen overnight; it has already been described in part 2 how judges and scholars disagreed, at least from the late 1910s, on the proper scope of the doctrine of vested rights, and how many of those criticising the Norwegian Supreme Court's jurisprudence used arguments from American law. In 1922, the Norwegian Supreme Court overruled earlier liquor cases, without doubting or limiting the doctrine of vested rights.[631] In 1931, by contrast, Justice Berg, who later became Chief Justice, expressed doubt about the very concept of vested rights – setting forth the idea that it was up to the legislature to decide whether people's reliance on current laws should be taken into account.[632]

Later in the 1930s, Justice Schjelderup was one of the Norwegian writers who were critical of the doctrine of vested rights, arguing that it impeded the ability of the legislature to enact economic regulations. In his article on American law from 1938, he gave an overview of the U.S. Supreme Court's treatment of economic

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agree that the buyer had been "deprived of any vested right in such a way that he can claim compensation under the Constitution's art. 105 or 97". *Ibid.,* p. 528.
In the 1954 case, the Court found it consistent with art. 97 to nullify tax exemptions granted by laws enacted by the occupying power – the argument being that the occupying regime had no power to make laws which should outlast the hostilities. A somewhat similar case had been decided in 1949, when a claim by a bankruptcy estate, that certain taxation was unconstitutional, was dismissed. The tax was levied after the bankruptcy proceedings opened. Neither that fact, nor the fact that the income being taxed came from illegal activity and had therefore been seized was sufficient for the law to be invalidated. Rt. 1949.743.
Also in 1949, the Supreme Court upheld a law permitting a milk distributing company to change into a cooperative. This vastly increased the gains and the impact of milk producers within the company at the expense of other shareholders. Two shareholders argued *inter alia* that this was inconsistent with art. 97. The opinion endorsed by the majority stated that this argument was unacceptable and "pointed out that from its very inception the corporation has, in spite of all changes, always had close ties to the producers and that, when the changes occurred, there was a general need in the Norwegian milk industry to find a solution like the one permitted in the Act". Rt. 1949.309, 317.

[630] *See* the discussion of Rt. 1948.1147 and Rt. 1959.33 *supra,* in chapter 3.3.5. Changes in Norwegian Case Law after World War II.

[631] Rt. 1922.641

[632] *See* note 264, *supra* and accompanying text. The dissenters in Rt. 1931.865 wrote: "[A]n old rule like the [one amended] can lead people to count on it continuing to be in force, but they must do so at their own risk when the provision is of the kind I just described, namely a provision that the legislature can alter at any time. It is the legislature's alone to decide to which extent this circumstance [people putting their trust in the provision] shall be taken into account." Rt. 1931.865, 868.

regulations. He discussed Justice Field's dissent in *Munn* v. *Illinois*,[633] and its impact on later decisions briefly, noting that during Fuller's tenure as Chief Justice, "the strong individualists – earlier represented by Justice Field – became a majority on the court".[634] He illustrated their opinions by citing *Allgeyer* v. *Louisiana*:[635]

> "The liberty mentioned in that amendment means not only the right of the citizen to be free from the mere physical restraint of his person, as by incarceration, but the term is deemed to embrace the right of the citizen to be free in the enjoyment of all his faculties; to be free to use them in all lawful ways; to live and work where he will; to earn his livelihood by any lawful calling; to pursue any livelihood or avocation, and for that purpose to enter into all contracts which may be proper, necessary, and essential to his carrying out to a successful conclusion the purposes above mentioned."[636]

Schjelderup commented disapprovingly that this showed that the "new majority" had forgotten what it had stated as late as 1895, namely that "in a civilized society there can be no absolute freedom to do what you want or contract as you desire".[637] He also noted that "at the end of the 19th century, economic liberalism had become truly powerful" pointing especially to the U.S. Supreme Court's decisions in *E.C. Knight*,[638] *Pollock* v. *Farmer's Loan and Trust*[639] and *In re Debs.*[640]

Schjelderup then noted that he would:

> "not try to give an overview of the last 30 or 40 years' battle of democracy against property rights. The material is too voluminous and many individual fields too complex. My goal is also more specific: to paint a picture of democratic ideas in American constitutional law and of their victories and defeats in the battle to realize the goals of the constitution. I believe this to be especially interesting here in Norway, where we live under a constitution closely related to the American one; because this battle has, on a smaller scale, its equivalent here and because it is

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[633] *Munn* v. *Illinois*, 94 U.S. 113 (1877). *See* the discussion of Schjelderup's article in note 471, *supra* and accompanying text.

[634] Schjelderup, *supra* note 424, p. 36.

[635] *Allgeyer* v. *Louisiana*, 165 U.S. 578 (1897). In this case, a law prohibiting insuring property with companies not admitted to doing business in the state was invalidated.

[636] *Ibid.,* p. 589.

[637] Schjelderup, *supra* note 424, p. 36.

[638] *U.S.* v. *E.C. Knight Co.*, 156 U.S. 1 (1895). In this commerce clause case, the Supreme Court found that the formation of a sugar-manufacturing monopoly could not be suppressed by the Sherman Act since "commerce succeeds to manufacture and is not a part of it". *Ibid.,* p. 12.

[639] *Pollock* v. *Farmers' Loan and Trust*, 157 U.S. 429 (1895) (income tax invalidated).

[640] *In Re* Debs, 158 U.S. 564 (1895). The federal government was believed to be within its competence when it suppressed the Pullman strike, because "to it is committed power over interstate commerce and the transmission of the mail … the powers thus conferred upon the national government are not dormant, but have been assumed and put into practical exercise by the legislation of congress … in the exercise of those powers it is competent for the nation to remove all obstructions upon highways, natural or artificial, to the passage of interstate commerce or the carrying of the mail." *Ibid.,* p. 599.

> never-ending. Even though it has until now – here as in the U.S. – been a matter of protecting the general public against the disadvantages of our economic system, the time can come when an authoritarian bureaucracy threatens to deprive the citizens of their freedom."[641]

Schjelderup therefore focused on "a field where opinions have been especially divided", cases concerning hours and wages regulations, discussing *Lochner*,[642] *Adair*,[643] *Coppage* v. *Kansas*[644] and *Muller* v. *Oregon*.[645] Because of this focus, the cases concerning New Deal legislation were described as epochal. He described the spring session of 1937 – the year *West Coast Hotel* v. *Parrish*,[646] *Steward Machine Co.* v. *Davis*,[647] which upheld the unemployment provisions of the Social Security Act, and *Helvering* v. *Davis*,[648] which upheld the Social Security Act's old-age pension provisions, were decided – as being

> "in itself the conclusion of the first 150 years of the evolution of American democracy under the Constitution – from a simple pioneer society to a complicated modern industrial society. After 40 years of vacillation, the Supreme Court stated once and for all that American democracy – Congress as well as the state legislatures – should have reasonable room to avoid or limit extensive and dangerous crises, facilitate solutions of conflicts between interest groups and above all, to move towards social justice. This happened in the way that the court said clearly it would no longer be useful for the individual to invoke the constitution's freedoms when any limits that are not immediately necessary are placed on his

[641] Schjelderup, *supra* note 424, p. 122. Before addressing the 20th century cases, however, Schjelderup introduced "the man who has, above all others, left his mark on modern American understanding of the law" – Justice Holmes – by translating his dissent in *Abrams* v. *U.S.*, 250 U.S. 616 (1919). He reprinted a great part of the dissent in translation, including its celebrated statement that "when men have realised that time has upset many fighting faiths, they may come to believe even more than they believe the very foundations of their own conduct that the ultimate good desired is better reached by free trade in ideas – that the best test of truth is the power of the thought to get itself accepted in the competition of the market, and that truth is the only ground upon which their wishes safely can be carried out. That at any rate is the theory of our Constitution." Schjelderup, *supra* note 424, pp. 38–39, citing *Abrams*, 250 U.S. p. 630. On this dissent and its "canonical status", *see* White, *supra* note 398, pp. 132–138.

[642] *Lochner* v. *N.Y.*, 198 U.S. 45 (1905). A maximum hour's law for bakers in New York was struck down as inconsistent with the constitutionally protected liberty of contract.

[643] *U.S.* v. *Adair*, 208 U.S. 161 (1908) invalidated a federal law prohibiting yellow-dog contracts.

[644] *Coppage* v. *Kansas*, 236 U.S. 1 (1915) invalidated a Kansas statute prohibiting yellow-dog contracts.

[645] *Muller* v. *Oregon*, 208 U.S. 412 (1908) upheld a maximum-hours law for women working in laundries. In this context, Schjelderup discussed the influence of Justice Brandeis, citing many of his speeches, *inter alia* on democracy and his opinions in *Olmstead* v. *U.S.,* 277 U.S. 438 (1928), and *Whitney* v. *California*, 274 U.S. 357 (1927).

[646] 300 U.S. 379 (1937).

[647] 301 U.S. 548 (1937).

[648] 301 U.S. 619 (1937).

economic rights."[649]

It was described in chapter 3.3. how many other Norwegian legal writers in the late 1930s relied on American law and emphasised the need for flexible constitutional interpretation – especially of art. 97 – which had been the foundation of the vested rights doctrine, and the need for legislatures to be able to address various economic crises. Chapter 2 also discussed how many of the early critics of the vested rights doctrine built on American arguments. The changes visible in the jurisprudence when Norwegian decisions from around 1900 and then after 1950 are compared did not happen abruptly; instead, the changes occurring after the war had their roots in developing views and ideas through the 1920s and 1930s.

It is likely that American influence was fairly constant throughout this period and that developments in theory and jurisprudence in the U.S. were followed by Norwegian lawyers. The influence of the American jurisprudence and theory of the mid-1930s must be seen in that context, as a part of a continuing awareness of American constitutional jurisprudence and theory. The influx of discussion of American law in the late 1930s was therefore not an isolated phenomenon which caused, in and of itself, the changes in Norwegian jurisprudence around and right after World War II. The changes in Norwegian jurisprudence, like the changes in American jurisprudence, were a culmination of developments that took place over decades.

The point, therefore, is not that there was a direct causal connection between American law in the mid-1930s and the changes in Nordic jurisprudence around 1950. It is instead that, just as the vested rights doctrine was to a great extent adapted from 19th century American law, the constitutional law doctrines that displaced it – mainly those concerning the necessity of leaving the legislature great leeway to enact necessary economic regulations and a flexible non-originalist interpretation of the constitutions – were rationalised in part by reference to American law. American law was in the background during the rise, and the decline, of the doctrine of vested rights in Norwegian law.

3.5.2. Icelandic Law

It was noted in part 2, that there was never a set vested rights jurisprudence in Icelandic law similar to Norwegian vested rights jurisprudence. Consequently, the developments after World War II are less clear. In the 1950s, Icelandic jurisprudence seemed to be moving in the same direction as Norwegian law. The 1951 case in which the Supreme Court upheld a law invalidating the linking of debts to foreign currency was discussed in chapter 3.2., but in that case the Icelandic Supreme Court refused a classical vested rights claim.[650]

In 1964, however, another prototypical vested rights case was decided and with regard to the rhetorical changes evident in the property tax cases discussed in

[649] Schjelderup, *supra* note 424, p. 167.
[650] *See* notes 573–579 *supra*, and accompanying text.

chapter 3.2., *supra* its outcome was surprising. An Act prohibited mink-farming and a farmer requested compensation for the farm-houses which could not be used for any other purposes.[651] The Supreme Court simply stated that "the appellee built his houses and acquired machines in the reasonable belief that he would be allowed to raise minks. The prohibition of mink-farming ... made the buildings and machines useless. Therefore, his claim for damages should be granted."[652] This – *Mugler* with a different outcome – is an unusual outcome, because even though the necessity of prohibiting mink-farming was accepted, the state had to pay compensation to those who had property which was only fit for use in that industry.[653] Since there has been no evident follow-up to that case, it is probable that it was an exception and it will not be discussed further.[654]

The key developments in Icelandic law, therefore, were changing views of constitutional interpretation and the adoption of a relatively low level of scrutiny. Due to those developments, the doctrine of vested rights faded into the background, just like it did in Norway. The only exception was the 1964 mink farming case. The dearth of Icelandic constitutional theory in the decades after 1944 and the probable reliance on Nordic theory, which in turn relied on American theory, were described earlier. This makes it likely that American constitutional law and developments were in the background during the developments in Icelandic constitutional theory which displaced the theory of vested rights.

3.6. DELEGATION OF LEGISLATIVE POWER

The previous sections dealt with the influence of American law in the fields of the doctrine of vested rights, constitutional interpretation and levels of scrutiny. In this section, Nordic discussion of American cases concerning the delegation of legislative power and its influence in Norwegian law will be analysed in more detail. This discussion played a role in a Nordic debate over proper administrative procedure, means of controlling administrative bodies, and delegation of legislative power to administrative agencies, which took place from 1947–1951.[655]

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[651] Hrd. 1964.573. The lower court stated that "when interpreting a provision like the constitution's [property clause] it is imperative to rely on contemporary ideas concerning that field of the law, as they appear in laws, cases and administrative practice". *Ibid.,* p. 581.

[652] Hrd. 1964.573, 573–4.

[653] *See Mugler,* 123 U.S. 623 (1887), discussed *supra* and the discussion of the interplay between the police power and vested rights in part 2. The outcome reached by the Icelandic Supreme Court in this case bears some resemblance to early 20th century Norwegian cases.

[654] In Hrd. 1993.1217, the Supreme Court accepted that the conditions under which a licensee could drive a taxi could be changed. In this case, the changes were such that he lost his licence. The Supreme Court accepted that the licensee had a property right in the licence but that it could be limited for the purpose of ensuring traffic safety without any compensation being paid.

[655] The main players were Norwegian constitutional law professor Johs. Andenæs, Swedish professor Nils Herlitz and Danish professor Poul Meyer. *See* B. G. Tafjord, *Forvaltning og rettssikkerhet - Forvaltningskomiteens etablering, arbeid og innstilling 1947–1958*,

It has already been described that Nordic writers were well-versed in the cases in which the constitutionality of New Deal legislation was considered. The *Schechter* case,[656] in particular, commanded considerable attention in Norway. It was first described by professor Castberg in 1937. In a note on Roosevelt's court-packing plan in *TfR*,[657] he wrote without elaborating further that

> "in the Schechter case, decided in May of 1935, the Supreme Court held the law of June 16, 1933, the National Industrial Recovery Act itself, to be unconstitutional. The reasons were, first, that according to the Court the law went too far in delegating regulatory power over the economy to the president. The second reason given by the Supreme Court for striking this law was Congress' incursion into the states' sphere."[658]

In a University sponsored radio lecture in 1938, Castberg discussed delegation of legislative power in the U.S. and *Schechter* in more detail:

> "With the legislation passed under the current president, Roosevelt, legislative power has to a considerable degree been delegated to the president. Indeed, this has happened to a greater degree than the U.S. Supreme Court believes is consistent with the constitution. In an exceptionally important case, decided on May 27, 1935, it was declared that the so-called National Industrial Recovery Act from June 16, 1933 – at the time the most important piece of legislation in Roosevelt's reform efforts – went further than permissible under the Constitution's provisions on the legislature. The law permitted him to enact so-called "codes of fair competition", i.e. concurrence regulations. And under this mandate the president had enacted a series of especially wide-ranging regulations concerning the organization of different industries. But the Supreme Court viewed such a wide-ranging delegation as inconsistent with the Constitution's provisions on the legislative power of Congress. The regulations enacted by the president were therefore struck to the extent they were discussed in the case. – This case and certain others decided by the American Supreme Court under the Roosevelt administration have certainly had an embarrassing effect on President Roosevelt's economic policy. But a broad delegation of legislative power from Congress to the president will of course continue to be necessary in a country like the U.S. under the current

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[*Administration and the Rule of Law – the Establishment, Work and View of the Committee on the Administration 1947–1958*] (Unpublished M.A. thesis, University of Bergen, 1994) *see* the University of Bergen's homepage <www.uib.no/hi/tafjord>, visited on 4 August 2005.

[656] *Schechter Poultry Corp.* v. *U.S.*, 295 U.S. 495 (1935).

[657] *See* note 415, *supra* and the accompanying text. At the time (from 1937–1939) Ragnar Knoph was the editor of *TfR*. The Norwegian editorial board member was Supreme Court Justice Sverre Grette. The Icelandic editorial board member was also a Supreme Court Justice, Einar Arnórsson.

[658] Castberg, *supra* note 415, p. 120. Castberg's article on Roosevelt's court-packing plan and the arguments it caused was reprinted twice in the winter of 1952–53 because it was either part of the syllabus or supplementary material for university courses in law. *See* F. Castberg, *Fra statslivets rettsproblemer – et utvalg artikler og foredrag [Of the Legal Problems concerning the State – Chosen Articles and Lectures]* (Akademisk Forlag, Oslo, 1953).

circumstances."[659]

In his lecture and articles in 1937 and 1938, Schjelderup focused on delegation laws in the U.S. and on *Schechter* in particular because he viewed a strong executive branch as one of the main threats to democracy. He gave the context of *Schechter*, reprinted the greater part of the decision in translation, and commented:

> "I believe the Supreme Court's unanimous reasoning is extremely important today, also in countries other than the U.S, because it takes such a clear stand against the gliding from democracy to government that's authoritarian, centralized and in reality corporate."[660]

Schjelderup continued, emphasising the link between distrust of delegating legislative powers and the ideal of democracy that was a recurring theme in his lecture:

> "It is important to notice that even to a man of Justice Brandeis' convictions, perhaps even especially for him, this idea of anybody other than the elected representatives regulating the economy seems particularly reprehensible. Even if mistakes are made and time is wasted, we must presume it is best for the people that legislative work is done by the legislature. That way the aggregate experience from different fields found in such bodies to a much greater degree than in a committee or a court is put to good use. And last but not least the people's elected representatives will benefit from free public discussion in the press and in meetings to a much greater degree than other institutions when discussing bills. This is, in any case, the theory free constitutions are built on – to use Holmes' words from the *Abrams* case."[661]

In American law, the delegation doctrine developed considerably in the years around World War II. In *Rock Royal,* which upheld federal regulations of milk prices,[662] and its companion case, *Hood,*[663] the Agricultural Marketing Agreement Act of 1937 also withstood a delegation challenge. The Act, under which the Secretary of Agriculture issued an order for fixing and equalising minimum prices, was believed to set out standards clear enough to steer the delegation clear of constitutional hurdles.[664] In *Hood,* Justices Roberts, McReynolds and Butler dissented, arguing

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[659] Castberg, *supra* note 449, pp. 43–44.
[660] Schjelderup, *supra* note 424, p. 149.
[661] *Ibid.,* pp. 149–150.
[662] *See supra* chapter 2.4.
[663] *H.P. Hood & Sons* v. *U.S.*, 307 U.S. 588 (1939).
[664] Delegation to producers and to cooperatives was also challenged. In the context of the delegation to the Secretary of Agriculture, Justice Reed speaking for the Court stated: "It is well settled, therefore, that it is no argument against the constitutionality of an act to say that it delegates broad powers to executives to determine the details of any legislative scheme. This necessary authority has never been denied. In dealing with legislation involving questions of economic adjustment, each enactment must be considered to determine whether it states the purpose which the Congress seeks to accomplish and the standards by which that purpose is to be worked out with sufficient exactness to enable those affected to understand

that "the Act vests in the Secretary authority to determine, first, what of a number of enumerated commodities shall be regulated; second, in what areas the commodity shall be regulated; third, the period of regulation, and, fourth, the character of regulation to be imposed and, for these reasons, cannot be sustained".[665]

In *Sunshine Anthracite Coal Co.* v. *Adkins*,[666] decided in 1940, the U.S. Supreme Court upheld the Bituminous Coal Conservation Act of 1937, against commerce clause and delegation challenges. After describing the standards that minimum prices determined by the administrative body in question must conform to, Justice Douglas, speaking for the Court, wrote:

> "The problem of fixing reasonable prices for bituminous coal cannot be differentiated legally from the task of fixing rates under the Interstate Commerce Act … and the Packers and Stockyards Act … The latter provide the standard of 'just and reasonable' to guide the administrative body in the rate-making process. The validity of that standard … , the appropriateness of the criterion of the 'public interest' in various contexts … , the legality of the standard of 'unreasonable obstruction' to navigation … all make it clear that there is a valid delegation of authority in this case. The standards which Congress has provided here far exceed in specificity others which have been sustained …
>
> Delegation by Congress has long been recognized as necessary in order that the exertion of legislative power does not become a futility. *Currin* v. *Wallace*, 306 U.S. 1, 15 and cases cited. But the effectiveness of both the legislative and administrative processes would become endangered if Congress were under the constitutional compulsion of filling in the details beyond the liberal prescription here … For these reasons we hold that the standards with which Congress has supplied the Commission are plainly valid."[667]

In *NBC* v. *U.S.*,[668] decided in 1943, delegation of regulatory power to the Federal Communications Commission was upheld. The Court found that the standard of "public interest" was sufficiently clear.[669] In *Yakus* v. *U.S.*, decided in 1944, the Court upheld the Emergency Price Control Act of 1942.[670] Speaking for the majority, Justice Stone noted that

> "[t]he Act is thus an exercise by Congress of its legislative power. In it Congress

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these limits. Within these tests the Congress needs specify only so far as is reasonably practicable. The present Act, we believe, satisfies these tests." *U.S.* v. *Rock Royal Co-op.*, 307 U.S. 533, 574 (1939). (footnotes omitted).

[665] *Hood,* 307 U.S. pp. 603–604.

[666] 310 U.S. 381 (1940).

[667] *Ibid.,* pp. 398–399. Justice McReynolds dissented.

[668] 319 U.S. 190 (1943).

[669] *Ibid.,* pp. 225–226. The Court cited *New York Central Securities Corp.* v. *U.S.*, 287 U.S. 12 (1932): "It is a mistaken assumption that this is a mere general reference to public welfare without any standard to guide determinations. The purpose of the Act, the requirement it imposes, and the context of the provision in question show the contrary." JJ. Murphy and Roberts dissented.

[670] *Yakus* v. *U.S.*, 321 U.S. 414 (1944).

> has stated the legislative objective, has prescribed the method of achieving that objective – maximum price fixing –, and has laid down standards to guide the administrative determination of both the occasions for the exercise of the price-fixing power, and the particular prices to be established …
>
> The Constitution as a continuously operative charter of government does not demand the impossible or the impracticable ... The essentials of the legislative function are the determination of the legislative policy and its formulation and promulgation as a defined and binding rule of conduct … These essentials are preserved when Congress has specified the basic conditions of fact upon whose existence or occurrence, ascertained from relevant data by a designated administrative agency, it directs that its statutory command shall be effective."[671]

The Court added that "[c]ongress is not confined to that method of executing its policy which involves the least possible delegation of discretion to administrative officers".[672] In a companion case, *Bowles,* which concerned the validity of rent control under the Act's provisions, the Supreme Court referred to a great extent to the constitutional discussion in *Yakus.* It added however, that "Congress does not abdicate its functions when it describes what job must be done, who must do it, and what is the scope of his authority".[673] In *American Power & Light Co*.,[674] which was decided in 1946, substantial delegation to the Securities and Exchange Commission was upheld. In this case, it was argued that the delegation of power to the SEC was unconstitutional due to the absence of "any ascertainable standards for guidance in carrying out its functions".[675] The court noted that

> "[e]ven standing alone, standards in terms of unduly complicated corporate structures and inequitable distributions of voting power cannot be said to be utterly without meaning, especially to those familiar with corporate realities. But these standards need not be tested in isolation. They derive much meaningful content from the purpose of the Act, its factual background and the statutory context in which they appear."[676]

It is evident from the cases discussed here that it was of paramount importance in the American doctrine whether there was sufficient guidance given to the administrative body – whether there were ascertainable standards under which the delegated power was to be exercised.

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[671] *Ibid.,* pp. 423–425.
[672] *Ibid.,* pp. 425–426.
[673] *Bowles* v. *Willingham*, 321 U.S. 503, 515 (1944).
[674] *American Power & Light Co.* v. *S.E.C.*, 329 U.S. 90 (1946).
[675] *Ibid.,* p. 104.
[676] *Ibid.* The Court added that "from these sources … a veritable code of rules reveals itself for the Commission to follow in giving effect to the standards of § 11 (b) (2). These standards are certainly no less definite in nature than those speaking in other contexts in terms of 'public interest', 'just and reasonable rates', 'unfair methods of competition', or 'relevant factors'. The approval which this Court has given in the past to those standards thus compels the sanctioning of the ones in issue." *Ibid.,* p. 105.

In the late 1940s and early 1950s, Nordic lawyers showed great interest in the question of how to guarantee that certain principles of the rule of law would be respected by the executive branch. There was much debate over issues like judicial control of administrative action, the institution of Parliamentary Ombudsman, delegation of power to administrative bodies, and administrative procedure.[677] In that context, Stein Rognlien published an article titled '*Certain features of American administrative law, especially concerning administrative procedure*' in *TfR* in 1949.[678] He focused on delegation of legislative power, describing the main limitations on the delegation of power to administrative bodies based on U.S. Supreme Court decisions.[679] He stated that three delegation laws had been struck down and that two of these cases concerned the National Industrial Recovery Act, and described the principles for the limits of constitutional delegation of power "formulated in the N.I.R.A. cases" as "still valid, even though cases in the last years seem to have gone further than before in accepting delegation of power".[680] He summed up these principles:

> "The law must state not only the subject or area that shall be regulated but also legislative policy ... the law must determine reasonably clearly the standards or directions that shall be followed when regulations are issued for those purposes. These directions must include a real delimitation of power that all concerned can see and comprehend. The reins that are supposed to keep the delegation from running wild must be in the law itself so the courts can find them and use them. Or, as it has also been put: the delegated power must be kept 'canalized within banks

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[677] Amongst the lectures and essays which were parts of this discussion were Johs. Andenæs' *Domstolene og administrationen* [*The Courts and the Administration*] at a meeting of the Norwegian Bar Association in 1947. On Andenæs' discussion of *Schechter* in his constitutional law textbook and the reference made to that discussion by the Supreme Court, *see infra* note 693 and accompanying text. Another lecture was Jens Chr. Mellbye's *Domstolene og administrasjonen. Et arbeidsfelt for Den Norske Sakførerforening* [*The Courts and the Administration. An issue for the Norwegian Bar Association*]. In the 19th Nordic administrative seminar in 1949, Poul Meyer gave the opening speech, titled *Nogle bemerkninger om mere betryggende regler for administrative avgjørelser* [*Some Comments on Adding Guarantees to the Rules on Administrative Decisions*]. One of the lectures at that seminar was by Castberg, who had written about *Schechter* a few years before, *see* note 415 *supra* and accompanying text. In late 1950, the Norwegian Judges' Ass'n held a seminar on special administrative courts. In 1951, the 19th Nordic Legal Conference in Stockholm focused on *How to Guarantee Respect for the Rule of Law in Administrative Decisions*. Andenæs gave the opening speech and the speeches were published in conference journals and in *Nordisk Administrativt Tidsskrift* [*Nordic Administrative Journal*], *Norsk Rettstidende* [*Norwegian Legal Journal*] and as a public document in Sweden (a part of *Sverige's Offentliga Utredningar*).

[678] S. Rognlien, 'Enkelte trekk fra amerikansk administrativ rett, særlig fra forvaltningsprosessen, [Some Features of American Administrative Law, Especially of Administrative Procedure]' *TfR* (1949) p. 263. Sverre Grette and Einar Arnórsson, Supreme Court Justices in their respective countries were still on the editorial board.

[679] *Ibid.,* pp. 270–272.

[680] *Ibid.*

that keep it from overflowing.'"[681]

Rognlien pointed out that these general principles could lead to different conclusions in concrete cases, pointing to *Schechter*[682] on one hand and *Sunshine Anthracite Coal Co.* v. *Adkins*,[683] *NBC* v. *U.S.*,[684] and *American Power & Light Co*. on the other.[685]

Two additional points of Rognlien's are important in relation to developments in Norwegian law. Firstly, he mentioned that in "certain special fields where the citizen's rights are relatively unaffected ... delegation of power is permitted to a greater degree".[686] Secondly, he wrote that "it is an important point concerning the delegation of legislative power that parliament can, through its committees", control the administration's work.[687] Both of these statements were later fleshed out by the courts.[688]

In 1952, the Norwegian Supreme Court decided a case which was important both in the context of delegation and of judicial deference to legislative choices.[689] The Association of Norwegian Whalers sued the state, claiming that a special fee on exported whale oil was unconstitutional. The fee was determined by the price authorities and went into a general "price-regulating" fund managed by the price authorities instead of being ear-marked for the whaling industry. The whalers argued that the fee was unconstitutional because it was inconsistent with art. 75a of the Constitution, which provides that taxes shall be levied by Parliament. A split Supreme Court upheld the law. The majority believed that the fees were not taxes so there was no question of unconstitutional delegation of *taxing* power and that the delegation of *legislative* power was acceptable under the circumstances. One group of justices did not believe it necessary to distinguish between the taxing and legislative power in this manner and another believed the law was unconstitutional

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[681] *Ibid.,* p. 271, citing Cardozo's dissent in *Panama Refining Co.* v. *Ryan*, 293 U.S. 388, 440 (1935).
[682] 295 U.S. 495 (1935).
[683] 310 U.S. 381 (1940).
[684] 319 U.S. 190 (1943).
[685] 329 U.S. 90 (1946).
[686] Rognlien, *supra* note 678, p. 271.
[687] *Ibid.* Apart from the delegation doctrine, Rognlien's comments on judicial review of legislation's constitutionality are limited to describing the due process clause as a "constitutional goodie-bag which has enabled the courts, especially the federal Supreme Court, to strike all congressional laws and administrative regulations that they find unreasonable. Originally 'due process of law' meant procedural rules consistent with the rules of procedure set out in the common law, but today the courts use it as an authority to control that a provision's substance is reasonable and that the process of passing it was reasonable or fair." *Ibid.,* p. 283.
[688] The Supreme Court emphasised in 1952 and again in 1956 that although there was question of considerable delegation of power, Parliament could and did control the administration. Rt. 1952.1089, 1098 and Rt. 1956.952, 960. On the importance of whether individual rights are affected or not, *see* note 692, below and the accompanying text.
[689] *See* note 609 *supra* and accompanying text.

because it went too far in delegating power to the executive branch – irrespective of whether that power was viewed as taxing or legislative.

On the issue of the delegation of power, the majority found that although it

> "should emphasize that the delegation of power to collect fees from the citizens is much broader in this case than ever before in peace-time, I do not believe that the courts have, in this case, a basis for substituting their judgment for the legislature's on the issue of how far it is necessary or constitutionally permissible to go under the current circumstances."[690]

It was thus clear that the Supreme Court would not substitute its evaluation of a measure's efficacy for the legislature's, even when – as in this case – the constitutional claim rested on the argument that the fees were not a regulatory measure at all. It was also clear that, regarding delegation of legislative power, the Court would defer to the legislature's judgment of its necessity and constitutionality.[691] The two had traditionally been linked in Norwegian theory, which held that it was mainly the necessity for delegation that determined its constitutionality. This may explain some of the Court's uneasiness about reviewing laws in this field. The majority also explained its deference by referring to the fact that delegation of legislative powers was primarily a matter of separation of powers and not directly concerned with protecting the rights of the individual.[692]

When discussing the delegation of power in general, the majority opinion referred to Johs. Andenæs' textbook of constitutional law, stating that "[c]oncerning legislative power, practice and theory both allow [delegation] to great degree, since the key criteria is the necessity of the delegation. I refer to … Andenæs: *Statsforfatningen i Norge* at 183–4".[693] On the cited pages, Andenæs supported the theory that "it is fundamentally the necessity for delegation that limits it" by noting that

> "[i]t is hard to draw clear lines in this field and it will usually be natural to rely on

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[690] Rt. 1952.1089, 1097.

[691] On appeal, the Whalers' Association argued that the lower court had failed to address the argument that since it took the price directorate eight months to decide which action to take, the rationale that the delegation allowed for quicker responses to crises was unacceptable. The appellants wrote: "Even if it were true that the Price Directorate was the only body who has sufficient overview over the questions that arise concerning fees, this would not affect the constitutional interpretation. The constitution provides that the taxing power belongs to the legislature and it cannot be assumed that our highest constitutional authority lacks the knowledge to assess such a decision to collect fees." Tillegg til ankeerklæring til Høyesterett i sak for Oslo Byrett nr. 3614/1948, avd. XV nr. 126, [Addendum to the Appeal in case …] p. 5.

[692] *See* note 613 *supra* and accompanying text. This is in accord with Rognlien's suggestion of a more deferential review when the rights of the individual are "relatively unaffected", *supra*. This was affirmed in a 1956 case and the Supreme Court followed up on this suggestion in the 1970s and 1980s.

[693] Rt. 1952.1089, 1097 citing Johs. Andenæs, *Statsforfatningen i Norge* [*The Norwegian Constitution*] (2nd ed., 1948).

> the evaluation of Parliament. The Norwegian Parliament has not shown any tendency to delegate legislative power and the courts have never struck a law as going too far. In the U.S. on the other hand, there was a famous instance of this a few years ago, when the federal Supreme Court struck one of the most important laws in Roosevelt's social reform plan, The National Industrial Recovery Act of 1933, because it went further in delegating legislative power than permissible under the constitution. Since the war, there has been a greater tendency here to delegate power. One such law has given rise to a great dispute, namely the [law at issue in the 1952 whaling case]. Many believe [it] delegates legislative power to the King, the ministry and the price directorate to an impermissible degree."[694]

The majority and the concurring opinions in the 1952 case both quoted Aschehoug's constitutional law treatise, *The Present Constitution of Norway*, which was discussed in detail in part 2. The concurring Justice cited Aschehoug as authority for the principle that delegation that "considerably limits" Parliament's sovereignty over legislation and taxation is impermissible. It is interesting to note that on the page cited Aschehoug discussed American doctrine on this point. He commented that the theory that no one who has been entrusted with constitutional functions can delegate them to another

> "has, to a certain degree been advanced in American constitutional law … It must be admitted that in [states with a written constitution] the authorities are not free to delegate authority to whatever extent they desire, because this could happen to such a degree that the constitutional order was in fact changed. It must be emphasized that the legislature cannot delegate to any of its committees the authority to decide on matters of the state. Apart from this, the risk of permitting the authorities to delegate their power is so small that it is negligible."[695]

Aschehoug supported the reference to American law on this point by referring to other parts of his treatise, where he cited *Constitutional Limitations*.[696] Like the reference to Andenæs, this is an example of the 1952 Court quoting Nordic writers discussing *inter alia* American constitutional law. It is worth noting, however, that the references to American law in the passages cited were not isolated incidents. Andenæs' reference to *Schechter* must be considered against the background of the considerable discussion of that case which had already taken place in Nordic legal circles.

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[694] On the subject of foreign constitutions, Andenæs referred his readers to Knud Berlin, Udsigt over *Forfatningsudviklingen i forskellige fremmede Lande* [*A Perspective on Constitutional Developments in Various Foreign Countries*] (3rd ed., 1938) and Castberg, *supra* note 449.

[695] T.H. Aschehoug, *Norges nuværende statsforfatning II* (Malling, Christiania, 1892), p. 81. Cited in Rt. 1952.1089, 1100.

[696] There, he wrote on authorities contracting with individuals or corporations, including whether they should be able to contract to set up monopolies and whether they should be able to make contracts in which they promise not to undertake takings. On both these points he quoted Cooley's *Constitutional Limitations*. *Ibid.,* pp. 137–138.

The 1952 case indicates that the emphasis on flexible constitutional interpretation and on the leeway that the legislature must have to address crises – an emphasis that was fuelled by discussion of American law – was such that it was out of the question for the Norwegian Supreme Court to strike a law that was a fundamental part of the efforts to rebuild and stabilise the Norwegian economy after the war. This was true although it was the Court's view that the levying of fees at issue in the case was "a novelty in our legal system", and that the delegating of power was "much broader in this case than ever before in peace-time". This was also true although at least some writers discussing pre-1937 American jurisprudence – notably Schjelderup, who stepped down from the Supreme Court right before the 1952 case was decided – had admired American 1930s cases concerning delegation of legislative power while being critical of most other constitutional decisions of that period.

In 1956, the Norwegian Supreme Court decided another case concerning the same delegation law. In addition to fees like the ones at issue in the 1952 case, the administration required the timber industry to pay fees that went into special funds which were supposed to fund research for the benefit of the industry as a whole.[697] Again, the court proved extremely deferential to the legislature. Concerning the constitutionality of the delegation of power to collect the fees, the lower court – whose opinion was endorsed by the Supreme Court – referred to the Supreme Court's opinion of 1952 and added, among other things, that it had "no basis to state that Parliament acted irresponsibly by giving the administration a mandate to take the necessary steps to rationalise the economy.[698] The court has no reason to think that it was unnecessary to delegate the power to collect fees connected to such measures to the administration."[699]

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[697] Rt. 1956.932.

[698] Both the Norwegian and the Icelandic Supreme Court have mandatory jurisdiction in many cases. Therefore many Supreme Court opinions simply say that "[r]eferring to the lower Court's reasoning, its decision is affirmed." Frequently, the Supreme Court also adds a few comments.

[699] Rt. 1956.932. Apart from the summaries in the court decision there is very little information to be had about the arguments of the parties. No record is kept of oral arguments. The state's attorney argued that "it must be the legislature itself who decides when to delegate power" and pointed out that the price regulation after the war would not have been possible without such delegation of legislative power. He also argued that since delegation was permissible, the fees would be valid even if viewed as taxes. *Tilsvar til Oslo byrett* [*Answer to the Court in Oslo*], dated Aug. 15, 1952, signed by Rolv Ryssdal. Later he simply stated in his brief that the fees were constitutional and that he would "give further reasons for that during oral argument." *Prosesskrift til Oslo byrett*. Sak nr. 1019/1952 avd. 13 nr. 54. [*Brief to the Court in Oslo …*] dated Oct. 3, 1953. By contrast, the appellants stated: "We believe that the power of the legislature to collect fees and levy taxes are one of the main characteristics of democratic constitutions and we believe it is vitally important that the legislature's role in this is respected. We believe it is inconsistent with democratic principles to allow the executive branch to bypass the legislature and collect substantial fees for its own use. We also believe that for our constitution to be truly democratic, only the legislature must be allowed to decide

Before the Supreme Court, the representatives of the timber industry argued that the delegation was overly broad because it was meaningless to say that the fees could only be collected for "price regulating purposes" when that was understood as broadly as it had been in this case, and because there were no limits at all to the administration's discretion as to how to use the funds to make the industry more effective. The majority opinion said on this point:

> "The appellant has ... argued that all economic legislation has the purpose of rationalizing the economy and that the word 'rationalizing' has no meaning unless it is clear what goals are being pursued. Choosing these goals must be a role for Parliament and a delegation of power to rationalize the economy, without further directions, cannot be consistent with the constitution.
>
> I cannot agree with the appellant on this point. It is not true that the delegated power is unlimited – both the statement of purpose ... and the conditions for collecting fees set a limit that is clear in principle. I cannot focus solely on the fact that "organizing economic activity in a rational way" is in itself quite vague, since the legislative history, and the context in which the power is delegated do not leave in any serious doubt, what kind of measures the law is referring to."[700]

The opinion in this case echoes American delegation cases asking for ascertainable standards and Rognlien's article on American administrative law. On the issue addressed by the Supreme Court in the quotation above, Rognlien had noted that "the [U.S.] Supreme Court has, in more recent cases, not required that the definition or limitation of the standard was expressly stated in the law, if a sufficiently clear meaning can be gathered from the law as a whole, from its goal or the legislative history".[701]

In addition to playing an important role in the context of constitutional interpretation, the discussion of American law that took place in the Nordic countries in the late 1930s thus influenced the field of administrative law and permissible delegation of legislative power – questions that were extremely important as societies were rebuilt and reorganised after the war. The key players in the administrative law debate of that period were familiar with American cases from the mid-1930s, and Rognlien's article focused on American law alone, discussing delegation cases up to the late 1940s. The Nordic debate on administrative law was thus influenced by American jurisprudence and that influence is evident from Norwegian cases decided in the 1950s. The analytical framework was similar and the decisions cited Norwegian writers who clearly relied on American law.

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how to spend the state's funds." Letter from Norges treforedlingsråd to the Prime Minister (25 May 1952) (on file with author).

[700] Rt. 1956.932, 960.

[701] Rognlien, *supra* note 678, p. 272.

3.7. CONCLUSIONS

Around World War II and in the late 1930s in particular, great attention was paid to American legal ideas in Nordic constitutional law. Most Nordic journal articles and lectures described American constitutional history of the last decades to some extent. Eight or ten accounts of *Lochner* era jurisprudence and its decline, differing in their degrees of sophistication, were published in Nordic journals during this period.

It is obviously impossible to know whether these articles were read, and if so, whether they were properly understood. What we do know, however, is the following: relative to the volume of legal scholarship published in the Nordic countries, immense attention was paid to American constitutional law in the late 1930s. *TfR* – which is a joint Nordic journal – alone published 11 articles on American law in the period from 1937–1940. In less than three years, that makes up a considerable part of a journal published four times a year. In addition, there were lectures, books and articles in other legal journals and yearbooks.

We also know who the key players in discussing American law were. Frede Castberg was the professor of constitutional law at the University of Oslo, he wrote the constitutional law textbook which was used in Norway until the 1960s, and did considerable work in administrative law. He was influential in the post-war years and served as president of the University for five years in the mid-1950s. Ferdinand Schjelderup was, as already mentioned, a Supreme Court Justice who was an important figure in the resistance movement during World War II. Ragnar Knoph was a professor at the University of Oslo and one of the most respected legal theorists of his generation. He was also a friend of Schjelderup's. Johs. Andenæs was the professor of constitutional and administrative law at the University of Oslo. He was one of the central figures in Norwegian law and legal theory throughout the 20th century, and his *Constitutional Law of Norway* is still on the syllabus at the University of Oslo. In the late 1930s, Poul Michael Sachs worked in the Danish Ministry of Justice. Alf Ross, who both responded to Sachs' lecture and reviewed Ernst Andersen's *Constitution and Customary Law*, was arguably one of the most influential and respected figures in Nordic law in the 20th century and a leader of the Scandinavian legal realist movement. Ernst Andersen was a professor of law in Copenhagen, as was Poul Andersen, who is widely credited with being the father of Danish administrative law. Ólafur Jóhannesson studied in Copenhagen and Stockholm in 1945 and 1946, was professor of constitutional and administrative law at the University of Iceland, wrote textbooks in both subjects and was, in addition, a member of Parliament from 1959 through the 1970s and prime minister in the 1960s and 70s. These scholars all wrote about American constitutional law and some of them did so in great detail. Simply put, these were people that lawyers listened to at the time. There were certainly others, equally influential, who never wrote on American law. What matters, however, is that we have the professors of constitutional and administrative law at the only universities in their respective countries, a Supreme Court Justice, and some of the most respected legal writers of

their time writing about American law, drawing arguments from it and utilising them when discussing their own legal systems.

So what were these scholars saying? Many contented themselves with providing the historical and to a degree doctrinal background of the American constitutional debate of the 1930s. That is important because it lent a depth to the later discussions of the New Deal cases and the court-packing plan that those discussions would otherwise have lacked. Yet while the scope and focus of the discussion obviously varied, it is most important for our purposes to analyse which ideas in American law were viewed as successful and desirable and hence proved influential in shaping Nordic doctrine. For at this time, more than perhaps before and since, there was a decidedly judgmental slant in the Nordic discussion of American law.

The Nordic writers discussing American law were more or less unanimous on one point: when exercising judicial review, the courts should be careful to leave the legislature enough leeway to react to crises and societal changes. Related to this, courts should apply a low level of scrutiny and interpret the constitution flexibly. Instead of viewing the constitution as laying down fixed rules, they should view it as pointing in the direction that society should go and its provisions as flexible standards, getting their substance from changing societal norms and requirements. American constitutional history and the story of the U.S. Supreme Court's 'switch-in-time' in 1937 were used to support this argument. This is true irrespective of the area of American law under discussion: commerce clause cases, due process cases, taxing and spending power cases were all cited to support this theory, irrespective of the fact that many aspects of the American jurisprudence had no analogue in Norwegian law.

In addition, many discussed the court-packing plan and the debate revolving around it. There were basically two different angles: some, like Castberg, emphasised that it was inappropriate for the executive to try to influence the courts, even through judicial nominations. Others, like Sachs, viewed judges as engaged in politics and hence found the plan an obvious response to a grave problem. The views of the 'switch-in-time' were similarly different. Most observers, even such cautious ones as Schjelderup, viewed the court-packing plan as at least one of many factors contributing to the decisions in *West Coast Hotel* and the *Wagner Act* cases. Some, such as Knoph, went quite far in interpreting those 1937 decisions as judicial capitulation to threats and, indeed, as an illustration that the power of the judiciary would never be able to protect constitutional rights to a degree unacceptable to the majority.

When it came to drawing lessons from American constitutional law and from the events of the 1930s and 1940s, the writers who believed strongly in externalist reasons – in the effectiveness of the court-packing plan as a threat or in the uniformity and weight of public opinion – were the least interesting to our purposes. Yet it is a point worth noting that in Nordic constitutional law, just as in American constitutional law, the account of the 'switch-in-time' provided a slightly sinister reminder that in the end, the legislature would probably prevail in the event of conflict with the judiciary.

Just as American constitutional theory did not change overnight in 1937, Nordic or Norwegian jurisprudence did not suddenly change in the wake of the discussion of American law in the late 1930s. It is more likely that ideas that were already around in the 1920s and 30s gained strength from being seen as successful in the U.S., which was widely viewed as the key country to watch concerning judicial review, and by being linked to what was viewed by Nordic commentators as positive democratic developments. This applies to theories of the proper role of the courts and constitutional interpretation and to the substantive influence of American law. It had been argued in essays and various dissents and concurrences through the '20s and '30s that the Nordic courts should interpret the constitution flexibly. It was not until the late 1940s and early 1950s, however, that this view won out in jurisprudence: in the Norwegian allodial property case of 1948, where the need to let the legislature adapt the law to various circumstances led to the overruling of a 1907 decision on the same law, and in the delegation cases in 1952 and 1956, where it was spelled out that the courts would be deferential to legislative choices. The change in rhetoric in Icelandic court decisions in the 1950s pointed in the same direction. The fact that this emphasis on flexible constitutional interpretation and giving the legislatures considerable room to maneuver was partly in contradiction with the emphasis on human rights after the war did not lead to the bifurcation of judicial review, even though that solution was known in Norwegian law.

American doctrine and case law also influenced substantive areas of constitutional law. Just as there was an increased emphasis on flexible constitutional interpretation and giving the legislature enough leeway to address various circumstances, the emphasis on protecting vested rights declined. The doctrine of vested rights had been questioned in Norway since the beginning of the 1930s. In the late 1930s Schjelderup posited it as an antithesis to democratic ideals and in the wake of the war Berg and others emphasised welfare rights at the expense of traditional vested rights and property rights. In the 1948 and 1959 cases, it was evident that the doctrine had, to a great degree, been abandoned in Norwegian law. Vested rights to engage in licensed activities were not protected any more. The Icelandic jurisprudence was less clear. The protection of vested rights seemed to have been abandoned in 1951, but in 1964 the mink farm case threw that theory into disarray for a while.

There was also an influx of American ideas on the border between constitutional and administrative law. The law of administrative procedure was developing in the Nordic countries in this period just as it was in the U.S. American influences concerning administrative procedure lie beyond the scope of this book. The question of permissible delegation of legislative power arose in the U.S. in the first decades of the 20th century, and the mid-1930s American cases wrestling with this question were discussed and analysed in the Nordic countries. The 1952 and 1956 delegation cases show the unwillingness of the 1950s Norwegian Court to police the limits of permissible delegation of legislative power – an unwillingness which had its mirror image in the U.S. Once again, those taking part in the debate had a working knowledge of American law. *Schechter* and other cases were part of

the general discussion of American constitutional law, and many Norwegian lawyers had emphasised their importance. Many of the lawyers mentioned above discussed those cases and took part in the discussion over the development of administrative law in the 1940s and 1950s. Rognlien, the only one to write on American administrative law in particular, worked for the Ministry of Justice and parliamentary committees.

In the period from 1930 into the 1960s, American legal ideas were very influential in the Nordic countries. That influence was not as clearly defined as in the period from the 1880s up to World War II, but it was important. Many of the ideas that either appeared in discussions of American law or gained strength from such discussions were dominant in Nordic constitutional law for most of the twentieth century. This is true concerning theories on constitutional interpretation, ideas about the proper role of the courts, and ideas of leaving the legislature considerable leeway for delegating legislative power.

PART 4. THE FOCUS SHIFTS TO EUROPEAN LAW – THE PERIOD AFTER 1970

4.1. INTRODUCTION

In this part, the influence of American constitutional law on Nordic constitutional law after 1970 will be examined. It will be argued that the volume and importance of Nordic writings on American constitutional law decreased in this period. Nordic scholars still referred to American constitutional history when discussing the history and development of judicial review, but when dealing with contemporary legal issues they did not look towards American law to the degree they had before.[702]

To some extent, the declining importance of American doctrine may be explained by the increasing impact of the Convention for the Protection of Human Rights and Fundamental Freedoms (usually called the European Convention on Human Rights or ECHR).[703] By the end of this period, the Convention and the jurisprudence of the European Court of Human Rights (ECtHR) had led to important changes in Nordic constitutional law. The ECHR's status in domestic law and its influence, as well as the influence of the decisions of the ECtHR in Nordic constitutional law were the most important topics in Nordic constitutional law in the late 1980s and 1990s.

The theory here is that in spite of the decrease in Nordic writings about American constitutional law, American constitutional law did influence Nordic constitutional law in this period. It will be argued that even though direct American influence had diminished, American constitutional thought merged with British and Continental European legal ideas and played an important role in shaping European thinking about human rights, which in turn influenced Nordic constitutional law immensely.

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[702] In *Konstitutionellt rättighetsskydd – Svensk rätt i ett komparativt perspektiv*, [*Constitutional Protection of Rights – Swedish Law from a Comparative Perspective*] (Fritzes, Stockholm, 1996). Joakim Nergelius discusses judicial review, theoretically, in the Scandinavian countries, Germany, France and Britain as well as the guarantees of rights in the EU and under the ECHR, comparing Swedish law to all of the above. Nergelius bases much of his theoretical discussion of human rights on American legal theory. He notes that "extensive parts of the American debate are of general application. The U.S.A. is, so to speak, the center of the debate." *Ibid.*, p. 110. Accordingly, he discusses American theory extensively in his general chapter of judicial review (discussing the theories of Thayer, Hand, and Bickel, as well as Robert Dahl, John Hart Ely, Chemerinsky and Ackerman) and also in a particular chapter on American law. This book gets less attention in this dissertation than many others because it is Swedish and written to reflect on Swedish law. Even so, it is cited in writings on the topic in Norway, Denmark and Iceland.

[703] The European Convention on Human Rights entered into force in 1953. In 1960, the European Court of Human Rights decided its first case. In the 1970s, the Court's caseload quickly increased and since then the Court has decided hundreds of cases.

First, therefore, this part will discuss direct American influences in Nordic constitutional law after 1970. Then, the role played by American law in the development of the European Human Rights jurisprudence will be examined. Finally, the influence of the Convention and the decisions of the ECtHR on Nordic constitutional law will be discussed briefly.

4.2. NORDIC WRITINGS ABOUT AMERICAN LAW AFTER 1970

4.2.1. Introduction

In part 2, Nordic legal literature of the 1950s and 1960s was described to the extent that it discussed the developments in American law associated with the decline of 'classical legal thought'.

In addition, American desegregation cases in the 1950s[704] were known and discussed in the Nordic countries and they sparked a renewed interest in American law, especially in Denmark. Criminal law professor Knud Waaben published a book on these cases in 1966,[705] and various articles were published on these cases and other American constitutional cases in the late 1950s and 1960s.[706] Unlike earlier

[704] *Brown* v. *Board of Education of Topeka,* 347 U.S. 483 (1954) (hereinafter *Brown I*); *Brown* v. *Board of Education of Topeka*, 349 U.S. 294 (1955) (hereinafter *Brown II*), in which the Supreme Court decided which relief to grant based on *Brown I.* The Court ordered that "the cases are remanded to the District Courts to take such proceedings and enter such orders and decrees consistent with this opinion as are necessary and proper to admit to public schools on a racially nondiscriminatory basis with all deliberate speed the parties to these cases". *Ibid.*, p. 301. *Cooper* v. *Aaron*, 358 U.S. 1 (1958). In this case, the Supreme Court unanimously reaffirmed *Brown I* and held that "the constitutional rights of children not to be discriminated against in school admission on grounds of race or color declared by this Court in the *Brown* case can neither be nullified openly and directly by state legislators or state executive or judicial officers, nor nullified indirectly by them through evasive schemes for segregation whether attempted 'ingeniously or ingenuously'." *Ibid.*, p. 17, citing *Smith* v. *Texas*, 311 U.S. 128, 132 (1940). In *Cooper,* the Court stated: "In 1803, Chief Justice Marshall, speaking for a unanimous Court, referring to the Constitution as 'the fundamental and paramount law of the nation', declared in the notable case of *Marbury* v. *Madison*, … that '[i]t is emphatically the province and duty of the judicial department to say what the law is'. This decision declared the basic principle that the federal judiciary is supreme in the exposition of the law of the Constitution, and that principle has ever since been respected by this Court and the Country as a permanent and indispensable feature of our constitutional system. It follows that the interpretation of the Fourteenth Amendment enunciated by this Court in the *Brown* case is the supreme law of the land, and Art. VI of the Constitution makes it of binding effect on the States 'any Thing in the Constitution or Laws of any State to the Contrary notwithstanding'. Every state legislator and executive and judicial officer is solemnly committed by oath taken pursuant to Art. VI, cl. 3, 'to support this Constitution'." *Ibid.*, p. 18.

[705] K. Waaben, *Den Amerikanske Neger og Forfatningen* [*The American Negro and the Constitution*] (Gyldendal, Copenhagen, 1966).

[706] *See e.g.*, E. Harremoes and H.B. Jørgensen, 'Lighed for loven – Nogle kommentarer til de amerikanske raceadskillelsesdomme, [Equal Protection – A Few Comments on the American

discussions of American constitutional law in Nordic theory, these essays did not purport to be relevant in the context of Nordic constitutional law. Many of these were legal news – discussions of legal changes in a foreign country that were not supposed to have any parallels in the legal system within which they were being discussed. Others were snapshots of legal history. It has been argued since the mid-1970s that American civil rights cases were relevant – also in the relatively racially and ethnically homogeneous Nordic societies – when considered at a higher level of generality.[707] However at the time, this discussion did not link American and Nordic constitutional law.

In the 1960s, there were two great controversies about judicial review in particular in the Nordic countries. One started with the theory that linked Aschehoug's assumed introduction of judicial review in the mid-1880s to the introduction of parliamentary government in Norway and concerned the extent to which courts were political bodies and used for political means.[708] This debate was discussed briefly in part 2.[709] The other debate – which mostly took place in Denmark – centered on the question of whether judicial review could be prohibited by ordinary legislation. The rationale behind this theory was technical – one of the main points was whether the concept of constitutional custom, which is viewed as the basis of judicial review in Nordic law, was acceptable[710] - and so was the discussion that ensued.[711]

Racial Separation Cases]', *Juristen* (1957) p. 21; B. Hjejle, 'Rettens dag – i USA, [The Day of the Law – in the U.S.A]', *Sagførerbladet* (1958) p. 124; Th. Thorsteinsson published many articles on American law and American legal history in the 1950s and 1960s, including: 'Darrow for the Defence', *Juristen* (1950) p. 101; 'The New Deal i Amerikas højesteret', *see supra* note 461; 'I Amerikas retter i dag, [In American Courts Today]', *Fuldmægtigen* (1968) p. 22; and 'Parlament og domstol, [Parliament and Court]', Juristen (1967) p. 187.

[707] *See* T. Eckhoff, 'Domstolenes Rettsskapende Virksomhet', [The Legislative Function of the Courts], 27:3 *Úlfljótur* (1974) pp. 274–281.

[708] This debate was mainly between J.A. Seip and J. Andenæs. *See* J.A. Seip, Supreme Court, *supra* note 111; J.A. Seip, *supra* note 112; J.A. Seip, 'Replikk, [Reply]', *Lov og Rett* (1965) p. 463; J. Andenæs, 'Høyesterett som politisk organ, [The Supreme Court as a Political Body]', *Lov og Rett* (1965) p. 22; J. Andenæs, 'Jus og Politikk, [Law and Politics]', *Lov og Rett* (1965) p. 456. A postscript was added by A. Bratholm, 'Jus og politikk – refleksjoner etter en diskusjon, [Law and Politics – Reflections After a Discussion]', *Lov og Rett* (1966) p. 97.

[709] *See supra* chapter 2.3.

[710] Ross argued that judicial review could not be based on an interpretation of the constitution and that since the different branches disagreed on the question of judicial review, there could be no question of custom, which presupposes that all parties have obeyed a rule due to the belief that it was binding. Therefore, he concluded that judicial review could have a legal basis only in case law, which according to Nordic legal theory can be overridden by ordinary legislation. A. Ross, 'Kan domstolenes kompetence til at prøve loves grundlovmæssighed berøves dem ved lov? [Can the Courts Be Deprived of Their Power of Judicial Review by Statute?]', in Abitz *et al.* (eds.), *Festskrift til professor, dr. juris Poul Andersen 12. juni 1958* [*Liber Amicorum for Professor, dr. juris Poul Andersen 12 June 1958*] (Danmarks Juristforbund, Copenhagen, 1958) p. 356. It may have been in response to this, that F. Castberg devoted a few pages in his comparative work, *Freedom of Speech in the West* to the

PART 4

Apart from two cases in 1945 and 1952, which concerned retroactive laws of a penal character and were mentioned in part 2,[712] no law had been invalidated by the Norwegian courts since the early 1930s. At the time, no law had ever been struck down in Denmark. Given this lack of case law and the fact that these debates were very abstract and neither was particularly tied to case law nor to American thought, they will not be described further here. Neither will the writings concerning cases about civil rights since they were neither meant to have, nor had, any influence on Nordic law. Due to this and the fact that the aspects of this theory that are of interest concerning judicial review have already been discussed in part 3, Nordic constitutional theory and case law in the 1950s and 1960s will not be discussed any further here.

Since 1970, Nordic writings about American constitutional law have belonged to one of two groups:[713] they have either concerned First Amendment doctrine or judicial review. Scholars writing on other fields of constitutional law did not rely on American ideas. In this chapter, the treatment of American law in Nordic legal discourse after 1970 will therefore first be discussed insofar as it concerns freedom of speech. Then, the writings discussing judicial review will be examined, first those concerning judicial review in general and secondly those focusing on bifurcated

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answer to this question in American law, concluding that "[n]o ordinary law in the United States could oblige the Supreme Court to judge according to a law which the Court found clearly unconstitutional". F. Castberg, *Freedom of Speech in the West – A Comparative Study of Public Law in France, The United States, and Germany* (Oslo University Press, Oslo; Oceana Publications, New York, 1960) p. 268.

[711] *See* P. Andersen, 'Kan Domstolenes Kompetence til at prøve Loves Grundlovmæssighed frakendes dem ved Lov? [Can the Court's Be Deprived of Their Power of Judicial Review by Statute?]', *Juristen* (1960) p. 111; O.A. Borum, 'Domstolenes ret til prøvelse af loves grundlovmæssighed – endnu en gang, [The Courts' Right to Exercise Judicial Review – Once Again]' *in* Blegvad *et al.* (eds.), *Festskrift til professor, dr. jur & phil Alf Ross 10. juni 1969* (Juristforbundet, Copenhagen, 1969) p. 49; S.S. Knudsen, 'Kan domstolenes ret til at prøve grundlovsstridige love fratages dem ved lov?, [Can the Courts Be Deprived of Their Power of Judicial Review by Statute?]', *Juristen* (1959) p. 145; and K.K. Steincke, 'Domstolenes kompetence overfor formentlig grundlovsstridige love, [The Courts' Competence Concerning Allegedly Unconstitutional Acts]' *Juristen* (1960) p. 228.

[712] *See supra* note 627.

[713] Two additional factors must be mentioned: First of all, there were quite a few short articles about American law and American lawyers in Nordic law journals, of the type 'A few words on the state police in Connecticut' and 'A few comments on suspects' status in American law'. Both examples are from the Icelandic law review *Úlfljótur*. F. Þórðarson, 'Nokkur orð um ríkislögregluna í Connecticut, [A Few Words on the State Police in Connecticut]', *Úlfljótur* (1950) p. 7; S. Ingvarsdóttir, 'Nokkur atriði um réttarstöðu sakbornings samkvæmt bandarískum rétti, [A Few Comments on Suspects' Status in American Law]', 34:3–4 *Úlfljótur* (1971) p. 93–99. A Danish example is R. Nielsen, 'Integration og diskrimination - Kommentar til en amerisk Højesteretsdom, [Integration and Discrimination. A Commentary to an American Supreme Court Case]', *Retfærd* (1980) p. 75, (commenting on *United Steelworkers* v. *Weber,* 443 U.S. 193 (1979)).

review in American law. Finally, conclusions will be drawn about the importance of American thought in Nordic constitutional theory after 1970.

4.2.2. The Influence of American First Amendment Theory – Peter Germer

The only examples of scholars relying on American doctrine in a particular substantive area of constitutional law during this period concern free speech theory. In 1973, Peter Germer published a dissertation on free speech theory[714] in which he relied to a great extent on American First Amendment theory.[715] He explained his

[714] P. Germer, *Ytringsfrihedens væsen* [The Substance of Freedom of Speech] (Juristforbundet, Copenhagen, 1973). His treatment of judicial review will be discussed in some detail in the next section. Germer was not the first Nordic lawyer to look towards American First Amendment doctrine. In 1960, F. Castberg, who had published a dissertation on the non-retroactivity clause of the Norwegian constitution in 1920 (*See supra* note 166) published *Freedom of Speech in the West, see supra* note 710, where he spent about 160 pages discussing American First Amendment doctrine and practice. Castberg described the landmark cases in American First Amendment jurisprudence and may thus have made this field of the law more accessible to his successors. However, the book has some characteristics which make it less important than many others for our purposes: it was not intended to be of particular value to Norwegian or Nordic constitutional law, which is in fact hardly mentioned. It is strictly a comparative analysis of free speech doctrine, with only minor discussion of judicial review, and it is quite tied to its time. It was written at the height of the Cold War and focused to a great degree on actual and acceptable means of combating communism in western democracies. Finally, it was written in English, so apart from being physically accessible to Norwegian scholars, it was not considerably easier reading than American textbooks.

[715] Germer summed up his approach in English: "Special mention is given to the doctrines of 'clear and present danger', 'preferred position', and 'balancing of interests.' It is argued that the 'clear and present danger' doctrine in the formulation of Holmes and Brandeis coincides with the distinction between 'speech' and 'action'. This distinction may solve some of the problems concerning the definition of free speech but cannot be given an across-the-board application. The doctrine of 'preferred position' stresses the need for active judicial enforcement of the constitutional guarantees of free speech. But the preferred position of freedom of speech does not mean that the usual presumption supporting legislation is reversed in cases concerning free speech. The doctrine of 'balancing of interests' has been criticised both in American and in German constitutional theory. The only guidance the doctrine gives is that it is not possible to give the courts any guidance on questions of free speech. A universal theory of free speech can be found in the Meiklejohn interpretation of the First Amendment of the United States' Constitution. The thesis analyses the U.S. Supreme Court's step-by-step acceptance of the Meiklejohn interpretation from *New York Times Co*. v. *Sullivan* to *Rosenbloom* v. *Metromedia, Inc.* The Brennan standard of free speech concerning matters of public interest reveals what the Germans would call the essence (*Wesensgehalt*) of freedom of speech. … The universal principles of free speech can be synthesised in the theory that freedom of speech means absolute protection of speech concerning matters of public interest. First, only 'speech' not 'action' is protected. 'Incitement to action' must be regarded and treated as 'action'. Second, only speech concerning matters of public interest is protected. Private defamation and purely commercial advertising are not protected. Third, speech that is

reliance on American materials by stating that American law simply afforded "the richest material concerning substantive freedom of speech".[716] The main aim of his argument was to refute the accepted wisdom in Danish constitutional law that the free speech clause of the Danish constitution

> "guarantees only freedom from prior restraint, not freedom from subsequent civil or criminal sanctions. The prevailing theory of Danish constitutional law maintains that it is impossible to find a constitutional test that defines freedom of speech in terms of freedom from subsequent sanctions. The thesis argues that a test to that effect has been formulated in many constitutions such as … the Constitution of the United States."[717]

To that end, Germer discussed American First Amendment doctrine in detail – from the framing of the First Amendment, through Holmes' and Brandeis' opinions and Alexander Meiklejohn's theories, to *New York Times* v. *Sullivan*[718] and beyond. His book is by far the most detailed description of a topic in American constitutional law published in the Nordic countries in this period. It is also remarkable because, like many of the earlier discussions of American law, it utilised American law as a resource for ideas about domestic law. Germer not only discussed American law, he also applied ideas and concepts from American doctrine to Danish law.

Germer discussed the 'clear and present danger' doctrine in considerable detail,[719] citing many U.S. Supreme Court opinions and dissents as well as scholarly writings about them. He concluded that

> "[t]he legal understanding concerning the [free speech clause] of the Danish constitution is currently at a stage resembling the situation concerning the American Constitution's First Amendment until 1919. … It is therefore rational for Danish courts, when faced with future free speech issues, to follow a similar path to that blazed by the U.S. Supreme Court in *Schenck v. United States*, so that it will be authoritatively established that [the free speech clause] does not only protect against censure and other prior restraints, but also protects freedom of speech substantively understood."[720]

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utterly without redeeming social value is not protected, as it has nothing to do with the purposes which freedom of speech is intended to serve." Germer, *supra* note 714, p. 250 (Summary in English).

[716] *Ibid.*, p. 71.

[717] *Ibid.*, p. 250.

[718] 376 U.S. 254 (1964). In this case, the Supreme Court held that "[t]he constitutional guarantees require, we think, a federal rule that prohibits a public official from recovering damages for a defamatory falsehood relating to his official conduct unless he proves that the statement was made with 'actual malice' - that is, with knowledge that it was false or with reckless disregard of whether it was false or not". *Ibid.*, pp. 279–280. The necessity of promoting "uninhibited, robust and wide-open" public debate was a fundamental aspect of the decision.

[719] Germer, *supra* note 714, pp. 73–93.

[720] *Ibid.*, p. 93. Germer went on to describe recent First Amendment theory in more detail, including the balancing of interests approach, Meiklejohn's theories and their acceptance in

Based on his research of American law and, to a degree, of German law, Germer formulated a theory of free speech.[721] His book was read in the other Nordic countries as well as in Denmark. It introduced the idea of substantive freedom of speech into Danish law and it was precisely in introducing this idea that the book was influential. Danish free speech jurisprudence did not change, however, until the influence of the ECHR was felt in the late 1980s and 1990s.[722] Germer's doctrine did thus not win out in the courts.

Almost 30 years after Germer's book was published, Kyrre Eggen wrote a dissertation on free speech in Norwegian constitutional law, and here again, there was some reliance on American materials, although the Norwegian constitution and the ECHR play the most prominent roles in Eggen's analysis.[723] As will be discussed in more detail in section 4.3., the European Court of Human Rights has also looked to American First Amendment theory in its jurisprudence.[724] That jurisprudence has been very influential in the Nordic countries.[725]

4.2.3. Discussion of American Theories of Judicial Review

American constitutional law and constitutional theory in particular continued to be discussed in Nordic law in this period. In what follows, instances where American law was mentioned in the context of judicial review in general will be examined first.

Then, the focus will be on the influence of the American doctrine of bifurcated review in Nordic law. This topic was discussed in some detail in Nordic writings in the 1970s, and the Norwegian Supreme Court has adopted a version of this doctrine.

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the case law, discussing also the considerations concerning "public figures" (*ibid.*, p. 159) and "the chilling effect". Germer summed up his discussion of this theory: "Such a gradual change in the constitutional doctrine of free speech is illustrated by Brennan's opinions in the cases from *Sullivan* to *Rosenbloom* ... Justice Brennan has thus step by step reached a general acceptance of Alexander Meiklejohn's theory of unlimited freedom of public speech." *Ibid.*, p. 168, citing *Rosenblatt* v. *Baer*, 383 U.S. 75 (1966), *Time Inc*. v. *Hill,* 385 U.S. 374 (1967) and *Curtis Publishing Co*. v. *Butts,* 388 U.S. 130 (1967).

[721] *Ibid.*, p. 209. Perhaps more importantly, Germer discussed judicial review and its bifurcation in the U.S. in considerable detail. That aspect of his book will be discussed *infra*.

[722] L. Sandager-Jørgensen, *Ytringsfrihed – med fokus på grundlovens art. 77* [*Freedom of Speech – with a Focus on the Constitution's art. 77*] (Unpublished thesis, Århus University, 1999), <www.themis.dk/synopsis/docs/Afhandlinger/Ytringsfrihed.html>, visited on 4 August 2005.

[723] K. Eggen, Ytringsfrihet: *Vernet om ytringsfriheten i norsk rett [Freedom of Expression: The Protection of the Freedom of Expression in Norwegian Law*] (Cappelen Akademisk Forlag, Oslo, 2002).

[724] *See* A. Lester, 'The Overseas Trade in the American Bill of Rights'*,* 88 *Colum.L. Rev*. 537 (1988) and the discussion *infra* in chapter 4.3.

[725] *See* as far as Denmark is concerned, *e.g.* Sandager-Jørgensen, *supra* note 722. The same is true of Icelandic law, but the first case that the ECtHR decided against Iceland, *Thorgeir Thorgeirsson* v. *Iceland*, Eur. Ct. H. R. (ser. A-239) (1992) was a free speech case.

4.2.3.1. Judicial Review in General

In this period, Nordic scholars continued to refer to American constitutional law when discussing judicial review in general. In a 1998 article on judicial review, Norwegian law professor Erik Boe reminded his readers that

> "we know how President Roosevelt's New Deal legislation was consistently invalidated as 'unconstitutional'. The control is more cautious now, but it is still not a given that the U.S. Supreme Court upholds laws. This is illustrated by a decision from 1997 concerning a state law aimed at internet pornography … Instead of interpreting the law reasonably narrowly, the U.S. Supreme Court interpreted it very broadly and invalidated it after carefully examining its relation to the First Amendment"[726]

Perhaps more importantly, he noted that Norwegian courts have been hesitant to acknowledge the existence of non-textual constitutional principles, noting that Norwegian Chief Justice

> "Carsten Smith states he is hesitant to accept such principles … That is because the trail blazed by the U.S. is frightening. New constitutional principles are frequently constructed there. For example there is a right to abortion, to contraception and to pornography which are viewed as stemming from 'the right to privacy' … But even if this model is less than appealing, let us not throw the baby out with the bathwater."[727]

As late as 1998 Nordic scholars thus referred without further explanation to American law and to the experiences of the New Deal Court.

The most thorough discussion of American constitutional law in this period was published in 1997. That year, Norwegian Supreme Court Justice Finn Backer wrote an article on American influence in Norwegian constitutional law in particular.[728] He described Aschehoug's theories and reliance on American law briefly and commented, "also at later forks in the road, the Norwegian doctrine of judicial review has been influenced by American law".[729] He discussed famous Warren Court and Burger Court decisions, which was a novelty, even as he criticised the Norwegian jurisprudence that purported to build on those courts' jurisprudence.

Backer commented that "[w]hen it comes to the more concrete decisions of the U.S. Supreme Court in various fields, it is harder to see links to events in Europe and in our country".[730] In spite of this, he went on to describe famous U.S. Supreme Court cases from the 1950s onwards. The first discussed was *Brown* v. *Board of*

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[726] E. Boe, 'Lovers grunnlovsmessighet [The Constitutionality of Laws]', *Jussens Venner* (1998) p. 4, 6.
[727] *Ibid.*, p. 15.
[728] Backer, *supra* note 3.
[729] *Ibid.*, p. 80. On Aschehoug's influence in Norwegian constitutional law and his reliance on American theory, *see supra* chapter 2.3.
[730] *Ibid.*, p. 82.

Education[731] and the cases which followed it. Backer pointed out that Norwegians had done little to counteract discrimination in a society becoming increasingly multi-cultural.[732] He also discussed *Baker* v. *Carr* and *Gray* v. *Sanders*[733] and the right to privacy cases, *Griswold* v. *Connecticut, Eisenstadt* v. *Baird* and *Roe* v. *Wade.*[734] He pointed out that *Roe* "had without doubt been part of the international, ideological climate which is the background for the viewpoint decided upon" in Norway, where a new abortion law was passed in 1978.[735] He also discussed *Miranda* v. *Arizona*,[736] pointing out that *Miranda* and other Warren court criminal procedure cases had "influenced the international climate concerning the rights of suspected persons", as well as Norwegian law in particular by "stating the premises for the discussion on increasing the rights of suspects, that takes place every once in a while".[737] Backer also discussed *New York Times Co.* v. *Sullivan,*[738] comparing that case to Norwegian defamation cases, and *United States* v. *Nixon*.[739]

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[731] *Brown I,* 347 U.S. 483 (1954) (holding that racially segregated schools were unconstitutional).

[732] *Ibid.*, p. 82. Backer pointed out that "[w]e could learn much from the American example … The only area where we are really up to date is gender equality, as the law of June 9, 1978, introduces fairly severe 'affirmative action' measures."

[733] *Baker* v. *Carr*, 369 U.S. 186 (1962) (holding that voters could challenge apportionment which overrepresented rural counties and thus diluted the votes of urban voters). In *Gray* v. *Sanders,* 372 U.S. 368 (1963), the Supreme Court stated that "[t]he conception of political equality from the Declaration of Independence, to Lincoln's Gettysburg Address, to the Fifteenth, Seventeenth, and Nineteenth Amendments can mean only one thing - one person, one vote". *Ibid.*, p. 381.

[734] *Griswold* v. *Connecticut*, 381 U.S. 479 (1965) (invalidating Connecticut's ban on contraception on the grounds that it interfered with a constitutional right of privacy); *Eisenstadt* v. *Baird*, 405 U.S. 438 (1972) (invalidating a law prohibiting the sale of contraceptives to single people on equal protection grounds); *Roe* v. *Wade*, 410 U.S. 113 (1973) (striking down a Texas law prohibiting abortions except to save the pregnant woman's life and setting out a system based on the trimesters of pregnancy).

[735] Backer, *supra* note 3, p. 84. The Norwegian Law of 1978 permitted abortion in the first trimester. Backer pointed out that while abortion was a constitutional right in the U.S., most other countries solved the problem at the legislative level. He mentioned the decision of the German Constitutional Court of Feb. 25, 1975, which found that a German law similar to the Norwegian law violated the German Basic Law's provision protecting life and physical integrity. Backer finally noted that "[n]either in the U.S. nor elsewhere have the opponents of abortion given up their opposition … because they have suffered a setback in many places. This shows that the question of abortion is, at heart, a moral and political question and that the best system is not to lock it into a particular interpretation of the constitution but instead to leave it up to the legislature of each time." *Ibid.*, p. 84. On abortion in particular, *see* chapter 4.4., *infra*.

[736] In *Miranda* v. *Arizona,* 384 U.S. 436 (1966), the Supreme Court held that the Fifth Amendment required that a person in custody must, prior to interrogation, be clearly informed that he has the right to remain silent, and that anything he says will be used against him in court, that he has the right to consult with a lawyer and to have the lawyer with him during interrogation.

[737] Backer, *supra* note 3 p. 83.

He concluded that the "American constitution and the American Supreme Court have… distinguished themselves by turning the spotlight to the rights of the individual". He mentioned American influence on post World War II constitutions and human rights conventions, adding:

> "We seem to have inherited our theory of the courts' power of judicial review from the Americans, even if we had, to a small degree, started exercising a certain review before the American influence was felt. But it must be admitted that substantively we are talking about very different judicial review, not only because the Americans have more constitutional provisions to work with, but also because we have a different view of judicial review. No one wants our Supreme Court to become a political court in the manner of the American Supreme Court. But if one believes in judicial review at all, it is unnecessary to be quite as cautious as tradition dictates.
>
> This caution is linked to an aversion to getting mixed up in what are seen as political circumstances. But I believe it is also linked to a tendency to prioritise social interests, as defined by politicians at any given time, over the rights of the individual. The Americans have a different viewpoint: once somebody has a right, society must work around it. This has increasingly been the view in Europe as well. One needs only think of the ECtHR's case law. We are supposed to work within the rules set out by decisions of international courts, which are quite frequently courageous. Maybe it is time for us to show less caution in cases where the private party to the cases has a good cause and constitutional protection can be a possibility based on accepted legal principles."[740]

After giving an overview of the landmark cases of the last few decades, Backer thus concludes that since more aggressive judicial review is required of Norwegian courts in part because of international obligations, the American example might be even more compelling than before. However, his article is limited in that the main focus was on the American cases and not on the comparative analysis, so he discussed American cases without following up on their influence in Norwegian jurisprudence.

The second book written in the Nordic countries on judicial review and constitutional interpretation alone was published in 1993.[741] In *The Supreme Court and Popular Government*, constitutional law professor Eivind Smith described the history of judicial review in Norway and discussed the counter-majoritarian problem in particular. In his introductory chapters, he compared the Norwegian system to the system in other Nordic countries, countries on the continent, Britain and the U.S.

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[738] *New York Times Co.*v. *Sullivan*, 376 U.S. 254 (1964) (Proof of actual malice required in a libel suit brought by public official against critics of their official conduct).
[739] *United States* v. *Nixon*, 418 U.S. 683 (1974). President Nixon had to turn materials relating to the Watergate break-in over to a special prosecutor. The Supreme Court found that "neither the doctrine of separation of powers, nor the need for confidentiality of high-level communications, without more, can sustain an absolute, unqualified Presidential privilege of immunity from judicial process under all circumstances". *Ibid.*, p. 706.
[740] Backer, *supra* note 3, p. 85.
[741] Smith, *supra* note 3.

Smith noted that even though the British model had influenced the role of the Norwegian Parliament, its influence had "not been strong enough to prevent the emergence of judicial review in Norway. The same is true of the examples from our Nordic neighbours. In the specific debate over judicial review and the Supreme Court as a political body, influences from the federal Supreme Court in the U.S. have played a much more important role."[742] Smith noted that due to the fact that the U.S. was the only country with judicial review when it was adopted in Norway, "it is, in and of itself, natural that the debate here has, since the late 19th century, been oriented towards the U.S."[743] Due to a number of differences,[744] Smith emphasised that "[i]n our times, it is presumably not the U.S. Supreme Court that is the world's most politically influential court or the court having the most important political role… I will finally mention the extensive European developments of systems of constitutional control of laws by special constitutional courts. It is this that provides the most important traits in the comparative picture of the relation between constitution and law in democratic countries."[745]

In sum, there were some essays in which American law was mentioned curtly, but only two instances of Nordic writers really discussing American law in the context of judicial review: Eivind Smith in 1993 and Backer in 1997. The focus was, in both instances, mainly historical; only Backer attempted – and then only to a very limited degree – to apply theories and concepts from American law to Norwegian constitutional law. This scarcity of theoretical discussion and its relative irrelevance for domestic constitutional law sets this period clearly apart from the periods discussed in parts 1 and 2.

4.2.3.2. Bifurcated Judicial Review

It was mentioned briefly in part 3, that since the Second World War, the U.S. Supreme Court has exercised bifurcated judicial review, in the sense that it has been deferential towards most legislation which concerns economic activity, while applying 'heightened scrutiny' to many non-economic rights.[746] The importance of individual rights on one hand and judicial deference to the legislature and letting the legislature adapt the constitution to changing times on the other hand, were first synthesised in American law in the 'preferred position' cases concerning the First

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[742] *Ibid.*, p. 31.
[743] *Ibid.*, p. 32.
[744] Smith mentions the makeup of the U.S. Supreme Court as much more political than the Norwegian Supreme Court; the differing possibilities for choosing what cases reach the Supreme Court; the federal system of the U.S. and the separation of powers there compared to a unitary state with a parliamentary system of government. *Ibid.*
[745] *Ibid.*
[746] *See* White, *supra* note 398, p. 129: "[S]ince the Second World War the prevailing stance of constitutional review adopted by the Supreme Court has been one of bifurcated review rather than guardian review. That posture, we have seen, results in judicial deference toward most forms of legislation regulating economic activity and heightened judicial scrutiny of legislation restricting certain civil rights and liberties, prominent among those the right of free speech" and the sources cited therein.

Amendment,[747] which were a stage in the development of free speech jurisprudence. G.E. White has noted that "the principal rationale for enhanced protection for free speech, from the 1920s through the 1940s, was that expanded protection for free speech reinforced the ideal of majoritarian democracy ... That rationale [was] summed up in the claim that speech rights occupied a 'preferred position' in American constitutional jurisprudence."[748]

Based on the rationale that free speech reinforced democracy, and due to the incorporation of the First Amendment into the Fourteenth Amendment,[749] Supreme

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[747] *See* White, *supra* note 596 and White, *supra* note 398, p. 128–163.

[748] White, *supra* note 398, p. 131.

[749] *Ibid*., p. 142. In *Gitlow* v. *New York,* 268 U.S. 652 (1925), Justice Sanford, speaking for the Court, stated that "[f]or present purposes we may and do assume that freedom of speech and of the press - which are protected by the First Amendment from abridgment by Congress - are among the fundamental personal rights and 'liberties' protected by the due process clause of the Fourteenth Amendment from impairment by the States. We do not regard the incidental statement in *Prudential Ins. Co.* v. *Cheek*, 259 U.S. 530 (1922) 543, that the Fourteenth Amendment imposes no restrictions on the States concerning freedom of speech, as determinative of this question." *Ibid.*, p. 666. The First Amendment was therefore relevant concerning a conviction for 'criminal anarchy' which was prohibited under New York Penal Law. The conviction was upheld. In 1927, Justice Brandeis' followed up on this in his concurrence in *Whitney* v. *California,* 274 U.S. 357 (1927). He wrote: "Despite arguments to the contrary which had seemed to me persuasive, it is settled that the due process clause of the Fourteenth Amendment applies to matters of substantive law as well as to matters of procedure. Thus all fundamental rights comprised within the term liberty are protected by the Federal Constitution from invasion by the States. The right of free speech, the right to teach and the right of assembly are, of course, fundamental rights … These may not be denied or abridged." *Ibid.*, p. 373. He added: "Those who won our independence believed that the final end of the State was to make men free to develop their faculties; and that in its government the deliberative forces should prevail over the arbitrary. They valued liberty both as an end and as a means. They believed liberty to be the secret of happiness and courage to be the secret of liberty. They believed that freedom to think as you will and to speak as you think are means indispensable to the discovery and spread of political truth; that without free speech and assembly discussion would be futile; that with them, discussion affords ordinarily adequate protection against the dissemination of noxious doctrine; that the greatest menace to freedom is an inert people; that public discussion is a political duty; and that this should be a fundamental principle of the American government. They recognised the risks to which all human institutions are subject. But they knew that order cannot be secured merely through fear of punishment for its infraction; that it is hazardous to discourage thought, hope and imagination; that fear breeds repression; that repression breeds hate; that hate menaces stable government; that the path of safety lies in the opportunity to discuss freely supposed grievances and proposed remedies; and that the fitting remedy for evil counsels is good ones. Believing in the power of reason as applied through public discussion, they eschewed silence coerced by law -- the argument of force in its worst form. Recognising the occasional tyrannies of governing majorities, they amended the Constitution so that free speech and assembly should be guaranteed." *Ibid.*, pp. 375–376 (footnote omitted).

Court decisions became more speech-protective around 1930.[750] Based on the link between free speech and democracy, the Supreme Court characterised First Amendment rights as occupying a 'preferred position' in American constitutional law in a number of cases after 1937.[751] This categorisation was criticised by many, perhaps most importantly Justice Frankfurter who, in his concurrence in *Kovacs* v. *Cooper*,[752] argued that "[t]his is a phrase that has uncritically crept into some recent opinions of this Court" and that it was "a mischievous phrase, if it carries the thought, which it may subtly imply, that any law touching communication is infected with presumptive invalidity".[753] The phrase 'preferred position' then disappeared from court opinions soon after 1950.[754]

During the period in which First Amendment freedoms were viewed as being in a 'preferred position,' the Supreme Court advanced a rationale for bifurcated review more generally in *U.S.* v. *Carolene Products*.[755] In that opinion, which was discussed in part 2, Justice Stone, writing for the Court, suggested that a low level of

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[750] *See* White*, supra* note 398, p. 143. *See Near* v. *Minnesota*, 283 U.S. 697 (1931) (finding that injunctions against 'malicious, scandalous and defamatory' newspapers and periodicals were prior restraints and invalid); *Stromberg* v. *California*, 283 U.S. 359 (1931). In this case, the Supreme Court struck down a conviction for displaying a red flag: "The maintenance of the opportunity for free political discussion to the end that government may be responsive to the will of the people and that changes may be obtained by lawful means, an opportunity essential to the security of the Republic is a fundamental principle of our constitutional system. A statute which upon its face, and as authoritatively construed, is so vague and indefinite as to permit the punishment of the fair use of this opportunity is repugnant to the guaranty of liberty contained in the Fourteenth Amendment." *Ibid.*, p. 369; *Grosjean* v. *American Press Co*., 297 U.S. 233 (1936) (invalidating an advertising tax on newspapers over a certain circulation); *De Jonge* v. *Oregon*, 299 U.S. 353 (1937) (invalidating an Oregon criminal syndicalism law).

[751] Even though the categorisation of 'preferred position' was not used in the article, Justice Schjelderup translated a great part of *Palko* v. *Connecticut,* 302 U.S. 319 (1937), and discussed the importance of the freedom of speech to democratic self-governance – in Norway and in the U.S. in his 1940 article in *TfR.* Schjelderup, *supra* note 453. *See supra* chapter 3.2.

[752] 336 U.S. 77 (1949).

[753] *Ibid.*, p. 90. Frankfurter examined the 'preferred position' cases and argued that "[t]he objection to summarizing this line of thought [First Amendment doctrine influenced by Holmes, emphasizing "those liberties of the individual which history has attested as the indispensable conditions of an open as against a closed society"] by the phrase 'the preferred position of freedom of speech is that it expresses a complicated process of constitutional adjudication by a deceptive formula … Such a formula makes for mechanical jurisprudence." *Ibid.*, p. 96 (Frankfurter J., concurring). *See also e.g.,* P.A. Freund, *The Supreme Court of the United States, Its Business, Purposes and Performance* (World Pub. Co, Cleveland, 1961) pp. 32–33 and 75, (discussing the criticism of Learned Hand and Justice Frankfurter); H. Wechsler, 'Toward Neutral Principles of Constitutional Law', 1, 25 *Harv. L. Rev*. (1959) p. 73.

[754] White, *supra* note 398, p. 152.

[755] *U.S.* v. *Carolene Products,* 304 U.S. 144, 152–3 (1938).

scrutiny would be the norm but that stricter scrutiny would be justified under certain circumstances.[756] The scheme for judicial review set out in the footnote further developed the ideas of different levels of scrutiny that formed the basis of the 'preferred position' doctrine.[757]

So although heightened scrutiny was already applied to a non-economic right not guaranteed by the First Amendment in 1942,[758] First Amendment rights and the 'preferred position' cases were clearly in the background of the *Carolene Products* footnote's comment on specific prohibitions of the constitution.[759] They seem to have been the prototypical rights to receive heightened protection long after the Supreme Court ceased using that phrase. As late as 1961, a commentator emphasised First Amendment rights when talking about heightened scrutiny:

> "the experimental mood of the Court now tolerates the widest range of legislation, save in one sphere. Within the past two decades, social and economic legislation of state or nation has almost never been struck down under the due process clause of the Fifth or Fourteenth Amendment; but legislation restricting the freedom of speech or assembly or religion has frequently succumbed to the prohibitions of the First Amendment and of the Fourteenth, which has absorbed and made applicable to the states the provisions of the First."[760]

Another noted in 1959 that "it never has been really clear what is asserted or denied to have a preference and over what".[761] It seems clear, however, that originally only interference with First Amendment freedoms was subject to strict scrutiny, which later became true of most non-economic rights.

In sum, judicial review in the U.S. has, in the post-war years, been exercised in such a way that courts apply a low level of scrutiny in most cases but a heightened level of scrutiny in cases in which a fundamental, non-economic right is at stake and

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[756] *See* note 597, *supra* and accompanying text.

[757] *See* White, *supra* note 398. Nergelius, *supra* note 702, p. 123 notes that "the preferred position principle," "stems from a footnote by Justice Stone in [Carolene Products]. Schematically, the theory is that political rights as well as the interests of minorities which are weak and subject to discrimination must be better protected through judicial review than economic rights, which was particularly meaningful because these last rights had, for the previous half-century … enjoyed a strong protection by the Supreme Court."

[758] *Skinner* v. *Oklahoma ex. rel*. *Williamson*, 316 U.S. 535 (1942). A compulsory sterilization statute was invalidated. White has commented that just as was true for free speech, "[t]he basis for that heightened scrutiny [for noneconomic rights] was the close connection between the freedom personified in noneconomic liberties and democratic theory". White, *supra* note 596, p. 309.

[759] The footnote stated: "There may be narrower scope for operation of the presumption of constitutionality when legislation appears on its face to be within a specific prohibition of the Constitution, such as those of the first ten Amendments, which are deemed equally specific when held to be embraced within the Fourteenth." *Carolene Products,* 304 U.S. p. 153.

[760] Freund, *supra* note 753, pp. 23–24.

[761] Wechsler, *supra* note 753, p. 25. Both Freund and Wechsler were cited in Nordic legal writings.

when the political process cannot, for some reason, be trusted to protect the right or minority in question.[762]

In his 1973 dissertation on free speech,[763] Germer discussed judicial review of legislation limiting free speech and of legislation in general, and introduced the idea of different levels of scrutiny:

> "Even if the Danish Supreme court has, in its decisions concerning laws' compatibility with the Constitution, shown extreme caution [citing UfR. 1921.644], it is not impossible that the Supreme Court will invalidate a law that limits the substantive freedom of speech. The overwhelming majority of cases concerning legislation's constitutionality have concerned the takings clause … which can in and of itself suggest that the courts should be cautious, but in cases concerning laws' compatibility with the principle of free speech in art. 77, the courts need not show a similar caution.
>
> In American doctrine, it is believed that it is not necessary to apply the same guiding principles when testing laws' compatibility with the provisions protecting free speech as when testing laws' compatibility with the constitution's provisions protecting property. In the last thirty-five years' case law, there are almost no cases where economic or social legislation has been invalidated as inconsistent with the protection of property in the Fifth and Fourteenth Amendments, but the American Supreme Court has not shown equivalent caution when enforcing the Constitution's provisions protecting speech.
>
> This difference in the intensity of judicial review is explained by reference to the theory that freedom of speech occupies a constitutionally prioritised position, 'a preferred position'. This point of view can be traced back to Justice Stone's opinion in *United States v. Carolene Products Co.,* which was decided in 1938."[764]

Germer then discussed *Carolene Products* and other cases.[765] He added that "there seems to be general consensus that while questions concerning the constitutionality of economic laws should in general be left to the final decision of the legislature, protecting constitutional guarantees of liberty is amongst the most important roles of

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[762] Some comments on this appeared already in Nordic contemporary writings. *See* Eckhoff, *supra* note 608; Andersen, *supra* note 3; Ross, *supra* note 519.

[763] Germer, *supra* note 714.

[764] *Ibid.*, pp. 93–94. (Footnotes omitted.)

[765] He discussed the following cases: *Schneider* v. *New Jersey,* 308 U.S. 147 (1939), (invalidating statutes allegedly aimed at preventing littering by prohibiting handing out leaflets in streets); *Jones* v. *Opelika*, 316 U.S. 584 (1942) (upholding license taxes on the sale of printed matter); *Thomas* v. *Collins*, 323 U.S. 516 (1945); and *Kovacs* v. *Cooper*, 336 U.S. 77 (1949) (upholding a city ordinance prohibiting the use of sound trucks or other instruments emitting loud noises). Germer also emphasised, possibly due to Frankfurter's concurrence in *Kovacs,* that there "has not been any consensus amongst American Supreme Court Justices on whether the general presumption of constitutionality should be reversed in cases concerning freedom of speech, so that there should be a presumption of unconstitutionality whenever a law interferes with freedom of speech". Germer, *supra* note 714, p. 98.

the courts."[766] Germer acknowledged that even if freedom of speech were put in a 'preferred position,' the scope of the constitutional protection would still need to be defined by the courts. Still, he concluded:

> "A double standard for judicial review is recommended not only for American law but also for Danish law. The fact that there is widespread hostility towards active judicial review is mainly due to the fact that the debate about the courts' right to exercise judicial review has concentrated on the constitutional protection of property rights. The principles that have been established in the case law concerning takings … have been accepted as applicable unchanged also to judicial review of laws' compatibility with other constitutional provisions."[767]

Germer elaborated on this point, arguing that the considerations which came into play when the courts review the constitutionality of economic laws were not necessarily relevant when the right at issue was a non-economic one.

In that context, Germer discussed Wechsler's theory of neutral constitutional principles.[768] In his 1959 article 'Towards Neutral Principles of Constitutional Law', Wechsler had argued "that the main constituent of the judicial process is precisely that it must be genuinely principled, resting with respect to every step that is involved in reaching judgment on analysis and reasons quite transcending the immediate result that is achieved".[769] On this basis, he disputed what he described as the argument "that no court can review the legislative choice – by any standard other than a fixed 'historical meaning' of constitutional provisions – without becoming 'a third legislative chamber'", suggesting that there is "a middle ground consisting of judicial action that embodies what are surely the main qualities of law, its generality and its neutrality".[770] He elaborated that "[a] principled decision … is one that rests on reasons with respect to all the issues in the case, reasons that in their generality and their neutrality transcend any immediate result that is involved."[771]

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[766] *Ibid.,* citing Freund's *The Supreme Court of the United States, Its Business, Purposes and Performance.* Freund had noted "[i]n short, when freedom of the mind is imperiled by law, it is freedom that commands a momentum of respect; when property is imperiled, it is the lawmakers' judgment that commands respect." Freund, *supra* note 753, p. 33.

[767] Germer then referred to Poul Andersen's *Danish Constitutional Law* from 1954, where Andersen had suggested, based in part on the positive comments by the political parties, that judicial review concerning civil rights could well become a fixture of the Danish constitutional system. Germer, *supra* note 714, p. 99.

[768] *Ibid.*, pp. 101–106, discussing the theories set forth in Wechsler, *supra* note 753, and H. Wechsler, 'The Courts and the Constitution'*,* 65 *Colum. L. Rev*. (1965) p. 1001.

[769] Wechsler, *supra* note 753, p. 15.

[770] *Ibid.*, p. 16.

[771] Wechsler, *supra* note 753, p. 19. In his article, Wechsler also discussed "'the preferred position' controversy", anticipating the concerns of Norwegian scholars as he wrote: "The real test inheres, as I have tried to argue, in the force of the analysis … In this view, the 'preferred position' controversy hardly has a point – indeed, it never has been really clear what is asserted or denied to have a preference and over what. Certainly the concept is pernicious if it implies that there is any simple, almost mechanistic basis for determining priorities of values having constitutional dimension, as when there is an inescapable conflict

After giving an overview of Wechsler's theories, Germer discussed Bickel's response to this theory briefly in *The Least Dangerous Branch*.[772] Bickel argued that a "true principle may carry within itself its own flexibility, but – and this is the important thing – flexibility on its own terms".[773] Germer seconded that argument, noting that the principle, so necessary in constitutional adjudication, could well be flexible.[774]

Finally, Germer discussed the counter-majoritarian problem and possible solutions based on American law. He mentioned that Ernst Andersen[775] had argued in the late 1940s that judicial review was undemocratic, and supported Ross' argument that the fundamental question was "whether the final decision concerning the fate of important legislative reforms should be made by lawyers or a wider circle of politicians, representing the population".[776] In response to this concern, Germer cited Eugene V. Rostow, who argued, in an article named 'The Democratic Character of Judicial Review'[777]

> "[g]overnment by referendum or town meeting is not the only possible form of democracy. The task of democracy is not to have the people vote directly on every issue, but to assure their ultimate responsibility for the acts of their representatives, elected or appointed. For judges deciding ordinary litigation, the ultimate responsibility of the electorate has a special meaning. It is a responsibility for the quality of the judges and for the substance of their instructions, never a responsibility for their decisions in particular cases. It is hardly characteristic of law in democratic society to encourage bills of attainder, or to allow appeals from the courts in particular cases to legislatures or to mobs. Where the judges are carrying out the function of constitutional review, the final responsibility of the people is appropriately guaranteed by the provisions for amending the Constitution itself, and by the benign influence of time, which changes the personnel of courts. Given the possibility of constitutional amendment, there is nothing undemocratic in having responsible and independent judges act as important constitutional mediators."[778]

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between claims to free press and a fair trial. It has a virtue, on the other hand, insofar as it recognises that some ordering of social values is essential; that all cannot be given equal weight, if the Bill of Rights is to be maintained." Wechsler *supra* note 753, p. 25.

[772] *See* A. Bickel, *The Least Dangerous Branch: The Supreme Court at the Bar of Politics* (Bobbs-Merrill, Indianapolis, 1962). Bickel mostly disagreed with Wechsler, particularly with Wechsler's discussion of *Brown I* and the following cases. *Ibid.*, pp. 49–65.

[773] *Ibid.*, p. 58.

[774] Germer, *supra* note 714, p. 104.

[775] *See* part 3, *supra.*

[776] E. Andersen, *Fra Juraens Overdrev: Studier* [*From the Fringes of the Law: Essays*] (C.E.C. Gad, Copenhagen, 1953) pp. 97–98. Here taken from Germer, *supra* note 714, p. 106. Germer also referred to statements in Andersen's *Forfatning og sædvane* [*Constitution and Customary Law*], which is discussed in part 3, *supra*.

[777] Germer, *supra* note 714, p. 107, citing E.V. Rostow, 'The Democratic Character of Judicial Review', 66 *Harv. L. Rev.* (1952) p. 193.

[778] Rostow, *supra* note 777, p. 197. It is interesting to note, that an argument similar to Rostow's did not come up in the Nordic debate on judicial review either when Germer's book

PART 4

In his attempt to answer the questions arising concerning the undemocratic character of judicial review, Germer also reprinted a part of Alexander Bickel's comments on judicial review and neutral principles. Among the cited passages is the following:

> "[T]he supreme autonomy that the Court asserts in many matters of substantive policy needs justification in a political democracy. And it can have it, if at all, only in the claim that the function never relinquishes the pursuit of reason, and that ultimately it is principled, that the Court does not discharge its office even by doing what most people may think right or necessary, unless it does it in principled fashion …
>
> The Court is the place for principled judgment, disciplined by the method of reason familiar to the discourse of moral philosophy, and in constitutional adjudication, the place only for that, or else its insulation from the political process is

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was published or later. It was certainly argued that democracy did not have to mean unhindered majority rule, but the thrust of the Norwegian argument in particular, was that respect for the rights of the individual was an inherent part of any democracy. Hence, judicial review to ensure this respect could not possibly be undemocratic. This is advanced *e.g.* by Smith, *supra* note 3. A similar argument was described by an American commentator, in the context of the Bork appointment hearings: "Civil libertarians have pointed out that there are two concepts in the American Constitution, not one. The first is the principle of democracy, that is, that the popular will rules. The second is the principle of liberty, that is, that individual rights triumph over the desires of the majority and that if there was anything undemocratic about this idea, the Bill of Rights, and the First Amendment in particular, must be considered undemocratic in their very nature." B. Caine, 'Introduction – The Influence Abroad of the United States Constitution on Judicial Review and a Bill of Rights', 2 *Temp. Int'l & Comp. L.J.* 59 (1988) p. 61. While this rationale agrees with Rostow that "[i]t is error to insist that no society is democratic unless it has a government of unlimited powers, and that no government is democratic unless its legislature has unlimited powers", (Rostow, *supra* note 777, p. 199) arguing that human rights are a necessary part of democracy is a different rationale – or a different definition of democracy – than that primarily advanced by Rostow. However, he anticipated this point, stating without elaborating that: "I for one believe that the defense of civil rights by the courts is a force not only for democratic values but for social order." *Ibid.*, p. 207. In his article, Rostow also discussed levels of scrutiny briefly, although not the primary protection of free speech, which was the key point in Germer's discussion. He wrote, "[t]he risk today, and it is a real one, is that the Supreme Court is not giving sufficient emphasis to the second part of Marshall's 'twofold rule'. The freedom of the legislatures to act within wide limits of constitutional construction is the wise rule of judicial policy only if the processes through which they act are reasonably democratic. Chief Justice Stone put emphasis on the fact that in many instances legislative acts are directed against interests which are not or cannot be represented in the legislature: out-of-state interests … or politically impotent minorities … This line of thought led him to the arresting conclusion that statutes which affected interests beyond political protection, or which limited the full democratic potentialities of political action, were not to be approached by the Court with the deference it usually accorded legislative decisions, by way of 'presumption' or otherwise." *Ibid.*, pp. 202–203, referring to *U.S.* v. *Carolene Products,* 304 U.S. 144 (1938).

> inexplicable."[779]

On the basis of these arguments from Rostow and Bickel, Germer concluded that

> "[i]f Danish courts want to take on the role of enforcing constitutional liberties according to these principles, so that they differentiate between interference with economic and non-economic rights, and so that they base their decisions on neutral principles, there will be no reason to describe judicial review as undemocratic."[780]

Just like earlier theorists, therefore, Germer used arguments from American law to argue for specific jurisprudential developments in Danish law and to respond to Danish theories, which had – in turn – been based in part on American law. Germer's book is interesting for a number of reasons. First of all, it is a good book on First Amendment theory. Second, it discussed the American doctrine of different levels of scrutiny in some detail. That doctrine had been mentioned in Nordic legal discourse a number of times, but Germer particularly emphasised the protection of freedom of speech and its importance for democracy. Third, Germer linked all this to a discussion of the democratic or undemocratic character of judicial review in particular, and attempted to use these arguments from American law in the context of Nordic law.

Had Germer's book been really influential, Nordic constitutional theory on this point would have looked much more like American theory, or at least, the questions asked would have been similar. However, it was not. Other Nordic lawyers, including those writing about judicial review, have referred to Germer as an authority on American law. Yet the Courts did not follow his suggestions in this area any more than in the context of free speech, and many of the balls he threw up by discussing various theories of judicial review were never caught. This seems especially true in Denmark.

In Norway, however, Professor Carsten Smith endorsed the general idea that non-economic rights should be protected more jealously than economic rights in a lecture at the general meeting of Norwegian judges in 1974. His lecture was later published in the law review *Lov og Rett.*[781] Smith's fundamental theory was that the courts, and the Supreme Court in particular, should make their decisions broader and

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[779] A.M. Bickel, *The Supreme Court and the Idea of Progress* (Harper & Row, New York, 1970) pp. 86–87. This, and additional pages of Bickel's discussion of this point are reprinted in Germer, *supra* note 714. Germer also referred to Shapiro's argument that judicial review was not undemocratic when viewed in the context of American politics. *Ibid.*, p. 108, citing Shapiro's *Freedom of Speech: The Supreme Court and Judicial Review* from 1966 and Swisher's *The Supreme Court in Modern Role, on the relation between neutral principles and the democratic nature of judicial review* from 1958. *Ibid.*, p. 109.

[780] *Ibid.*, p. 110. He then went on to discuss the balancing of interests with great emphasis on American doctrine. He discussed a dozen or so American cases in that context as well as criticism levied against the doctrine in theory. I will not discuss that further here, since it has less to do with judicial review than what has been discussed here.

[781] C. Smith, 'Domstolene og rettsutviklingen, [The Courts and the Development of the Law]', *Lov og Rett* (1975) p. 292.

try to avoid the very narrow and concrete decisions he described as typical. While setting out a new model for the courts to follow, he summarized American constitutional history of the 1930s briefly and explained that

> "[i]n 1937 … [the Court] retreated from protecting economic rights. Since then, its actions, when it comes to striking down laws, have concerned political rights and other civil rights … This new wave has been based on the principle often called 'the preferred position principle'. It states that there is a fundamental difference between legislation that impairs the exercise of economic rights and legislation, which impairs the exercise of individual liberty, like freedom of speech, association, assembly, religion, etc. If one disagrees with economic legislation, the way to change it in a democratic society is to get the legislature to change it, through speech and elections. But it is a prerequisite for such trust in the legislature that the democratic political process can work without hindrance. Therefore, individual liberties need special protection by the courts.
>
> … The battle over political direction should be fought by each generation. If one is not successful in the democratic process in Parliament, an earlier generation's view of society should not prevail through the constitutional interpretation of the courts. But in this country as elsewhere, we should accept that individual liberty stands higher in the hierarchy of democratic values than economic rights and should therefore be better protected through judicial review."[782]

Smith then discussed Norwegian law and noted that no law had been invalidated for decades. He indicated that perhaps laws were only invalidated when it was "obvious or beyond doubt"[783] that they were inconsistent with the Constitution, but added "[t]his is unclear. And it would therefore be a useful clarification, if the Supreme Court would, when the occasion presents itself, declare that judicial review is limited in such a manner except when laws concern freedom of speech or other individual liberties."[784]

In a footnote to his article, Smith noted ruefully that he "could hardly say that the lecture was joyfully received by the country's judges".[785] Be that as it may, the Norwegian Supreme Court built on some of his recommendations the very next year. In a case where the constitutionality of a new law on compensation for takings was challenged, the majority of the court stated:

> "[T]here are different views of how much is needed for the courts to set a law aside as inconsistent with the constitution. I do not think it necessary to speak generally of this. The solution will, to some degree, depend on the constitutional provisions at issue. When dealing with provisions which protect the individual's personal liberty or security, the constitution's weight must be considerable. If, on the other hand, we are talking about provisions that regulate the workings of the other branches of government or their competence, I believe, like the first to vote in [the whaling case of 1952] that the courts must, to a great degree, respect Parliament's own view.

[782] *Ibid.*, pp. 301–302.
[783] As was the case in Denmark, and now also in Sweden.
[784] C. Smith, *supra* note 781, p. 302.
[785] *Ibid.*, pp. 292.

> Provisions which protect economic rights must be in a middle position.
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> I think it clear that Parliament's understanding of such legislation's relation to the constitution must play an important role when the courts determine its constitutionality, and that the courts must be careful when superimposing their evaluation on the legislature's … Based on this, I would, personally, hesitate to find a law unconstitutional in cases where there is reasonable doubt and where parliament has clearly evaluated the law's constitutionality and come to the conclusion that the law is consistent with the constitution. But if judicial review is to have any meaning, the courts must exercise it in cases in which they find it beyond reasonable doubt that the law will lead to consequences which are inconsistent with the constitution."[786]

All the justices endorsed this. In a minority opinion, Justice Bølviken added a few comments. She wrote:

> "It is my opinion that when the legislature has evaluated the constitutionality of laws, a lot is needed for the courts to be justified in imposing their will on the legislature's. As a starting point, it must be the legislature's to evaluate the relation to the constitution. The substance of the right to exercise judicial review depends on the constitutional provisions at issue. Concerning [the takings clause], the legislature must have considerable leeway to enact regulations, while the picture is very different when it involves the constitutional provisions which protect personal integrity."[787]

This was the first instance in decades of a law being struck down, and only the third time that the Norwegian Supreme Court discussed its power to exercise judicial review.[788] Apart from establishing that judicial review was alive and well in Norway, this decision explained how it would be exercised: The court would show more deference to legislative judgment concerning laws' constitutionality in cases concerning separation of powers and the competence of various branches of government than in cases concerning civil liberties. Cases concerning the economic rights of individuals would occupy a middle position. The case in question fell into this category.[789]

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[786] Rt. 1976.1, 5–6.
[787] Rt. 1976.1, 22.
[788] The other two were a case from 1866 (UfL. VI, 165) and Rt. 1918.401 (the *Waterfalls* case).
[789] The majority and minority seem to differ on the level of deference in such cases, since the minority is more deferential to legislative judgment than the majority. *See also* J. Andenæs, 'Grunnlovtolking, domstoler og politikk – Randbemerkninger til en høyesterettsdom', [Constitutional Interpretation, Courts and Politics – Random Comments on a Supreme Court Case] *in* Jakhelln *et al*. (eds.), *Rett og Humanisme, Festskrift til Kristen Andersen* [*Law and Humanism – Liber Amicorum for Kristen Andersen*] (Tanum-Norli, Oslo, 1977) pp. 31–32 [hereinafter Andenæs, 'Interpretation']. To some extent, commentators disagree on the holding of this case. In the main textbook of constitutional law, it is stated that "there is, so to speak, a double standard … first, the constitutional interpretation that makes the most sense and that Parliament must base its decision on. Then there is the interpretation that the courts

After the 1976 case was decided, it was immediately pointed out that the doctrine it set out was based on Carsten Smith's lecture from 1974. Johs. Andenæs pointed out that

> "distinguishing between economic and non-economic rights has not been a fixture of Norwegian case law. Carsten Smith introduced this to a Norwegian audience in a lecture on 'The Courts and the Development of the Law' given at the judges' seminar in 1974, referring to developments in American case law. His reasoning was that (1) the personal liberties are placed higher in the hierarchy of democratic values than economic rights, and (2) that this means that they are better protected by the courts against the legislature. Neither the majority nor the minority of the court gave any reasons for their view, but it is probable that a similar way of thinking underlay the case … Whether these premises are tenable is something that I will not discuss here."[790]

On American law on this point, Andenæs referred to Germer's book on free speech, discussed above. In his 1993 treatise on judicial review, Eivind Smith also tracked the ideas in the 1976 case back to Carsten Smith, noting:

> "The idea that the courts are the guardian of the democratic rules of the game is behind the so-called 'preferred position principle' which developed in the U.S.A. In short this principle states that the courts shall prioritise enforcing rules which matter for democratic government (e.g. on freedom of speech) over enforcing rules which are reached by democratic processes (e.g. those impairing economic rights). This principle is a part of the ongoing American debate on judicial review's legitimacy and on the Supreme Court's decisions.
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> In Norway, Carsten Smith introduced this mode of thinking. In the premises of Rt. 1976.1 (Kløfta) the Supreme Court stated its endorsement. The case can hardly be described as impacted by the doctrine and the impact of this principle in the case law is at best a matter of discussion, but that is another story."[791]

Ultimately though, Eivind Smith expressed doubts about the distinction between rights that are important for the workings of democracy and those affected by

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must accept once Parliament has made a decision. The statements in [the 1976 case] about the weight that the courts should afford to Parliament's evaluation are tied to the premise that 'Parliament has clearly assessed the situation and come to the conclusion that the law is not inconsistent with the constitution'." J. Andenæs, *Statsforfatningen i Norge* [*The Constitution of Norway*] (Tano, Oslo, 8th ed. 1998) p. 292 [hereinafter Andenæs, 'Constitution']. Others believe that different levels of scrutiny would be applied in all cases, not only those in which Parliament has evaluated the law's constitutionality. *See* Boe, *supra* note 726. However, the text of the opinion seems to suggest otherwise.

[790] Andenæs, 'Interpretation', *supra* note 789, pp. 34–35.

[791] Smith, *supra* note 3, p. 328. The echoes of the *Carolene Products* footnote are clear in this passage. The same commentator also noted that the doctrine could be used to argue that judicial review of legislation impairing central, democratic rights is not only legitimate but also very important. On the other hand, it could also be used to argue that the courts should reach quite far to uphold political choices in e.g. economic matters, if the legislative process fulfils minimum requirements for democracy. *Ibid.*

decisions reached through democratic processes, noting that it had no basis in the text of the Norwegian constitution.[792] He also argued that

> "the distinction between the rules of the game and its outcome is not by any means as clear as the Norwegian debate over 'the preferred position' might suggest. Not least, 'economic' matters can have an important and direct meaning for the workings of democracy: Questions of the right to education and to be free of poverty, for instance, can be decisive concerning the real possibility of taking part in the democratic process."[793]

Finally, Eivind Smith stated that it was no coincidence that judicial activism had been a hallmark of American jurisprudence in the period this principle was dominant in the U.S. He added that

> "[s]uch a development is hardly the aim of those who argue for a differentiated review here. But if the courts were to become activist, we would come up against considerations of the sort that arise concerning the legitimacy of differentiated constitutional protection without a basis in the constitution itself. It is easy to be sympathetic to the idea of the courts having a special mission as guardians of the rules of the democratic process. The legal system has, in general, special responsibility for ensuring that minimum procedural requirements are fulfilled. But this responsibility cannot be limited to the most general principles of democratic government. Respecting constitutional rules which apply to the procedure antedating the political decision is not sufficient to fulfill ideal goals of democracy and majority rule."[794]

This doctrine of different levels of deference to legislative judgment has thus been criticised by Norwegian scholars for not having a basis in the constitution and for being based on dubious premises.[795] In a lecture given in 2000, Carsten Smith, who

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[792] *Ibid.*

[793] *Ibid.*, p. 329. Smith also discussed American law further: "It is not a coincidence that once this principle became dominant, the case law shows 'judicial activism' in the field of civil rights going quite far: the judicially mandated remedies against segregated schools are well known." *Ibid.*

[794] *Ibid.*

[795] *See also e.g.,* Andenæs, Constitution, *supra* note 789, pp. 292–293: "There may be good reason to question the use of this distinction concerning judicial review. It is one matter if one believes one category of constitutional provisions to be more fundamental, more 'sacred' than another. That may affect the interpretation of these provisions. But even accepting this, it is questionable that this distinction should be meaningful in the context of the relation between the legislature's and the courts' evaluation of legislation's constitutionality. The considerations which support deferring to the judgment of the legislature are about as important in both cases." Smith discussed the doctrine in light of democratic considerations: "Such a theory of gradual constitutional protection has no basis in the constitution. Developments in the case law in the direction pointed out by 'the preferred position principle' are therefore based on the courts' changing the norms, which flow from the constitution itself, of their own accord … Judicial amendments of norms enforced by judicial review without a

was then Chief Justice of the Norwegian Supreme Court, responded to the criticism, pointing to the fact that public opinion in Norway concurred with the idea that civil rights and liberties are more fundamental values than economic rights and that this "order of priority … is also common in the international arena, in United Nations human rights works, in the practice of the European Court of Human Rights and in the constitution or court practice of many nations".[796] He mentioned the rationale for bifurcating judicial review,[797] discussed the Norwegian Court's decision to use a particularly low level of scrutiny in separation of powers cases[798] and concluded that "[t]he concept of judicial review in Norway was created in the 19th century on the American model, and was modernised in the 20th century by adapting the preferred position principle to Norwegian conditions".[799]

In spite of the criticism, the Supreme Court has affirmed the doctrine of bifurcated – or even trifurcated – review in subsequent cases. Two of those cases are from 1996 and suggest a further gradation.[800] In both cases, the question was whether it was inconsistent with art. 97 of the Norwegian Constitution, which prohibits retroactive laws, to decrease pensions from Social Security paid to those who had already started receiving pension. The Supreme Court determined that the welfare rights at issue occupied a middle position between economic and civil

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previous constitutional amendment are problematic in a democratic society." Smith, *supra* note 3, pp. 328–329.

[796] C. Smith, 'Judicial Review of Parliamentary Legislation: Norway as a European Pioneer' (The University of London Annual Coffin Memorial Lecture, 3 April 2000) *the Norwegian Supreme Court*, <www.hoyesterett.no/artikler/2694.asp>, visited on 5 August 2005.

[797] On economic legislation, Smith noted that "economic legislation is a central area of party politics which is frequently amended through public debate and elections. But a condition for a trustworthy political process is openness for the public to participate in the process and a transparent political system. For this reason special protection should be given to civil and political rights – including the freedom of speech." *Ibid.*

[798] "As far as these norms [regulating the separation of powers] are concerned, the Court will, it has stated, to a large extent respect Parliament's own position. However, sharp criticism has been directed at these decisions, with critics arguing that the legislative process in Parliament is in itself also a safeguard of individual rights." The decisions he referred to were ones in which "the Supreme Court has refrained from intervening in a far-reaching delegation of legislative authority on the part of the Parliament, declaring that the primary sphere for judicial review is the rights of a citizen". *Ibid.*

[799] Smith continued: "This begs the question as to whether in the new present century we will also dare to emulate the most recent practice adopted by the US Supreme Court - the application of nontextual constitutional rights … The idea of extrapolating implicit constitutional rights remains removed from the Norwegian conception so far. The Supreme Court has nonetheless tested these waters, although with extreme caution … Most of the supplementation of the Constitution which would concur with Norwegian thinking can be achieved by applying the European Convention on Human Rights and the two United Nations Covenants. It is probable that these may present the Norwegian courts with some of their greatest legal challenges in the near future." *Ibid.*

[800] Rt. 1996.1415 and Rt. 1996.1440.

rights.[801] In the first of those cases, the Supreme Court elaborated on this differentiation. After citing the 1976 decision, Justice Schei wrote:

> "I believe this division into three categories is right in principle. It is certainly relatively rough, the economic rights in particular include a variety of different categories, but as a general starting point the constitutional protection based on the provisions on personal liberty or security must be better than the protection for economic rights."[802]

The Court upheld the law. While concurring in the decision, Justice Backer criticised this categorisation, mainly for not corresponding to Norwegian reality. In his concurrence, he noted that Andenæs and Eivind Smith

> "have latched on to the thought that differentiating between constitutional provisions … is consistent with a lecture given by then Professor Carsten Smith … in 1974. He recommended adopting the American 'preferred position principle'. This principle presupposes that there is a fundamental difference between legislation impairing economic rights and legislation impairing personal liberties like freedom of expression, association, assembly and religion.
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> To this, it is necessary to add that constitutional cases concerning personal rights and liberties arise frequently in the U.S., but very rarely in Norway. Based on the number of cases, the constitutional cases that count in this country are cases concerning economic rights and interests, based on the constitution's art. 97 and 105. I do not see any reason to downgrade the protection of such rights and interest for the only reason that it would presumably be even more important to protect personal rights and liberties when any such cases arise before the Norwegian courts. I believe one must be careful not to mix up the question of judicial deference to the legislature and the substantive question of the limitations set out in the constitution. On the latter question, I agree that parliament has great leeway to regulate the conditions of economic activity and economic life in general."[803]

A year later, the Supreme Court was called on to decide a freedom of expression case. This was a criminal case, in which a spokesman for a nationalist party was

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[801] The Supreme Court's decision in the latter case referred to the former on most important points.

[802] Rt. 1996.1415, 1429. Schei continued: "It is argued that the rights at issue concern payments which replace salaries and which guarantee welfare. These characteristics of these rights should – we are told – lead to them having similar, or almost similar, protection as personal liberty and security … I agree that these characteristics are important. They play a central role in the constitutional evaluation. On the other hand, I cannot see that there should be a reason to view the protection of welfare rights under art. 97 as similar to the protection of personal liberty and security. When it is a question of this last category, the consideration of the legislature's ability to act must be pushed aside when the constitutional protection is assessed. This would not be the case with the welfare rights." *Ibid.* The state had referred to American law, stating that welfare had not been viewed as a fundamental interest in U.S. constitutional law. *Ibid.*, pp. 1419–1420.

[803] Rt. 1996.1415, 1438 (J. Backer, concurring). He later wrote an article on the influence of American jurisprudence in Norwegian constitutional law, *see supra* note 3.

convicted of racist statements in the party platform.[804] On the issue of judicial review, the Court said:

> "Concerning the legislature's view of the law's constitutionality, I note: The constitution's art. 100 [guaranteeing freedom of speech] is in the category of constitutional provisions enacted to protect the individual's personal liberty and security. Judicial review will be particularly potent here, and possible legislative assumptions about the constitutionality of criminal laws, which impair the freedom of speech, can hardly weigh toward limiting the protection. I refer to [the 1996 cases]."[805]

In spite of this, the majority upheld the conviction, the Constitution's art. 100 and the free expression provision of the European Convention of Human Rights notwithstanding.[806] Two dissenters found this a *non sequitur*. After citing the 1976 and 1996 cases they noted that "it is clear that the constitution's art. 100 is precisely a provision in the category where the constitution should carry the most weight. This weight increases as we near the central subject of the provision."[807] This presumably refers to political speech as opposed to 'low-value' speech. Based on this and the fact that there was question of a political party and its platform, the minority wanted

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[804] This case obviously raised important free speech questions. The appellant argued that "[f]reedom of speech is perhaps the most important prerequisite for democracy and this is especially true in the political arena. It is not for the authorities to decide between which political views voters should be able to choose from. The minority must have an opportunity to show that the majority is wrong; the majority must counter undesirable views with arguments, not with punishment." Rt. 1997.1821, 1823.

[805] *Ibid.*, p. 1831. A commentator has noted that the review is stricter – in the sense of the Court paying less attention to the opinion of Parliament – than the Court suggested in the 1976 case. He adds, "[i]t may be argued that there is a lack of consequence between the form and the reality of the vote. The majority backs … away from super-imposing the Court's view of the usefulness of [the penal provision] for the purpose of eliminating racism. The minority, which expresses itself more cautiously about how deep the review should be, in reality superimposes its assessment of the law's usefulness over the Parliament's." K. Eggen, 'Kjuus-saken – rasediskriminering og ytringsfrihet, [The Kjuus Case – Racial Discrimination and Freedom of Expression]', *Lov og Rett* 1998, p. 259–275, 269.

[806] The court found that certain actions suggested in the party platform were in effect "ethnic cleansing". It noted that "it has been argued that such legislation … is not an appropriate means of countering racist speech. It must – we are told – be countered with arguments in public debate rather than be forced into hiding. This argument is well known and general. It has been advanced in public debate since [art. 100] was enacted. But the possibility of stopping the worst sort of racist speech – and thus also the harassment it constitutes for those it hits - through arguments alone is uncertain at best. I do not believe that the legislature's assessment of the appropriateness of these means [is] without foundation or otherwise weak in substance … I add that the provision is not only motivated by a wish to prevent the dissemination of racist speech. It is also a mark of society's protection of minorities which are submitted to extremely injurious remarks." Rt. 1997.1821, 1832–3.

[807] *Ibid.*, p. 1834.

to acquit.[808] Although the case is hardly typical because there are important human rights on both sides of the balance, the case has raised questions on whether the level of scrutiny really is higher when non-economic rights are at issue.

In his 1997 article discussed above, Backer traced the doctrine of differentiated review to American law through Carsten Smith's lecture.[809] Similarly, Carsten Smith stated unequivocally in 2000 that the Norwegian Supreme Court had adopted this doctrine based on American jurisprudence.[810]

The basic idea in the Norwegian doctrine is thus clear – to give civil and political rights priority over economic rights – and it is clear that this basic idea stems from American law. Carsten Smith stated clearly that the role model was the Warren Court, and to a certain degree the Burger Court. The 'preferred position' cases were thus not particularly the model for the Norwegian jurisprudence, although the emphasis in Norwegian theory at least, was on First Amendment

[808] On this decision, including the difference between the decision and the dissents, *see e.g.,* Eggen, *supra* note 805.

[809] He wrote: "the [preferred position] doctrine is old, but it broke through after the U.S. Supreme Court modified its extreme position on protecting economic rights after the conflict with President Roosevelt in 1937. The activist direction that the Supreme Court took under Earl Warren, who was Chief Justice from 1953 to 1969 applied to personal liberties, even though these can sometimes also have economic consequences. Both Andenæs and Eivind Smith are critical of this distinction and have pointed out that it has no basis in the words of the constitution or in Norwegian case law. In addition, I want to point out that most cases on laws' constitutionality in this country concern economic rights. The situation is thus different from that in the U.S.A. Many cases concerning individual liberties arise there. It would be a pity if the doctrine were used to diminish the protection of constitutional rights in the most relevant field in this country. However, this doctrine has been repeated in the two plenary decisions of Nov. 8, 1996 … and must be viewed as good law today." Backer, *supra* note 3, p. 81.

[810] "[T]he Supreme Court in two plenary decisions in 1976 and 1996 devised an order of priority for the constitutional rules, a kind of constitutional relativity, awarding them varying degrees of legal strength during judicial review. In this matter the Supreme Court was inspired by the American 'preferred position principle' particularly as practiced by the U.S. Supreme Court during the 1950s and 60s, the time of Chief Justice Earl Warren. While the U.S. Supreme Court during the 1930s had shifted from very active to very restrained review as regards economic legislation, this Court exercised during Warren's period of office particularly strong activism in relation to civil rights. The personal and political rights and liberties were thus given a preferred position in relation to economic rights." Smith, *supra* note 796. Smith synthesised the doctrine: "The Norwegian Supreme Court has categorised the constitutional rules into several main groups. Where these rules relate to the individual's personal liberty or safety, the constitutional protections must be most vigorously guarded by the Supreme Court against encroachment by legislation, whereas for constitutional rules relating to economic rights, the Parliament's own interpretation of the Constitution when passing an Act should be attributed greater significance." *Ibid.*

freedoms, and the term 'preferred position' is generally used to describe bifurcated judicial review.[811]

There are important differences between the American version of bifurcated review and Norwegian jurisprudence. The most important may well be the fact that the differentiation only seems to matter in Norwegian law when Parliament has clearly evaluated the constitutionality of legislation. So when Parliament has not discussed the legislation's constitutionality at all, the differentiation probably plays no role, but that is not clear from the cases and neither is it clear what the standard will be in such cases. Some scholars believe that the distinction matters in all cases, including those concerning laws whose constitutionality was not discussed in Parliament, but these scholars are a minority. It is also unclear what is required before Parliament would be believed to have considered the law's constitutionality: whether comments by one Member of Parliament would be enough, whether a committee had to consider the constitutionality of a proposed Act, or whether even more would be necessary. The doctrine, in its Norwegian form, thus seems designed to limit the friction between the legislative and judicial branches: When it really matters to the legislature, the 'less important' rights will to a greater degree be left at the mercy of the legislature. By contrast, the legislature's evaluations will play a lesser role when civil and political rights are at stake. The uncertainty concerning when the doctrine kicks in, and the theoretical problems inherent in limiting its reach to laws whose constitutionality have been expressly evaluated by the legislature, are important and, it seems, unanswered.

The second important difference is that while it clearly makes a difference in American law which level of scrutiny is applied, it is not clear that the same is true in Norway. Thus, the law at issue in the 1976 compensation case clearly concerned economic rights, and its constitutionality had been debated extensively in Parliament. In spite of this, the law was struck down. In the 1997 free speech case, the appellant was convicted – in spite of the fact that there was a question of

[811] Nergelius traced the ancestry of the preferred position doctrine from Stone's footnote four in *U.S.* v. *Carolene Products,* 304 U.S. 144 (1938), through *Jones* v. *Opelika*, 316 U.S. 584 (1942), and noted that it "had an almost total breakthrough in the 1940s and 1950s. In practice, the increased protection was quickly concentrated around rights which are politically meaningful, like free speech, free press, freedom of assembly and association; preferred position became constantly more closely identified with first amendment rights." Nergelius, *supra* note 702, p. 421, citing, *inter alia*, *Murdock* v. *Penn,* 319 U.S. 105 (1943). Nergelius described "the core of the preferred position principle as primarily protecting those rights influencing the political process and those of discrete and insular minorities". Nergelius, *supra* note 702, p. 422. He then noted that after 1949, the term 'preferred position' disappeared from Court decisions. White describes the preferred position cases as, in some respect, the forerunner to later bifurcated review. *See* White, *supra* note 398 and White, *supra* note 596.

political speech by a political minority. The results of the cases thus do not necessarily support the claims of differentiation made in these same cases.[812]

It is noteworthy that, while Norwegian scholars referred to Germer's book on freedom of speech, the Danish courts did not follow up on his ideas. However, the developments in Norway – as well as the big picture in American law – were followed in Danish law. In 1995, Professor Henning Koch wrote:

> "Judicial review concerning precisely the concept of property is less than useful [as a basis] for a general discussion of judicial review.
>
> The U.S. and Norway were clear exceptions amongst democratic states in the first decades of this century because of the Supreme Court's active exercise of judicial review.
>
> Precisely in those countries, developments have entailed that the Supreme Court is relatively cautious when reviewing economic and social-political legislation. In the U.S. through 'judicial self-restraint' since 1937 and in Norway, last expressed in the 1976 Kløfta-case. And in Norway, this seems not to be a result of direct political choice of judges as in the U.S."[813]

After discussing the 1976 Norwegian Supreme Court case setting out this doctrine and Norwegian theories of judicial review, Koch concluded, "the characterisation of human rights just described could rightly be transported to Denmark – an active Supreme Court when there is question of the personal integrity of individuals and a more passive Supreme Court concerning the individual's economic position".[814] Like Backer, Koch emphasised that "the developments … in international law entail that there is a legal 'supra-legislature' in human rights cases – indeed there are two. The ECHR … and the EU court,"[815] thus diminishing the counter-majoritarian problem by portraying judicial review of Danish legislation as a *fait accompli.*

The next year, Danish Chief Justice Niels Pontoppidan discussed judicial review in the press[816] and indicated, *inter alia*, that he expected the jurisprudence to develop in the direction of more judicial protection for the "classical liberties" as

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[812] *See also* Nergelius, *supra* note 702, p. 187: "Later case law from the Supreme Court has not completely followed the reasoning of the majority in the *Kløfta* case, but it confirms that judicial review is, to a great degree, an existing feature of the Norwegian legal system."

[813] H. Koch, 'Rettens prøvelse – et sædekorn til splid [Judicial Review - a Seed of Discontent]', in Blume *et al*. (eds.), *Liv, Arbejde og Forvaltning* [Life, Work and Administration] (GadJura, Copenhagen, 1995) p. 236.

[814] *Ibid.*, p. 237.

[815] *Ibid.*, p. 238.

[816] This interview was given apropos the Supreme Court's decision to admit a constitutional challenge to the Maastricht treaty by "12 concerned citizens". The admissibility decision – which considerably eased the standing requirements for bringing constitutional cases before the Danish courts - is published in UfR. 1996.1300H. The substantive decision, where the Court held that the Maastricht treaty did not infringe on the Danish constitution, is published in UfR. 1998.800H.

opposed to "economic rights", a development that might also presumably include the incorporation of the ECHR into the Danish constitution.[817]

In sum, the bifurcation of judicial review in the U.S. had been mentioned in Nordic theory every once in a while from the late 1940s, but that discussion picked up in the early 1970s, when Germer and Carsten Smith discussed it. That discussion had no visible influence in Denmark at the time, but the Norwegian Supreme Court stated in 1976 that it would apply different levels of scrutiny depending upon the right at issue. While the Norwegian doctrine of bifurcated or differentiated review is clearly based on the American one, it is quite different from the American one, particularly concerning the requirement, in Norway, that Parliament must have assessed the legislation's constitutionality. While the law is not quite clear on this point it seems that it is only when Parliament has assessed the law's constitutionality, that different standards of review are applied. However, it is unclear which standard of review applies in cases concerning laws whose constitutionality has not been discussed by Parliament. This doctrine has been criticised in Norwegian theory, but perhaps most importantly; it is very unclear whether the courts actually follow through with it in practice. Danish judges have made statements supporting such a bifurcation, but there are no signs of it in the case law. There are no such signs in Iceland either.

4.2.4. Conclusions

After 1960, American law continued to be a point of reference concerning judicial review. In the most thorough treatise on judicial review since the 1940s, Eivind Smith's *Supreme Court and Popular Government* from 1993, American law was frequently in the background, even though the comparison of the constitutional system in the two countries took up only a few pages.[818] The American example or

[817] In his discussion of such indications, Steen Rønsholdt has noted that "the distinction is based on the view that it is necessary to accept greater state power to enact economic regulations, which the courts should be cautious in interfering with". S. Rønsholdt, 'Nogle spørgsmål om domstolskontrol med lovgivningsmagten, [Some Questions Concerning Judicial Control of Legislative Power]' *in Årsberetning Retsinstitut B* [*Y.B. of Legal Center B*] p. 26, 41 (1996). As a post-script, it may be added that when the Danish Supreme Court clearly invalidated a law for the first time, in early 1999, it was on separation of powers grounds, because it believed that Parliament had made what was in fact a judicial decision. See UfR. 1999.841H. The decision in question concerned cutting off funding from private schools run by a particular company.

[818] Smith, *supra* note 3, pp. 31–32 and 189. Smith compares constitutional courts to the system in the U.S. and in Norway. *Ibid.*, p. 35; he notes that Aschehoug was acquainted with American law. *Ibid.*, p. 175. *See also* part 2, *supra*; he states that the idea of differentiated review accepted in the 1976 case "is inspired by the post-war years' discussion about the federal Supreme Court in the U.S.A.". *Ibid.*, p. 255. He also points out that "in recent history, it is not least the impression left by the Supreme Court's interference with parts of the economic regulation under the New Deal policy in the 1930s in the U.S. contributed to a negative view of judicial review, also in this country; in this instance as in others, the

the history of judicial review in the U.S. was frequently mentioned in passing, but with the exception of Germer's book from 1973, Carsten Smith's lecture in 1974, Eivind Smith's book from 1993, and Finn Backer's article in 1997, nothing substantial was written on judicial review in the U.S. In addition, only Germer, Carsten Smith and Backer attempted to apply lessons from American law to their domestic constitutional law.[819] This is nothing like the avalanche of articles on American law and its various aspects that were published between the World Wars. There is, in fact, a sharp drop in the sheer volume of commentary on American constitutional law and judicial review in particular.

Germer's *The Substance of Freedom of Speech* was by far the most thoroughly researched and annotated discussion of American law in this period. Other discussions of American law were much more generalised. It is suggestive that in the articles and books mentioned above, there are only a few references to American books, most of them very general.[820] It is illustrative of the way the writers perceived the interest of their readers and the marginalisation of the topic that only Germer delved really deeply into the subject and none chose to refer his readers to a more thorough discussion.[821]

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tendency to look towards 'America' is strong in Norway". *Ibid.*, p. 290. There are innumerable examples of references to American law and doctrine, as Smith analyses judicial review in Norway and puts it in a comparative perspective.

[819] To a degree, this is also true of Pontoppidan. Of the people mentioned, two are Chief Justices (Pontoppidan and Carsten Smith), one is a Supreme Court Justice (Finn Backer) and two were, at various times, professors at the University of Oslo (Eivind Smith and Carsten Smith).

[820] Carsten Smith notes that he chose not to add footnotes to his lecture. However, he refers to Robert H. Jackson's *The Struggle for Judicial Supremacy.* Finn Backer cited Louis Favoreu's *Constitutional Review in Europe,* published in *Constitutionalism and Rights - The Influence of the United States Constitution Abroad* from 1990 (Henkin and Rosenthal, eds.); D.J. Garrow's *What the Warren Court has meant to America* published in *The Warren Court, A Retrospective* (Schwarz, ed. 1996); and *The Oxford Companion to the Supreme Court of the United States* from 1992. Eivind Smith does not refer to American literature in his discussion of American law (referring instead to, *inter alia*, Knoph and Carsten Smith) but his bibliography lists the following: S. Snowiss, *Judicial Review and the Law of the Constitution* (1990); Rostow's *The Democratic Character of Judicial Review* (*see supra* note 777); M. Marcus' *The Founding Fathers, Marbury v. Madison – and so what?* published in *Constitutional Justice under Old Constitutions* (Smith, ed. 1993); Gunther and Dowling's *Cases and Materials on Constitutional Law* (8th ed. 1970); and A.R. Brewer-Carías' *Judicial Review in Comparative Law* from 1989.

[821] In his comparative study of judicial review, Nergelius suggests a reason for this: "The developments in American constitutional law in the second part of the 1970s and in the 1980s have, just like the developments of the 1990s, been less than uniform. The number of new theories of judicial review has certainly been great but these doctrines are very dissimilar and do not always concern the same questions so the doctrine gives a divided picture. Simultaneously, the Supreme Court has, in the last decades, been divided and unable to agree on a major doctrine, such as the protection of economic freedom in the Lochner era, the doctrine of preferred rights in the period immediately following, racial integration during

More important than the decline in the utilisation of American examples in legal theory, however, were the changes in the case law. Direct references to writings on American law simply disappeared from court decisions during this period, and with the exception of the adoption of a version of bifurcated review by the Norwegian Supreme Court, so did echoes of American constitutional law. It is clear that the Norwegian Supreme Court adopted this doctrine based on American theory, but its real impact on the case law is unclear. There are no similar examples from Danish and Icelandic law.

So after 1970 there was, first of all, a decline in the volume of Nordic scholarship on American law. Secondly, the extent to which these articles utilised American constitutional law in the context of domestic constitutional law was different from older articles and, with a few exceptions, so was their depth. Thirdly, the courts mostly ceased echoing American law. In sum, American law was not in the centre of the discussion of judicial review in the same way as it had been before.

In the next two sections, the role American law has played in the development of the law of the ECHR will be discussed first, and then the influence of the ECHR and the ECtHR's decisions in Nordic law will be examined.

4.3. AMERICAN INFLUENCES ON THE INTERPRETATION OF THE EUROPEAN HUMAN RIGHTS CONVENTION AND THE CASE LAW OF THE EUROPEAN COURT OF HUMAN RIGHTS

Whether measured by volume of scholarship or references in court decisions, the key developments in the 1980s and 1990s were the increasing influence of the European Convention on Human Rights and the judgments of the European Court of Human Rights on domestic constitutional law.

Surprisingly little attention has been paid to the influence of American constitutional law on the application of the ECHR.[822] That influence is generally

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Warren's tenure or fundamental rights in the late 1960s and early 1970s." Nergelius, *supra* note 702, p. 447. I believe the reason he suggests is due to the distance in time – I am not convinced that there was any more consensus in 'American theory' as a whole in the other periods discussed in this thesis.

[822] In their casebook on European human rights law, Janis, Kay and Bradley compare aspects of the case law of the ECtHR to American and Canadian law. Janis, Kay and Bradley, *European Human Rights Law – Text and Materials* (Clarendon Press, Oxford, 1995). That is, however, so rare as to be almost unique. Colin Warbrick has written two articles comparing certain aspects of the law of the Convention to American law and Anthony Lester wrote an article on the influence of the U.S. Constitution abroad, focusing on ECHR law. *See* C. Warbrick, '"Federalism" and Free Speech: Accomodating Community Standards – the American Constitution and the European Convention on Human Rights', *in* Ian Loveland (ed.), *Importing the First Amendment – Freedom of Expression in American, English and European Law* (Hart Pub., Oxford, 1998) p. 173 [hereinafter Warbrick, 'Federalism and Free Speech']; C. Warbrick, '"Federal" Aspects of the European Convention on Human Rights', 10 *Mich. J. Int'l L.* (1989) p. 698 [hereinafter Warbrick, 'Aspects']; and Lester, *supra* note 724.

assumed to be important, but this subject has not been systematically researched. Such an analysis is beyond the scope of this thesis.

The methodology in this section will therefore be as follows: Firstly, it will be argued here that a substantial number of direct citations to American law, either in the decisions themselves,[823] in dissents, or, in certain circumstances, by the parties, suggest a trade in ideas between American law and the ECtHR.[824] Secondly, equal protection jurisprudence will be discussed as a case study, for I believe this to be one example of an area of the law where there has been a considerable trade in ideas without the ECtHR ever explicitly saying so. Finally, abortion rights will be discussed because they illustrate how American constitutional thought has mingled with European constitutional thought and suggestions by the ECtHR to form one current of thought, which then influenced Nordic domestic constitutional law.

It will, in sum, be argued in this chapter that American constitutional law has been an important influence in the development of the law of the ECHR. This is important in the context of American influence on Nordic constitutional law for, as will be discussed in the next section, the law of the ECHR has immensely influenced Nordic constitutional law.

4.3.1. References to American Law in the European Human Rights Case Law

There are dozens of ECtHR cases in which American law has been discussed incidentally because the facts of the case touch on American law.[825] There are also many cases in which American norms are discussed as a point of reference. For

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[823] Prior to Nov. 1, 1998, the Commission screened cases and gave opinions on their merits, publishing its opinions in reports. Many cases never went further; if the Commission found that there had been no violation of the Convention. Even some cases in which the Commission found that there had been a violation never went further, because they were settled after the Commission's decision. If cases went before the Court, a member of the Commission argued the case. In its decisions, the Commission discussed the law in detail. I include here those cases in which American law is discussed in Commission decisions. Protocol 11 to the ECHR changed the enforcement system so that since Nov. 1, 1998, there has only been a court, which makes all decisions and works in chambers. Prior to the entry into force of Protocol 11, the Judges of the ECtHR and the members of the Commission worked for those bodies only part-time but were generally also Justices, attorneys or professors in their homeland. Thus, both the Icelandic judge from 1971, Þór Vilhjálmsson, and the Norwegian judge from 1973, Rolv Ryssdal, were Justices and during a time, Chief Justices of the Icelandic and Norwegian Supreme Courts respectively. After 1998, membership of the ECtHR became a full-time position.

[824] In addition to other reasons, the judges' personal knowledge of American law may influence their thinking. At least two of the current judges hold American doctorate degrees (President Wildhaber and Jabrek) and many more have studied or worked in the U.S.

[825] Extradition cases are the most obvious example of this. The most famous of these is *Soering* v. *U.K.* Eur. Ct. H.R. (Ser. A-161) (1989) in which the Court held that if the British government extradited Soering to the U.S. he would, due to the "death row phenomenon", run "a real risk of treatment going beyond the threshold set by Article 3". *Ibid.*, para. 111. The ECHR's art. 3, prohibits "torture or inhuman or degrading treatment or punishment".

instance, the legal position of transsexuals in the U.S. was discussed in two transsexuals' cases against the U.K.,[826] the attitude of the American armed forces towards gays and lesbians has been mentioned in a number of cases,[827] the Foreign Sovereign Immunities Act was discussed in one case,[828] and the Model Penal Code in another.[829]

More importantly, there are cases in which the parties based their arguments before the ECtHR on American law. It is likely that the parties did so in many more cases than those in which it is expressly stated in the printed decisions and reports. In four cases, the majority of the Court has referred explicitly to American court cases.[830] In 19 additional cases, concurring or dissenting judges have referred explicitly to American case law,[831] and in five additional cases it is noted that the

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[826] See *I.* v. *The United Kingdom,* Judgment of July 11, 2002 (Hudoc <www.echr.coe.int>, last visited on 4 August 2005) and *Christine Goodwin* v. *The United Kingdom,* Judgment July 11, 2002 (ibid.) (violation of art. 8, guaranteeing respect for private life, in that the U.K. did not legally recognise the applicant's gender re-assignment). To name other examples, the fact that very specialized television programming is viewed as acceptable in the U.S. was underscored in one case. *Demuth* v. *Switzerland*, decided Nov. 5, 2002 (ibid.). A broadcasting license was refused to a station planning to broadcast only car-related information and shows. The ECtHR found that there had been no violation of art. 10, which guarantees freedom of expression. There are a number of even more specialized references to American law or American resources. Thus, American colonial legal history was discussed briefly in one case (*Saunders* v. *The United Kingdom*, 1996-VI Eur. Ct. H.R. 4044, Walsh, J., concurring) and the Anglo-American tradition of plea-bargaining was discussed in one report (*Colak* v. *The Federal Republic of Germany*, Report of Oct. 6. 1987 (Hudoc, *supra*). In a number of cases, often concerning extradition or deportation, the state reports of the U.S. Department of State were relied on as describing the human rights situation in third countries, *see, e.g., Paez* v. *Sweden*, Report of Dec. 6, 1996 (ibid.) (Report on Peru); *Bahaddar* v. *The Netherlands*, Report of Sept. 13, 1996, (ibid.) (Report on Bangladesh); *Yasa* v. *Turkey*, 1998-VI Eur. Ct. H.R. 2411; and *Aspichi Dehwari* v. *The Netherlands*, Report of Oct. 29, 1998, (Hudoc, *supra*) (Report on Iran).

[827] *See, e.g., Lustig-Prean and Beckett* v. *U.K.* decided Sep. 27 1999, (Hudoc, *supra* note 826) (discharging people from the Royal Navy because of their homosexuality constituted a violation of art. 8, which guarantees respect for private life).

[828] *McElhinney* v. *Ireland*, decided on Nov. 21, 2001 (ibid.). (The fact that an Irish national could not bring suit against the United Kingdom in Irish court for a tort allegedly committed by a British soldier was not a violation of art. 6, which guarantees access to courts.)

[829] *Streletz, Kessler and Krenz* v. *Germany*, decided on March 22, 2001 (ibid.). (The conviction of former leaders of the German Democratic Republic for incitement to murder (of those attempting to cross into the Federal Republic of Germany over the Berlin Wall) was not in violation of art. 7, which prohibits retroactive criminal laws.)

[830] These cases will be discussed more fully below. They are *James and others* v. *The United Kingdom,* Eur. Ct. H.R. (ser. A-98) (1986); *Fayed* v. *The United Kingdom*, Eur. Ct. H.R. (ser. A-294b) (1994); *Al-Adsani* v. *The United Kingdom,* Judgment of Nov. 21, 2001 (Hudoc, *supra* note 826); and *Appleby and others* v. *The United Kingdom,* Judgment of May 6, 2003 (ibid.).

[831] They are *Dudgeon* v. *The United Kingdom,* Eur. Ct. H.R. (ser. A-45) (1981); *Barthold* v. *Germany,* Eur. Ct. H.R. (ser. A-90) (1985); *Markt Intern Verlag GmbH. and Klaus Beermann*

parties' arguments were based on American law.[832] In addition, the Commission has referred to American law in many of its decisions, some of which will be discussed below.

One of the first examples of the Strasbourg organs' utilisation of American law is a Commission decision from 1974. The case is generally called *The East African Asians Case*, and the report of the Commission is dated 5 March 1974. The background to the case was that 200,000 British citizens living in the East African countries which had been the United Kingdom's dependencies chose to hold on to their British citizenship instead of acquiring Kenyan, Tanzanian or Ugandan citizenship. When experiencing discrimination in these countries they moved to the United Kingdom. After a blatantly racist campaign, a seemingly neutral but effectively racially discriminatory law was enacted to halt their 'immigration' and some complained to the European Commission.[833] In the words of one of the lawyers arguing the case,

> "the crux of the British Asians' case involved racial discrimination in the enjoyment of some of the most basic rights of citizenship which are not within the scope of the European Convention – the right to enter and to live and work in one's country of citizenship. Since the guarantee of equality without discrimination, in its fourteenth article, depends upon proof of discrimination in relation to some other Convention right or freedom, and since no other Convention right or freedom covers the right to enter and to live and work in one's country of citizenship, the Convention appeared to be unable to remedy the substance of the great wrong that had been done to the British Asians.
>
> Happily, the problem was solved by professor Charles Black [who] persuaded us to argue … that racial discrimination is inherently degrading and hence contrary to the prohibition against degrading treatment contained in article 3 … He referred us to the Supreme Court's decision in *Strauder v. West Virginia,* to Justice Harlan's … dissenting opinion in *Plessy v. Ferguson* and to *Trop v. Dulles*. Black's argument

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v. *Germany*, Eur. Ct. H.R. (ser. A-165) (1989); *Groppera Radio AG. and others* v. *Switzerland*, Eur. Ct. H.R. (Ser. A-173) (1990); *Imbrioscia* v. *Switzerland*, Eur. Ct. H.R. (Ser. A-275) (1993); *John Murray* v. *The United Kingdom*, 1996-I Eur. Ct. H.R. 30; *Grigoriades* v. *Greece,* 1997-VII Eur. Ct. H.R. 2575; *Cyprus* v. *Turkey*, Judgment of May 10, 2001 (Hudoc, *supra* note 826); *Anguelova* v. *Bulgaria*, Judgment of June 13, 2002 (Hudoc, *supra* note 826; *Ceylan* v. *Turkey,* 1999-IV Eur. Ct. H. R., 25; and 9 additional cases against Turkey, all decided July 8, 1999.

[832] *Norris* v. *Ireland,* Report of March 12, 1987 (Hudoc, *supra,* note 826); *Welch* v. *The United Kingdom,* Eur. Ct. H.R (ser. A-307) (1995); *Refah Partisi and Others* v. *Turkey,* Judgment of Feb. 13, 2003 (Hudoc, *supra* note 826), *Öcalan* v. *Turkey*, Judgment of March 12, 2003 (ibid.); *Appleby and others* v. *The United Kingdom,* Judgment of May 6, 2003 (ibid.).

[833] The report of the commission remains confidential. However, European Human Rights Reports obtained it from an interested party and published parts of it. 3 E.H.R.R. 76. *See also* Lester, *supra* note 724.

succeeded brilliantly."[834]

The references to *Strauder* v. *West Virginia*,[835] which was decided in 1879 and in which the Supreme Court invalidated a statute which excluded African-Americans from juries, and to Justice Harlan's dissent in *Plessy* v. *Ferguson,* in which the majority endorsed the doctrine of 'separate but equal',[836] strongly support the claim that the discrimination in question was degrading. The reference to *Trop* v. *Dulles* was intended to show that divesting people of the basic rights inherent in citizenship was a very serious step.[837] Indeed, the Commission concluded:

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[834] Lester, *supra* note 724, pp. 549-550 (footnotes omitted). The right to enter one's country of citizenship is guaranteed in art. 3 of Protocol 4 to the Convention, in which it is also prohibited to expel nationals. Freedom of movement is guaranteed in art. 2 of the Protocol. The Protocol entered into force in 1968, but the United Kingdom has not ratified it, so it did not apply in this case.

[835] 100 U.S. 303 (1879).

[836] 163 U.S. 537 (1896). The case concerned the constitutionality of a Louisiana law mandating separate but equal accomodations for different races traveling by railroad. The majority of the Court noted, "[w]e consider the underlying fallacy of the plaintiff's argument to consist in the assumption that the enforced separation of the two races stamps the colored race with a badge of inferiority". *Ibid.*, p. 551. Justice Harlan dissented, noting that, "[e]very one knows that the statute in question had its origin in the purpose, not so much to exclude white persons from railroad cars occupied by blacks, as to exclude colored people from coaches occupied by or assigned to white persons". *Ibid.*, p. 557. He also wrote: "But in view of the Constitution, in the eye of the law, there is in this country no superior, dominant, ruling class of citizens. There is no caste here. Our Constitution is color-blind, and neither knows nor tolerates classes among citizens. In respect of civil rights, all citizens are equal before the law. The humblest is the peer of the most powerful. The law regards man as man, and takes no account of his surroundings or of his color when his civil rights as guaranteed by the supreme law of the land are involved. It is, therefore, to be regretted that this high tribunal, the final expositor of the fundamental law of the land, has reached the conclusion that it is competent for a state to regulate the enjoyment by citizens of their civil rights solely upon the basis of race." *Ibid.*, p. 559. He added that "[t]he arbitrary separation of citizens, on the basis of race, while they are on a public highway, is a badge of servitude wholly inconsistent with the civil freedom and the equality before the law established by the Constitution. It cannot be justified upon any legal grounds." *Ibid.*, p. 562.

[837] In *Trop* v. *Dulles,* 356 U.S. 86 (1958), Trop had lost his U.S. citizenship as a result of having been convicted of wartime desertion by a court-martial. Speaking for the Court, C.J. Warren wrote: "And the deprivation of citizenship is not a weapon that the Government may use to express its displeasure at a citizen's conduct, however reprehensible that conduct may be. As long as a person does not voluntarily renounce or abandon his citizenship, and this petitioner has done neither, I believe his fundamental right of citizenship is secure. On this ground alone the judgment in this case should be reversed." *Ibid.*, pp. 92–93. The Court concluded that this punishment violated the Eighth Amendment: "We believe, as did Chief Judge Clark in the court below, that use of denationalization as a punishment is barred by the Eighth Amendment. There may be involved no physical mistreatment, no primitive torture. There is instead the total destruction of the individual's status in organised society. It is a form of punishment more primitive than torture, for it destroys for the individual the political existence that was centuries in the development. The punishment strips the citizen of his

> "The Commission recalls in this connection that, as generally recognised, a special importance should be attached to discrimination based on race; that publicity to single out a group of persons for differential treatment on the basis of race might, in certain circumstances, constitute a special form of affront to human dignity; and that differential treatment of a group of persons on the basis of race might therefore be capable of constituting degrading treatment when differential treatment on some other ground would raise no such question.
>
> The Commission considers that the racial discrimination to which the applicants had been publicly subjected by the application of the above immigration legislation, constitutes an interference with their human dignity which, in the special circumstances described above, amounted to 'degrading treatment' in the sense of Article 3 of the Convention."[838]

The only case in which the Commission has stated that racial discrimination can constitute degrading treatment was thus based on arguments drawn from American law.

The first case in which the majority of the ECtHR referred to American case law was *James and others,* decided in 1986. The case concerned a property rights challenge to a British Act which provided tenants residing in houses leased for long periods of time with a right, if certain conditions were fulfilled, to acquire the freehold of the house on certain terms. The applicants argued that this was inconsistent with art. 1 of protocol 1 to the Convention, which protects property.[839] They argued, *inter alia*, that this deprivation of property was for a purely private benefit and was therefore not in the public interest. The Court stated:

> "The Court agrees with the applicants that a deprivation of property effected for no reason other than to confer a private benefit on a private party cannot be 'in the public interest'. Nonetheless, the compulsory transfer of property from one individual to another may, depending upon the circumstances, constitute a legitimate means for promoting the public interest. In this connection, even where the texts in force employ expressions like 'for the public use', no common principle can be identified in the constitutions, legislation and case law of the Contracting States that would warrant understanding the notion of public interest as outlawing compulsory transfer between private parties. The same may be said of certain other

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status in the national and international political community. His very existence is at the sufferance of the country in which he happens to find himself. While any one country may accord him some rights, and presumably as long as he remained in this country he would enjoy the limited rights of an alien, no country need do so because he is stateless. Furthermore, his enjoyment of even the limited rights of an alien might be subject to termination at any time by reason of deportation. In short, the expatriate has lost the right to have rights. This punishment is offensive to cardinal principles for which the Constitution stands." *Ibid.*, pp. 101–102 (footnotes omitted).

[838] *East African Asians* case, 3 E.H.R.R. 76, 86.

[839] Art. 1 of Protocol 1 to the ECHR states, "[e]very natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law."

> democratic countries; thus, the applicants and the Government cited in argument a judgment of the Supreme Court of the United States of America, which concerned State legislation in Hawaii compulsorily transferring title in real property from lessors to lessees in order to reduce the concentration of land ownership (*Hawaii Housing Authority* v. *Midkiff* (104 S.Ct.2321 [1984]).”[840]

Both parties to the case had relied extensively on *Midkiff* in their discussion of the public use requirement. In its decision, the Commission noted that the applicants “dr[e]w attention in particular to a decision of the United States Court of Appeals for the Ninth Circuit holding that a system of leasehold enfranchisement in Hawaii infringed the Fifth Amendment to the United States Constitution, since it involved the transfer of property from one citizen to another and such takings were not for a public use”.[841] Before the ECtHR, the applicants not only summed up the decision of the Ninth Circuit, but also discussed and enclosed a transcript of the U.S. Supreme Court judgment in the case.[842] The applicants discussed the utilisation of American law *per se* and the relevance of the American case:

> “They respectfully draw the attention of the Court to:
>
> (i) the affinity between the language of the two instruments ‘for public use’ and ‘pour cause d’utilité publique’;
>
> (ii) the origins of the takings clause in the European philosophic and jurisprudential tradition (Alarcon CJ p. 3);
>
> (iii) the reasons which led the Courts of Appeal of the U.S.A. to draw a line between the taking of land for private and for public purposes;
>
> (iv) the fact that (as is apparent from the precedents referred to in the judgment) the limiting interpretation has in no way inhibited the taking of private property for a wide variety of economic and social purposes.”[843]

In their attempt to convince the ECtHR to reach a conclusion different from that of the U.S. Supreme Court, they attempted to distinguish *Midkiff* from their case on the facts,[844] concluding that

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[840] *James and others* v. *The United Kingdom*, (ser. A-98) (1986), para. 40.
[841] *James and others,* 81 Eur. Ct. H.R. (ser. B) 25.
[842] *Hawaii Housing Authority* v. *Midkiff*, 467 U.S. 229 (1984).
[843] *James and others,* 81 Eur. Ct. H.R. (ser. B) 143.
[844] The applicants argued *inter alia* that “[t]he result of the *Hawaii* case may be explained by reference to the peculiar factual circumstances in which the majority of the indigenous population had been dispossessed of their land, whose ownership had become concentrated in the hands of the few. The Supreme Court referred expressly to ‘the unique way (sic) (in which) titles were held skewed the land market’ (p. 14). Indeed the Court commented: ‘The State has never denied that the Constitution forbids even a compensated taking of property when executed for no other reason than to confer a private benefit on a particular private party. A purely private taking could not withstand the scrutiny of the public use requirement: it would serve no legitimate purpose of government and would thus be void. But no purely private taking is involved in this case. The Hawaii legislature enacted its Land Reform Act

> "read in context the judgment marks no departure from the long line of precedents summarised in the *Corpus Juris Secundum* on Eminent Domain that 'A governmental authority may not enrich one citizen at the expense of another by taking lands of one and transferring them to another'. Therefore, a unique situation (which is not paralleled in the circumstances giving rise to the present applications) produced the particular judgment."[845]

The British government similarly relied on *Midkiff*. It, too, attached a copy of the Supreme Court's opinion to its arguments, summed up the case, and cited the relevant passages. The government noted that

> "[a]lthough the constitutional provisions with which the Supreme Court was concerned are not identical in scope or form to the provisions [in the ECHR], the reasoning of the Supreme Court in a case involving similar enfranchisement provisions is both pertinent and persuasive."[846]

Finally, the Government

> "submitted that the judgment of the Supreme Court lends powerful support to the broader interpretation of the words 'in the public interest' applied by the Commission and confirms the correctness of the Commission's conclusion ... that 'a taking of property may in principle be considered to be 'in the public interest' where the property is taken in pursuance of legitimate public social or other policies notwithstanding that the property is not being put to public use'."[847]

It is clear that the applicants had relied upon the Ninth Circuit decision before the Commission, whereas the Government – for obvious reasons – only started discussing the case once the Supreme Court's judgment had been handed down.[848] In oral argument, the applicants therefore attempted to "demonstrate [that] the facts before the Supreme Court have no counterpart here. Indeed, we submit that had the Supreme Court been confronted with the circumstances of this case, it would have decided in the landlord's favour."[849] The applicants quoted many commentators criticising the Supreme Court opinion and summed up their points, noting that "all

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not to benefit a particular class of individuals but to attack certain perceived evils of concentrated property ownership in Hawaii – a legitimate public purpose.' (p. 15)." *Ibid.*, p. 142.

[845] *Ibid.*, pp. 142–143. The applicants noted that they "respectfully recognise that the Court is in no way bound or liable to be influenced by the approach of the U.S. courts construing the takings clause. The applicants, accordingly, invite them to prefer in the exercise of their unfettered choice the approach and reasoning of the Court of Appeals to that of the Supreme Court, if the latter cannot aptly distinguished on its facts." They also argued that "[f]urthermore, the judgment of the Supreme Court has attracted substantial criticism on the basis that it does blur the necessary boundary between taking for public and taking for private purposes. A compilation of such criticism is also included in this Annex. The applicants in so far as it may be necessary to do so rely upon such criticism." *Ibid.*, p. 143.

[846] *Ibid.*, p. 159.

[847] *Ibid.*, p. 161.

[848] *Ibid.*, p. 219.

[849] *Ibid.*

these points ... are as relevant in Strasbourg, as they would be in Washington."[850] They also emphasised the differences between *Midkiff* and the case at issue. The government, by contrast, emphasised that the Supreme Court opinion was a decision on principle.[851]

In sum, this aspect of *James & others*, which was a key one, was argued primarily on the basis of American law. While both parties admitted, in order to show due respect to the Court, that it was by no means bound by the U.S. Supreme Court's – or any other court's – decision, they argued on the basis of *Midkiff.* The applicants attempted to distinguish it and, by referring to criticism, to get the Court to 'overrule' it, while the government relied on it. But both parties acted on the assumption that it would be persuasive. Indeed, it seems from the Court's decision that *Midkiff* carried considerable weight.

Eight years after it decided *James and others*, the Court again referred to American law. In *Fayed*, the applicants' business deals had been the target of an inspection ordered by the British Secretary of State, and a report was issued which was largely unfavourable to them. No further action was taken. The applicants argued *inter alia* that "the Inspectors' report had determined their civil right to honour and reputation and denied them effective access to a court", and "that the making and publication of the Inspectors' report had determined criminal charges against them and violated the presumption of innocence"[852] in violation of art. 6 of the ECHR.[853] The ECtHR noted that it was

> "satisfied that the functions performed by the Inspectors were, in practice as well as in theory, essentially investigative (see the similar analysis by the Supreme Court of the United States of America of the function of the Federal Civil Rights Commission in the case of *Hannah* v. *Larche* (363 US 420 (1960)) … The purpose of their inquiry was to ascertain and record facts which might subsequently be used as the basis for action by other competent authorities - prosecuting, regulatory, disciplinary or even legislative."[854]

In *Hannah* v. *Larche,* the U.S. Supreme Court found that the Commission of Civil Rights' rules of procedure, which did not guarantee the rights to know the identity of the complainant, to cross-examine witnesses, and to know the exact charges being investigated, were consistent with the Fifth Amendment's due process clause. The decision was based on the Court's belief that it was

> "apparent from this brief sketch of the statutory duties imposed upon the Commission, [that] its function is purely investigative and fact-finding. It does not adjudicate. It does not hold trials or determine anyone's civil or criminal liability. It

[850] *Ibid.*, p. 221.
[851] *Ibid.*, p. 259.
[852] *Fayed* v. *The United Kingdom,* Eur. Ct. H.R. (ser. A-294b) (1994), para. 46.
[853] That article provides *inter alia* that "[i]n the determination of his civil rights and obligations ... everyone is entitled to a fair and public hearing ... by an independent and impartial tribunal established by law."
[854] *Fayed,* Eur. Ct. H.R. (ser. A-294b), para. 61.

> does not issue orders. Nor does it indict, punish, or impose any legal sanctions. It does not make determinations depriving anyone of his life, liberty, or property. In short, the Commission does not and cannot take any affirmative action which will affect an individual's legal rights. The only purpose of its existence is to find facts which may subsequently be used as the basis for legislative or executive action."[855]

This is an example of the ECtHR strengthening its conclusion by referring to a similar decision from the U.S. Supreme Court.

The third case, in which the ECtHR referred explicitly to American case law, is *Al-Adsani* v. *The United Kingdom*,[856] in which both the Commission and the Court discussed American law and American court cases.[857] That was, however, in order to ascertain whether there existed a *jus cogens* rule prohibiting torture, and to examine states' attitudes towards sovereign immunity. This decision was thus not concerned with American constitutional law in particular, and the case will therefore not be discussed further here.[858]

The Court also referred to American law in *Appleby* v. *The United Kingdom.*[859] *Appleby* was a freedom of speech case concerning an environmental group's right to distribute leaflets in a shopping mall, which was also the town centre. The Court

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[855] *Hannah* v. *Larche,* 363 U.S. 420, 440–441 (1960).

[856] Judgment of Nov. 21, 2001 (Hudoc, *supra* note 826). *Al-Adsani* concerned a complaint brought by a British and Kuwaiti citizen who was unable to sue the Kuwaiti government in British court over torture he had endured in Kuwaiti custody.

[857] The Commission and the Court discussed the Foreign Sovereign Immunities Act and the ILC's Report on Jurisdictional Immunities of States and their Property, noting that the ILC had cited *Princz* v. *Federal Republic of Germany,* 26 F. 3d 1166 (DC Cir. 1994); *Siderman de Blake* v. *Republic of Argentina,* 965 F. 2d 699 (9th Cir. 1992); and *Argentine Republic* v. *Amerada Hess Shipping Co.,* 488 U.S. 428 (1989). The British court had in addition referred to *Filartiga* v. *Pena-Irala.* 630 F.2d 876 (2nd Cir. 1980).

[858] The same was true in *Öcalan* v. *Turkey,* Judgment of March 12, 2003 (Hudoc, *supra* note 826), in which the applicant relied on cases from a variety of jurisdictions to illustrate his claim that his arrest in Kenya, which amounted more or less to a kidnapping, did not comply with Kenyan or international law. Amongst the cases cited was *United States* v. *Toscanino*, 500 F. 2d. 267 (2nd Cir. 1974). The applicant "[r]el[ied] on the case law of various domestic courts (the House of Lord's decision in the case of *R.* v. *Horseferry Road Magistrates' Court, ex parte Bennett* … ; the decision of the Court of Appeal of New Zealand in the case of *Reg.* v. *Hartley*… ; the decision of the United States Court of Appeals for the Second Circuit in the case of *United States* v. *Toscanino* (1974) 555 F. 2d. 267, 268; the decision of 28 May 2001 of the Constitutional Court of South Africa in the case of *Mohammed and Dalvie* v. *The President of the Republic of South Africa and others* … [and] maintained that the arrest procedures that had been followed did not comply with Kenyan law or the rules established by international law, that his arrest amounted to an abduction and that his detention and trial, which were based on that unlawful arrest, had to be regarded as null and void." *Öcalan,* para. 83. The Court held that Öcalan's arrest had been in compliance with Turkish law and hence compatible with art. 5 of the Convention.

[859] *Appleby and others* v. *The United Kingdom,* Judgment of May 6, 2003 (Hudoc, *supra* note 826).

noted that "[t]he parties have referred to case law from the United States and Canada".[860] It then stated:

> "The First Amendment to the Federal Constitution protects freedom of speech and peaceful assembly.
>
> The United States Supreme Court has accepted a general right of access to certain types of public places, such as streets and parks, known as 'public fora' for the exercise of free speech rights (*Hague* v. *Committee for Industrial Organisation*, 307 US 496 (1939)). In *Marsh* v. *Alabama* (326 U.S. 501 … (1946)), the Supreme Court also held that a privately owned corporate town (a company town) having all the characteristics of other municipalities was subject to the First Amendment rights of free speech and peaceable assembly. It has found that the First Amendment does not require access to privately owned properties, such as shopping centers, on the basis that there has to be 'State action' (a degree of State involvement) for the amendment to apply (for example, *Hudgens* v. *NLRB*, 424 US 507 (1976)).
>
> The US Supreme Court has taken the position that the First Amendment does not prevent a private shopping centre owner from prohibiting distribution on its premises of leaflets unrelated to its own operations (*Lloyd Corp.* v. *Tanner*, 47 U.S. 551, … (1972)). This did not however prevent state constitutional provisions from adopting more expansive liberties than the Federal Constitution to permit individuals reasonably to exercise free speech and petition rights on the property of a privately owned shopping centre to which the public was invited and this did not violate the property rights of the shopping centre owner so long as any restriction did not amount to taking without compensation or contravene any other federal constitutional provisions (*Pruneyard Shopping Center* v. *Robbins*, 447 US 74, … (1980))."[861]

In accordance with this, the applicants had also relied on state constitutional law, emphasizing that many American state constitutions provided better protection than the federal constitution.[862] In its opinion, the Court addressed this argument:

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[860] *Ibid.*, para. 24.

[861] *Ibid.*, paras. 25–27.

[862] Based on the applicant's arguments, the Court noted that "[s]ome State courts have found that a right of access to shopping centers could be derived from provisions in their State constitutions according to which individuals could initiate legislation by gathering a certain number of signatures in a petition or individuals could stand for office by gathering a certain number of signatures (for example, *Batchelder* v. *Allied Stores Int'l* N.E. 2d 590 (Mass. 1983), *Lloyd Corp*. v. *Whiffen*, 849 P.2d 446, 453–54 (Or. 1993), *Southcenter Joint Venture* v. *National Democratic Policy Comm*., 780 P.2d 1282 (Wash. 1989). Some cases found State obligations arising due to State involvement, for example, *Bock* v. *Westminster Mall Co.*, 819 P.2d 55 (Colo. 1991) (the shopping centre was a State actor because of financial participation of public authorities in the development of the shopping centre and the active presence of government agencies in the common areas of the shopping centre) and *Jamestown* v. *Beneda*, 477 N.W. 2d (N.D. 1991) (where the shopping centre was owned by a public body, though leased to a private developer.

Other cases cited as indicating a right to reasonable access to property under State private law were *State* v. *Shack*, 277 1.2d 369 (N.J. 1971) where the court ruled that under New

> "The Court would observe that, though the cases from the United States in particular illustrate an interesting trend in accommodating freedom of expression to privately-owned property open to the public, the U.S. Supreme Court has refrained from holding that there is a federal constitutional right of free speech in a privately owned shopping mall. Authorities from the individual states show a variety of approaches to the public and private law issues that have arisen in widely differing factual situations. It cannot be said that there is as yet any emerging consensus that could assist the Court in its examination in this case concerning [the free expression provision] of the Convention."[863]

The Court thus assessed American case law, both federal and state, but failed to find an 'emerging consensus' that could be helpful in the application of the free speech provision of the Convention. The arguments based on American constitutional law were clearly seen as relevant.

In general, American First Amendment doctrine has influenced the law of the ECHR in many ways.[864] The special value of freedom of speech, not only for the individual but also for democratic government[865] is acknowledged in ECtHR's jurisprudence just as in American free speech doctrine.[866] American doctrine has

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Jersey property law ownership of real property did not include the right to bar access to governmental services available to migrant workers, in this case a publicly funded non-profit lawyer attempting to advise migrant workers; *Uston* v. *Resorts International* 445 A.2d 370 (N.J. 1982), a New Jersey case concerning casinos where the court held that when property owners open their premises to the general public in pursuit of their own property interests they have no right to exclude people unreasonably (though it was acknowledged that the private law of most states did not require a right of reasonable access to privately-owned property, p.374); *Streetwatch* v. *National Railroad Passenger Corp.*, 875 F. Supp. 1055 (S.D.N.Y. 1995) concerning the ejection of homeless people from a railway station.

State courts which ruled that free speech provisions in their State constitutions did not apply to privately owned shopping centre included Arizona (*Fiesta Mall Venture* v. *Mecham Recall Comm.* 767 P.2d 719 (Ariz. Ct. App. 1989)); Connecticut (*Cologne* v. *Westfarms Assocs* 469 1.2d 1201 (Conn. 1984)); Georgia (*Citizens for Ethical Gov't* v. *Gwinnet Place Assoc.* 392 S.E.2d 8 (Ga. 1990)); Michigan (*Woodland* v. *Michigan Citizens Lobby*, 378 N.W.2d 337 (Mich. 1985)); Minnesota (*State of Minnesota* v. *Wicklund et al*., April 7, 1998 (Minnesota Court of Appeals)); North Carolina (*State of North Carolina* v. *Felmet*, 273 S.E.2d 708 (N.C. 1981); Ohio (*Eastwood Mall* v. *Slanco*, 626 N.E.2d 59 (Ohio 1994)); Pennsylvania (*Western Pa Socialist Workers 1982 Campaign* v. *Connecticut Gen. Life Ins. Co.*, 515 1.2d 1331 (Pa 1986)); South Carolina (*Charleston Joint Venture* v. *McPherson*, 417 S.E.2d 544 (SC 1992)); Washington (*South Center Joint Venture* v. *National Democratic Policy Comm.*, 780 P.2d 1282 (Wash. 1989); Wisconsin (*Jacobs* v. *Major*, 407 N.W.2d 832 (Wis. 1987))." *Ibid.*, paras. 28–30.

[863] *Ibid.*, para. 46.

[864] For a comparison of American and ECHR case law where community standards for free speech come into play, *see* Warbrick, 'Federalism and Free Speech', *supra* note 822.

[865] *See* the discussion of the preferred position cases and the bifurcation of judicial review, *supra.*

[866] In *Lingens* v. *Austria,* the Court noted that "freedom of expression … constitutes one of the essential foundations of a democratic society and one of the basic conditions for its progress and for each individual's self-fulfilment". *Lingens* v. *Austria,* Eur. Ct. H.R. (Ser. A-

frequently been discussed in concurring and dissenting opinions in free speech cases. The first free speech case where there is such a reference is *Markt Intern Verlag* decided in 1989.[867]

In July 1999, the ECtHR decided 11 freedom of expression cases against Turkey. In those cases, Maltese Judge Giovanni Bonello wrote a concurring opinion which was based almost entirely on American free speech doctrine, arguing that

> "punishment by the national authorities of those encouraging violence would be justifiable in a democratic society only if the incitement were such as to create 'a clear and present danger'. When the invitation to the use of force is intellectualised, abstract, and removed in time and space from the foci of actual or impending violence, then the fundamental right to freedom of expression should generally prevail."[868]

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103) (1986), para. 41. In their discussion of the ECtHR's case law based on art. 10, which protects freedom of expression, Janis *et al*. discuss American and Canadian cases and the similarity and differences between American First Amendment law and the ECHR case law. Janis, Kay and Bradley, *supra* note 822, pp. 157–229.

[867] *Markt Intern Verlag GmbH. and Klaus Beermann* v. *Germany*, Eur. Ct. H.R. (ser. A-165) (1989). In this case French Judge Louis-Edmond Pettiti wrote in his dissenting opinion that "[i]n this field the States have only a slight margin of appreciation, which is subject to review by the European Court. Only in rare cases can censorship or prohibition of publication be accepted. This has been the prevailing view in the American and European systems since 1776 and 1789 (cf. First Amendment, United States Constitution; case law of the supreme courts of the United States, Canada, France, etc.)." On the ECtHR's doctrine of margin of appreciation, *see* the next section.

[868] Judge Bonello argued that "I voted with the majority to find a violation of Article 10, but I do not endorse the primary test applied by the Court to determine whether the interference by the domestic authorities with the applicant's freedom of expression was justifiable in a democratic society …

I borrow what one of the mightiest constitutional jurists of all time had to say about words which tend to destabilise law and order: "We should be eternally vigilant against attempts to check the expression of opinions that we loathe and believe to be fraught with death, unless they so imminently threaten immediate interference with the lawful and pressing purposes of the law that an immediate check is required to save the country." [Citing *Abrams* v. *United States*.]

The guarantee of freedom of expression does not permit a State to forbid or proscribe advocacy of the use of force except when such advocacy is directed to inciting or producing imminent lawlessness and is likely to incite or produce such action. [Citing *Brandenburg* v. *Ohio*.] It is a question of proximity and degree. [Citing *Schenck* v. *United States*]

In order to support a finding of clear and present danger which justifies restricting freedom of expression, it must be shown either that immediate serious violence was expected or was advocated, or that the past conduct of the applicant furnished reason to believe that his advocacy of violence would produce immediate and grievous action. [Citing Justice Brandeis' concurring opinion in *Whitney* v. *California*]

It is not manifest to me that any of the words with which the applicant was charged, however pregnant with mortality they may appear to some, had the potential of imminently threatening dire effects on the national order. Nor is it manifest to me that instant suppression of those

In support of his decision, he cited Holmes' dissent in *Abrams,*[869] *Brandenburg* v. *Ohio*,[870] S*chenck*[871] and Brandeis' concurring opinion in *Whitney* v. *California*.[872] He filed a similar concurring opinion in each of the 11 freedom of expression cases against Turkey, decided that day.

Other examples of American influence concerning freedom of speech can be mentioned.[873] In *The Sunday Times Case*[874] the House of Lords had held that to publish an article on the so-called "thalidomide children"[875] while a negligence lawsuit was pending would constitute contempt of court. The Sunday Times took its case to the ECtHR, which found that this was a violation of art. 10 of the ECHR, which protects freedom of expression.

In their memorial, the applicants discussed American law. They discussed *Nebraska Press Ass'n* v. *Stuart*[876] in particular, both on how the matters in dispute would be "capable of repetition"[877] and concerning prior restraints on speech. In that context, the applicants argued that

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expressions was indispensable for the salvation of Turkey. They created no peril, let alone a clear and present one. …

In summary, 'no danger flowing from speech can be deemed clear and present, unless the incidence of the evil apprehended is so imminent that it may befall before there is opportunity for full discussion. If there be time to expose, through discussion, the falsehood and the fallacies, to avert the evil by the process of education, the remedy to be applied is more speech, not enforced silence'" [Citing opinion in *Whitney*] *Arslan* v. *Turkey*, Judgment of July 8, 1999, concurring opinion of Judge Bonello (Hudoc, *supra* note 826).

[869] 250 U.S. 616, 630 (1919) (J. Holmes dissenting).

[870] 395 U.S. 444, 447 (1969). In this case, Ohio's criminal syndicalism statute was invalidated because it was unconstitutionally sweeping; it drew no distinction between teaching the necessity for force or violence and preparing a group for violent action.

[871] 249 U.S. 47, 52 (1919), *see infra* note 881.

[872] 274 U.S. 357, 376-7 (1927) (J. Brandeis concurring), *see supra* note 749 .

[873] Janis *et al*. note, without attempting to trace the history of the ideas in question that there are similarities concerning the "preference for political speech". (Janis, Kay and Bradley, *supra* note 822, p. 191; in "the special rules applying to 'public figures'" *Ibid.*, pp. 192–193; concerning defamatory statements, *Ibid.*, pp. 195–196; and concerning commercial speech. *Ibid.*, pp. 206, 209–10. They also note the differences in the jurisprudence concerning the free speech of public servants and in broadcasting (*ibid.*, pp. 214–215).

[874] *The Sunday Times* v. *United Kingdom*, Eur. Ct. H.R. (ser. A-30) (1979).

[875] The "thalidomide children" were born with severe disabilities or deformities due to the fact that their mothers had taken the drug thalidomide while pregnant.

[876] 427 U.S. 539 (1976). In this case, the Supreme Court held that a 'gag order' prohibiting the press from publishing facts "strongly implicative" of the accused violated the First Amendment, even though the trial judge had entered it in order to be able to select an unprejudiced jury.

[877] *The Sunday Times* case*,* 28 Eur. Ct. H.R. 189 (ser. B). In *Nebraska Press Ass'n*, the Supreme Court held that the case was not moot even though the accused in the criminal trial had been convicted and the order at issue had therefore expired. It stated, "[t]he Court has recognised, however, that jurisdiction is not necessarily defeated simply because the order attacked has expired, if the underlying dispute between the parties is one 'capable of repetition, yet evading review'". *Nebraska Press Ass'n*, 427 U.S. p. 546.

> "[t]he Supreme Court of the United States has consistently decided that the constitutional guarantees of freedom of expression and due process afford special protection against contempt orders which prohibit the publication of particular information or ideas by means of a 'previous' or 'prior' restraint upon freedom of expression."[878]

The applicants "submitted that the recognition by the common law and by the decisions of the Supreme Court of the United States that the imposition of a prior restraint upon freedom of expression is peculiarly destructive of the exercise of that freedom is a principle generally recognised by civilised nations".[879] The applicants also discussed "decisions applying the 'void-for-vagueness' doctrine" and argued that they "are the United States' equivalent of the requirement in the Convention that restrictions upon certain fundamental rights and freedoms must be prescribed by law".[880]

Finally, the applicants relied on American law in their discussion of possible tests for the legality of restraints on the freedom of expression, citing *inter alia*,

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[878] *The Sunday Times* case, 28 Eur. Ct. H.R. 246-7 (ser. B).

[879] *Ibid.*, p. 247.

[880] *Ibid.*, p. 195. The applicants relied on American law in their arguments concerning the requirement in *inter alia* the freedom of expression clause of the convention that restrictions of the freedoms guaranteed must be prescribed by law. After discussing the theories of Blackstone and others on the rule of law and the need of law being accessible to the public, they noted that, "[t]hese principles are also well-established in the constitutional and legal system of the United States of America, the framers of whose Federal and State Constitutions were greatly influenced by Blackstone's *Commentaries* … The United States Constitution provides that no *ex post facto* law shall be passed, and both the Fifth and the Fourteenth Amendments to the Constitution contain guarantees of 'due process of law'. In a series of leading cases the Supreme Court of the United States has decided that the application of statutory or common law offences violated the constitutional guarantees of due process of law on the basis of the 'void-for-vagueness' doctrine." *Ibid.*, pp. 193–194. The applicants went on to cite the U.S. Supreme Court's opinions in *Connally* v. *General Construction Co*., 269 U.S. 385 (1926) (An Oklahoma statute prohibiting paying workers less than "the current rate of per diem wages in the locality where the work is performed" was invalidated because of its vagueness.); *Stromberg* v. *California*, 283 U.S. 359 (1931), s*ee supra* note 750; *Herndon* v. *Lowry*, 301 U.S. 242 (1937) (A conviction under an anti-syndicalist statute was struck because the statute did not "furnish a sufficiently ascertainable standard of guilt" and was "an unwarranted invasion of the right of freedom of speech". *Ibid.*, p. 261) and *Cantwell* v. *Connecticut*, 310 U.S. 296 (1940) (A state statute requiring a license to "solicit money, services, subscriptions or any valuable thing for any alleged religious, charitable or philantrophic cause" from anyone not a member of the organisation was invalidated since "[s]uch a censorship of religion as the means of determining its right to survive is a denial of liberty protected by the First Amendment and included in the liberty which is within the protection of the Fourteenth". *Ibid.*, p. 305). Later, the applicants also referred to *Bridges* v. *California*, 314 U.S. 252 (1941), in which convictions for contempt of court, based on the publication of editorial commenting on cases pending in a state court, were held to be unconstitutional, but *Bridges* relied on *Cantwell.*

Justice Holmes' opinion in *Schenck*.[881] In oral argument, counsel for the applicants, following up on this, argued that the ECtHR should follow in the footsteps of the European Court of Justice[882] when deciding when it was permissible to restrict freedom of expression. That court had found that there must be "a genuine and sufficiently serious threat to the requirements of public policy affecting one of the fundamental interests of society".[883] He continued:

> "But I would submit, at the risk of offending those who are admirers of the famous Holmesian test – the 'clear and present danger' test – that the Luxembourg Court's approach is a more helpful and perhaps a more intellectually honest approach to the problem of the test to be applied. It is similar to a 'clear and present danger' test but it spells out with greater clarity exactly what is involved. And looking again at the 'clear and present danger' test, which will be very familiar to common lawyers, it seems to us that that test is perhaps better expressed and expressed more similarly to the Luxembourg Court's test by Mr. Justice Brandeis in his celebrated concurring opinion in *Whitney v. California* ... in three sentences, very famous to anyone concerned with the law of freedom of expression in the United States. Mr. Justice Brandeis said: 'Fear of serious injury cannot alone justify suppression of free speech and assembly. Men feared witches and burnt women. It is the function of speech to free men from the bondage of irrational fears.' And this is the relevant passage: 'To justify suppression of free speech there must be reasonable grounds to fear that serious evil will result if free speech is practised. There must be reasonable ground to believe that the danger apprehended is imminent. There must be reasonable ground to believe that the evil to be prevented is a serious one.'"[884]

In the applicant's memorial, they argued, just like the applicants in *James and others,* that they

> "refer[red] to these decisions of the Supreme Court of the United States by analogy … it is submitted that these decisions by a judicial body of such great experience and distinction in the field of human rights are of particular relevance since the Supreme Court of the United States exercises its supervisory jurisdiction in relation to both common law and statutory offences."[885]

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[881] *Schenck* v. *U.S.*, 249 U.S. 47 (1919). Holmes wrote: "The question in every case is whether the words used are used in such circumstances and are of such a nature as to create a clear and present danger that they will bring about the substantive evils that Congress has a right to prevent." *Ibid.*, p. 52.

[882] The ECJ, formally named The Court of Justice of the European Communities, is an organ of the European Communities which "ensure[s] that the law is observed in the interpretation and applications of the Treaties establishing the European Communities and of the provisions laid down by the competent Community institutions." <www.curia.eu.int> visited on 4 August 2005.

[883] *The Sunday Times* case, 28 Eur. Ct. H.R. 389 (ser. B).

[884] *Ibid.*

[885] *Ibid.*, p. 242. The applicants added: "It is further submitted that the distinction made by the Supreme Court between judgments 'encased in the armour wrought by prior legislative deliberation' and judgments 'based on a common law concept of the most general and

In sum, even though American law was not mentioned in the *Sunday Times* judgment itself, "first amendment case law was extensively cited to the European Court, and it seems likely that it was influential".[886] In 1988, a commentator pointed out that in spite of judgments where the same concerns that inform American law are evident,[887] there are "important areas in which first amendment doctrine has not been followed overseas",[888] including by the ECtHR. However, the increase in number of direct references to American First Amendment law in the 15 years since this article was written suggests that its influence may be increasing.

American right to privacy cases were also utilised in argument as the ECtHR decided similar cases in the late 1970s and in the 1980s. In 1981, the Court decided in a case called *Dudgeon*[889] that Northern Irish sodomy laws violated art. 8 of the Convention, which guarantees the right of privacy. This was true even though it was open to question whether they had really been enforced for years. Seven judges dissented. One of them, Irish Judge Brian Walsh, wrote:

> "In the United States of America there has been considerable litigation concerning the question of privacy and the guarantees as to privacy enshrined in the Constitution of the United States. The United States Supreme Court and other United States courts have upheld the right of privacy of married couples against legislation which sought to control sexual activities within marriage, including

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undefined nature' is a valid distinction for the purpose of the exercise of the Court's supervisory jurisdiction under the Convention in the present case." *Ibid.*

[886] Lester, *supra* note 724, p. 553, citing *Sunday Times,* 28 Eur. Ct. H.R. (Ser. B) pp. 193–195 and 241–242. Lester commented: "The European Court did not go as far as did the Supreme Court in *Nebraska Press Ass'n* v. *Stuart* since the near absolutist American judicial opposition to prior restraint has not been matched in Europe. But the European Court's judgment was a strong and courageous affirmation of the importance of free speech and freedom of the press even where the right to a fair trial is held by a national supreme court to be threatened by public information and discussion." Lester, *supra* note 724, p. 554, citing *Nebraska Press Ass'n* v. *Stuart,* 427 U.S. 539 (1976).

[887] The example Lester takes is *Lingens* v. *Austria*, in which the Court stated: "Freedom of the press furthermore affords the public one of the best means of discovering and forming an opinion of the ideas and attitudes of political leaders. More generally, freedom of political debate is at the very core of the concept of a democratic society which prevails throughout the Convention. [/] The limits of acceptable criticism are accordingly wider as regards a politician as such than as regards a private individual. Unlike the latter, the former inevitably and knowingly lays himself open to close scrutiny of his every word and deed by both journalists and the public at large, and he must consequently display a greater degree of tolerance." *Lingens* v. *Austria*, Eur. Ct. H.R (Ser. A-103) (1986), para. 42. The applicant in the case had been fined for libel, after he had written articles criticising the Chancellor of Austria. Lester noted that *Lingens* affirmed the principles set out in *The Sunday Times* case and added that "[t]he Court did not go so far as to hold that *New York Times Co.* v. *Sullivan's* actual malice defense is required by article 10 of the Convention. However, the Court's judgment was sympathetic to the principles that explain *Sullivan.*" Lester, *supra* note 724, pp. 554–555, citing *New York Times Co.* v. *Sullivan,* 376 U.S. 254 (1964).

[888] Lester, *supra* note 724, p. 555.

[889] *Dudgeon* v. *United Kingdom,* Eur. Ct. H.R. (ser. A-45) (1981).

> sodomy. However, these courts have refused to extend the constitutional guarantee of privacy which is available to married couples to homosexual activities or to heterosexual sodomy outside marriage. The effect of this is that the public policy upholds as virtually absolute privacy within marriage and privacy of sexual activity within the marriage.
>
> [This] is a valid approach …"[890]

The U.S. Supreme Court addressed a similar question five years later, in *Bowers* v. *Hardwick*,[891] and reached the opposite conclusion to that of the ECtHR. In 1987, a year after *Bowers* was decided, a similar case once again reached the Commission. In *Norris*,[892] Irish sodomy laws were challenged. The government argued that

> "[a]t the time of the *Dudgeon* case apparently more than one other High Contracting Party, apart from Ireland, prohibited consensual homosexual acts between adults. Liechtenstein even entered an express reservation to the *Dudgeon* judgment when ratifying the Convention. The United States Supreme Court has refused to review the laws of certain American States retaining criminal prohibitions on homosexual acts."[893]

The Commission and the Court both refused to reconsider *Dudgeon.* It is interesting to note that when the U.S. Supreme Court overruled *Bowers* in 2003, it referred repeatedly to the ECHR, *Dudgeon, Norris* and similar cases.[894]

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[890] *Ibid.* Partially dissenting opinion of J. Walsh, Para. 22. Walsh continued: "It is a valid approach to hold that, as the family is the fundamental unit group of society, the interests of marital privacy would normally be superior to the State's interest in the pursuit of certain sexual activities which would in themselves be regarded as immoral and calculated to corrupt. Outside marriage there is no such compelling interest of privacy which by its nature ought to prevail in respect of such activities."

[891] 478 U.S. 186 (1986). In this case, the U.S. Supreme Court upheld a Georgia statute criminalizing sodomy against a due process challenge. In his 1988 article, Lester compared these two cases. *See* Lester, *supra* note 724, pp. 558–559. *Bowers* has now been overruled, *see infra* note 894.

[892] *Norris* v. *Ireland*, Commission Report adopted on 12 March 1987 (Hudoc, *supra* note 826).

[893] *Ibid.*, para. 45.

[894] *Lawrence* v. *Texas*, 539 U.S. 558 (2003). Justice Kennedy referred to ECtHR jurisprudence: "[A]lmost five years before *Bowers* was decided the European Court of Human Rights considered a case with parallels to *Bowers* and to today's case. An adult male resident in Northern Ireland alleged he was a practicing homosexual who desired to engage in consensual homosexual conduct. The laws of Northern Ireland forbade him that right … The court held that the laws proscribing the conduct were invalid under the European Convention on Human Rights. *Dudgeon* v. *United Kingdom* ... Authoritative in all countries that are members of the Council of Europe (21 nations then, 45 nations now), the decision is at odds with the premise in *Bowers* that the claim put forward was insubstantial in our Western civilization." *Ibid.*, p. 573. He also noted that "[t]o the extent *Bowers* relied on values we share with a wider civilization, it should be noted that the reasoning and holding in *Bowers* have been rejected elsewhere. The European Court of Human Rights has followed not *Bowers* but its own decision in *Dudgeon* v. *United Kingdom*. See *P. G. & J. H.* v. *United Kingdom*,

In two additional cases, it has been mentioned that the parties referred to American law in argument. It was argued in *Welch* v. *The United Kingdom*[895] that applying a confiscation order which had been enacted after Welch had committed a drug offence to him, would violate art. 7 of the convention.[896] He referred to cases from various jurisdictions to support his claim that confiscation orders were inherently punitive, amongst them *Austin* v. *U.S.* and *Alexander* v. *U.S.*[897] The Court found that applying the order to him violated art. 7. Similarly, it was argued in *Refah Partisi,*[898] in which a political party challenged its dissolution, that it "had not been prompted by a pressing social need and was not necessary in a democratic society. Nor … was their party's dissolution justified by application of the 'clear and present danger' test laid down by the Supreme Court of the United States of America."[899] The Court unanimously found that there had been no violation of art. 11, guaranteeing freedom of association.

It is clear from the cases discussed in this section that parties to cases decided by the European Court of Human Rights and the judges of that court are very aware of American law. The American cases cited are by no means all landmark cases – it is clear from the citations that plaintiffs actively searched for American cases supporting their arguments, and it seems clear from the frequency of such citations and from the cases in which the Court itself refers to American law, that the Court pays at least some attention to these arguments. It is also clear that American law has been influential in important areas of the law, such as concerning racial discrimination, the public purpose requirement for takings, and free speech.

4.3.2. Tiers of Scrutiny in General and in the Equal Protection Jurisprudence

In this section, equal protection jurisprudence will be examined as an example of more general American influence on the case law of the ECtHR. It will be argued

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App. No. 00044787/98; 56 (Eur. Ct. H. R., Sept. 25, 2001); *Modinos* v. *Cyprus*, 259 Eur. Ct. H. R. (1993); *Norris* v. *Ireland*, 142 Eur. Ct. H. R. (1988)." *Ibid.*, p. 576.

[895] *Welch* v. *The United Kingdom*, Eur. Ct. H.R. (ser. A-307a) (1995).

[896] Art. 7. of the Convention is as follows: "1. No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence under national or international law at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time the criminal offence was committed. 2. This article shall not prejudice the trial and punishment of any person for any act or omission which, at the time when it was committed, was criminal according to the general principles of law recognised by civilised nations."

[897] *Austin* v. *U.S.*, 509 U.S. 602 (1993), in which the Court held that forfeiture was "subject to the limitations of the Eighth Amendment's Excessive Fines Clause" (*ibid.*, p. 622); *Alexander* v. *U.S.*, 509 U.S. 544 (1993) in which forfeiture provisions of the Racketeer Influenced and Corrupt Organizations Act were upheld against a First Amendment challenge but remanded for reconsideration of its relation to the Eighth Amendment prohibition of excessive fines.

[898] *Refah Partisi* (The Welfare Party) *and others* v. *Turkey*, Judgment of Feb. 13, 2003 (Hudoc, *supra* note 826).

[899] *Ibid.*, para. 14.

that the equal protection jurisprudence of the ECtHR is, in many ways, similar to American equal protection jurisprudence, and that this is probably because American law influenced the ECtHR. The similarities in question concern the application of different levels of scrutiny in equal protection cases. First, however, it will be discussed more generally how the doctrine of differing levels of scrutiny has fared in the ECtHR.

Some international human rights conventions, including the ECHR, prioritise some rights over others.[900] One example of such prioritising relates to the fact that, due to the ECtHR's character as a supra-national court, it has adopted a doctrine of margin of appreciation.[901] Under the doctrine of margin of appreciation, state authorities are, because of their "direct and continuous contact with the vital forces in their countries … in principle in a better position than the international judge to give an opinion on the exact content of these requirements [that allow limitation of the rights protected in the convention] as well as on the 'necessity' of a 'restriction' or 'penalty' intended to meet them".[902] This is a doctrine of general application, relevant whenever the ECtHR adjudicates claims under the Convention.

In *Gillow* v. *The United Kingdom*,[903] the Court stated that "the scope of the margin of appreciation enjoyed by the national authorities will depend not only on the nature of the aim of the restriction but also on the nature of the right involved".[904] One commentator has stated that "[t]here is a growing practice of regarding some rights as more important than others, so that the burden on the State to justify its interference is correspondingly higher".[905] He points to judgments in which the Court has stated that justifying gender discrimination required "very

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[900] For instance, art. 15 of the ECHR permits the derogation, in times of war or other public emergency threatening the life of the nation, from most of the rights guaranteed in the Convention, excepting art. 2 (right to life), art. 3 (prohibition of torture and inhuman treatment), art. 4 (prohibition of slavery and forced labor) and art. 7 (prohibition of retroactive penal laws).

[901] This doctrine is based on two assumptions: first, that "what is necessary to achieve the stated interests may vary from state to state even in 'democratic societies'; and second, a government's estimate of that necessity is entitled to some deference by an international court, presumably less familiar with relevant local circumstances". Janis, Kay and Bradley, *supra* note 822, p. 167. Other commentators have noted that "[t]he 'margin of appreciation' doctrine is rooted in national case law concerning judicial review of governmental action". P. Van Dijk and G.J.H. Van Hoof, *Theory and Practice of the European Convention on Human Rights* (Kluwer Law International, The Hague, 3rd ed. 1998) p. 84.

[902] *Handyside* v. *The United Kingdom*, Eur. Ct. H.R. (ser. A-24) (1976) para. 48.

[903] *Gillow* v. *the United Kingdom,* Eur. Ct. H.R. (ser. A-109) (1986). The case concerned housing laws in Guernsey. The Gillows owned a house there when Mr. Gillow went to work abroad. They let the house until Mr. Gillow retired, by which time they had lost their residence qualifications and had to apply for a licence to occupy their house. Their applications for a licence were refused. The Court unanimously found a breach of art. 8, guaranteeing respect for private and family life.

[904] *Ibid.*, para. 55.

[905] Warbrick, Aspects, *supra* note 822, p. 720.

weighty reasons" and that interference with sexual activity required "particularly serious reasons".[906] The scope of the margin of appreciation varies according to the context,[907] so the right being limited is just one of many factors which determine the width of the margin of appreciation.[908]

Although the doctrine of margin of appreciation has often be described as a form of "judicial self-restraint," it may also convincingly be characterised as arising from the particular circumstances of one court far removed from the cases and often less than knowledgeable about local circumstances deciding cases which come out of different states.[909] So even though distinguishing between fundamental rights and

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[906] *Ibid.,* citing *Abdulaziz* v. *The United Kingdom*, Eur. Ct. H.R. (ser. A-94) (1985) and *Dudgeon* v. *United Kingdom,* Eur. Ct. H.R. (ser. A-45) (1981).

[907] ECtHR Judge MacDonald has noted in an article about the doctrine of margin of appreciation that "[t]he exact width of the margin of appreciation in any particular case is difficult to specify in advance … because it varies in accordance with the precise balance of the … principles that the Court thinks is appropriate in the case at hand." R.S.J. MacDonald, 'The Margin of Appreciation in the Jurisprudence of the European Court of Human Rights' in *International Law at the Time of its Codification: Essays in Honor of Roberto* Ago (A. Giuffrè, Milan, 1987) p. 187, 207. Here taken from Janis, Kay and Bradley, *supra* note 822, p. 177. *See also* Rehof and Trier, *Menneskeret* [*Human Rights Law*] (Jurist- og Økonomforbundets Forlag, Copenhagen, 1990) p. 122. Rehof and Trier note that the scope of the margin of appreciation will vary depending on the article being interpreted (i.e., which right is at issue), which concepts are being interpreted and the facts of the individual case. However, they argue that there will "typically be a wide margin of appreciation" when the Court evaluates whether there exists a state of national emergency, when there's question of national security, whether a taking is in the public interest, when the complainant is in a situation where it is natural that his rights should be limited (e.g., a member of the armed forces), when it is question of positive duties of the state, and when there is question of morals. On the other hand, the margin's scope will be relatively narrow when the concept in question does not relate to national interests, evidence questions are settled, when there is not question of the Convention articles that are purposely vague and, finally, when the issue at hand falls squarely under the Convention. Additionally, the margin is narrow when there is question of due process and when the interference with the individual's rights is important. *Ibid.*, pp. 122–124.

[908] As an example the margin of appreciation left to the states is relatively narrow in cases concerning due process requirements and judicial matters more generally because this is not an area where there are major differences between the member states or where they need leeway to implement national measures or policy. In *The Sunday Times* case, the ECtHR rejected a claim by the British government that the margin should be the same concerning a definition of "morals" and "the authority of the judiciary" on the basis that it had a much stronger foothold when working with relatively clear concepts such as "the authority of the judiciary". *The Sunday Times* v. *United Kingdom*, Eur. Ct. H.R. (ser. A-30) (1979) para. 59. On the other hand, it is interesting in contrast to American and to a certain extent Norwegian jurisprudence, that both these cases concerned limitations on the freedom of speech. The fact that the case deals with freedom of speech does not, *per se*, seem to affect the width of the margin of appreciation.

[909] *See e.g.,* Warbrick, Aspects, *supra* note 822, p. 719: "The 'margin of appreciation' involves respect for State decision-making based on its better functional position to assess the

other rights is a feature of American constitutional law, there is hardly enough reason to suggest that the variations in the scope of the margin of appreciation are derived from American law in particular. In some cases, the considerations that influence the scope of the doctrine may be borrowed from, or similar to, American law but considerations of reviewing evidence and other such considerations based on the international nature of the Court itself are also important.

In the ECtHR's case law, there is, therefore, an embryonic idea of differing levels of activism – a differing scope of the doctrine of margin of appreciation – depending on the right at issue.[910] Yet the right at issue is only one of many factors which determine the width of the margin of appreciation, and its importance is by no means clear or settled, so there is no question of a generally higher level of scrutiny for non-economic rights than economic rights.[911]

In the equal protection jurisprudence, by contrast, differing levels of scrutiny seem to play a greater role, as a doctrine is emerging under which the ground for discrimination matters in the context of ECHR equal protection jurisprudence.[912] In American equal protection jurisprudence, the fact that fundamental rights are involved or that discrimination towards certain groups is taking place triggers strict scrutiny.[913] The classifications that will trigger strict scrutiny are classifications based on race and national origin.[914] In most cases, strict scrutiny translates into the requirement that a discriminatory law be necessary to achieve a compelling governmental objective. The courts therefore invalidate most such laws.[915] A few other differentiating characteristics trigger intermediate scrutiny. Amongst those are gender,[916] sometimes alienage,[917] illegitimacy[918] and possibly sexual orientation.[919]

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situation, for example, to determine facts or to balance other interests. The doctrine is not one of judicial abstention or deference to the national decision maker."

[910] It has been pointed out that in ECtHR jurisprudence, just as in American jurisprudence, "the strength of the justification demanded has varied with the importance of the interest pursued and the right being limited." Janis, Kay and Bradley, *supra* note 822, p. 181.

[911] This is true even though the ECtHR has commented on the importance of the freedom of expression for democratic governance. *See ibid.*, p. 159 and *Lingens* v. *Austria*, Eur. Ct. H.R (Ser. A-103) (1986).

[912] *See* O.M. Arnardóttir, *Equality and Non-Discrimination under the European Convention on Human Rights* (Martinus Nijhoff Publishers, The Hague, London, New York, 2003) p. 74.

[913] *See e.g.*, *Strauder* v. *West Virginia,* 100 U.S. 303 (1880), where the Court invalidated a statute excluding African-Americans from sitting in juries, and *Harper* v. *Virginia Board of Elections,* 383 U.S. 663 (1966), in which a poll tax was struck down.

[914] *See Strauder* 100 U.S. 303 (1880); *Hernandez* v. *Texas,* 347 U.S. 475 (1954) in which a similar statute aimed at excluding Mexican-Americans was invalidated, and *Yick Wo* v. *Hopkins,* 118 U.S. 356 (1886). In *Yick Wo*, the Supreme Court struck down a San Francisco laundry ordinance, which was neutral on its face but discriminatory in how it was applied.

[915] I will completely sidestep the question of the level of scrutiny in affirmative action cases. In the majority of cases where suspect classifications are used, the law is invalidated.

[916] *See Craig* v. *Boren*, 429 U.S. 190 (1976). A law prohibiting the sale of low-alcohol beer to men aged 18–21, whereas women of the same age could buy it, was struck down since it did not fulfil the requirement of "serv[ing] important governmental objectives and [being] substantially related to the achievement of those objectives". *Ibid.*, p. 197. *See also U.S.* v.

Most discriminatory legislation, however, will only receive so-called rational basis review.[920] Such laws are upheld if they are rationally related to a legitimate governmental objective.

It is necessary to note that there are important differences in the written texts in this field; while the Fourteenth Amendment's Equal Protection clause is frequently

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Virginia, 518 U.S. 515 (1996) in which the Court found that the running a public military academy as a male-only institution, without providing an equivalent program for women, violated the equal protection clause. In this case, the Court noted that classifications by gender would be upheld if the state demonstrated "exceedingly persuasive justification" for them. *Ibid.*, p. 524.

[917] For a while, it seemed alienage would trigger strict scrutiny. *See Graham* v. *Richardson,* 403 U.S. 365 (1971), in which it was held that aliens could not be denied welfare benefits. *See also In re Griffiths,* 413 U.S. 717 (1973), in which the Supreme Court held that a resident alien could not be prevented from practicing law. In *Sugarman* v. *Dougall*, 413 U.S. 634 (1973), the Court found that aliens could not be prevented from working in the civil service. However, it suggested that aliens could be prevented from holding certain jobs, particularly if the positions were elective. That exception was elaborated on (and widened) in *Foley* v. *Connelie,* 435 U.S. 291 (1978) (aliens could be prevented from becoming state troopers), *Amback* v. *Norwick,* 441 U.S. 68 (1979) (the same conclusion concerning public school teacher) and later cases.

[918] *Clark* v. *Jeter*, 486 U.S. 456 (1988) (holding that a statute limiting the time during which paternity suits could be brought to 6 years violated the Equal protection clause).

[919] In *Romer* v. *Evans,* 517 U.S. 620 (1996), the Supreme Court struck down an Amendment to the Constitution of Colorado, which had stated that neither the state nor any subdivision should "enact, adopt or enforce any statute, regulation, ordinance or policy whereby homosexual, lesbian or bisexual orientation, conduct, practices or relationships shall constitute or otherwise be the basis of or entitle any person or class of persons to have or claim any minority status, quota preferences, protected status or claim of discrimination". The Court applied rational basis review – striking the Amendment because it "was 'born of animosity toward the class of persons affected' and further that it had no rational relation to a legitimate governmental purpose". *Lawrence* v. *Texas,* 539 U.S. 558 (2003), 574. In spite of this, *Romer* has been read as suggesting that a somewhat more exacting scrutiny will be used when laws discriminate against gays, lesbians and bisexuals.

[920] *See e.g., New York City Transit Authority* v. *Beazer*, 440 U.S. 568 (1979). In this case, the Transit Authority's exclusion of methadone users when hiring staff was upheld: "Because it does not circumscribe a class of persons characterised by some unpopular trait or affiliation, it does not create or reflect any special likelihood of bias on the part of the ruling majority. Under these circumstances, it is of no constitutional significance that the degree of rationality is not as great with respect to certain ill-defined subparts of the classification as it is with respect to the classification as a whole." *Ibid.*, p. 593 (footnotes omitted). *See also Railway Express Agency Inc.* v. *New York*, 336 U.S. 106 (1949) (statute restricting advertising on cars upheld even though similar dangers from other sources were not affected); *McDonald* v. *Board of Election*, 394 U.S. 802 (1969) (statute will be overturned only if no grounds can be conceived of to justify it); and *Minnesota* v. *Clover Leaf Creamery Co*., 449 U.S. 456 (1981) (statute will be overturned only if it is shown that the legislative facts upon which the "classification is apparently based on could not reasonably be conceived to be true by the governmental decision-maker".)

invoked alone, art. 14 of the ECHR is primarily a supporting provision. It states that: "The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status." In sum, it "guarantees freedom from discrimination in relation to enjoyment of the recognised rights".[921] Article 14 of the ECHR thus has a fundamentally different position than the Fourteenth Amendment.[922]

The European Court of Human Rights' case law concerning the equal protection article, art. 14, has been viewed as unusually chaotic. However, it has been argued in a recent study that the case law shows that the level of scrutiny applied in equal protection cases depends on "three basic variables" in the complaint of unequal treatment. These variables are: the type of discrimination – direct, either active or passive, or indirect;[923] the differentiating characteristic ("the badge of differentiation"); and the interest encroached upon.[924] It is noted that this model is "not formal and symmetrical as it would be if certain variables always resulted in the same type of scrutiny … the model is rather substantive and asymmetrical in that each category of influencing factors exists in interplay with the other categories."[925]

From the perspective of comparing the doctrine to American constitutional doctrine, the most interesting factor used to explain the jurisprudence of the ECtHR is the differentiating characteristic. Oddný Mjöll Arnardóttir writes on this point:

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[921] Steiner and Alston, *International Human Rights in Context – Law Politics Morals* (Clarendon Press, Oxford, 1996) p. 573. Arnardóttir comments that art. 14 is "only an accessory right with a limited field of application". Arnardóttir, *supra* note 912, p. 1.

[922] This is important in the context that in American constitutional doctrine, rights that are independently and explicitly guaranteed by some other constitutional provision are considered fundamental for the purposes of equal protection analysis. When such rights are interfered with, the courts will therefore apply strict scrutiny. Cases of this sort are only part of the U.S. courts' caseload concerning equal protection, but these are the only equal protection cases that reach the ECtHR.

[923] Active discrimination (which is also direct) is discrimination resulting from identifiable acts of state agents. Passive discrimination (which is also direct) "is [a term] developed to encapsulate in one functional term the new possibilities for discrimination claims arising out of the newly acknowledged positive obligations of states to ensure the enjoyment of non-discrimination. It is discrimination that results from the failure of state agents to act." Arnardóttir, *supra* note 912, p. 185. Examples of such discrimination are e.g. failure to remedy instances of discrimination that occur and failure to provide similar measures for relevantly similar groups. Indirect discrimination focuses on "the disparate impact or *disproportionate effect* of a *neutral* measure on *groups* of people". *Ibid.*, p. 122. Arnardóttir notes that "[t]he Court has not clearly entered into indirect discrimination analysis. As an effect of the clear indication towards *lenient review* linked to claims of indirect discrimination, applicants have not succeeded in establishing a *prima facie* case of indirect discrimination." *Ibid.*, p. 185.

[924] *Ibid.*, p. 184.

[925] *Ibid.*

> "The badges of differentiation can be divided into three sub-groups; insignificant non-personal badges of differentiation, insignificant personal badges of differentiation and significant personal badges of differentiation. *Lenient scrutiny* is most clearly indicated in the insignificant non-personal badges of differentiation group … *Lenient scrutiny* is … indicated in the insignificant personal badges of differentiation group, which can be defined negatively as encompassing all personal badges of differentiation that have not been elevated to the significant badges of differentiation group. Here, however, lenient scrutiny is not indicated as strongly as generally with respect to the non-personal badges of differentiation … *Strict scrutiny* is indicated in the last group comprising significant personal badges of differentiation. The significant badges of differentiation of sex, race, nationality, illegitimacy and religion, have already been established in the case law of the Court and the literature. The study concludes that the badge of differentiation of sexual orientation should be added to the list of significant badges of differentiation."[926]

In sum, strict scrutiny will be applied when the differentiation is based on gender, race, nationality, illegitimacy and religion: "the significant personal badges of differentiation". Conversely, lenient scrutiny will be applied when the categorisation is based on "insignificant non-personal badges of differentiation",[927] such as geographical location, language and birth. In other words, there is a slight difference between the ECtHR doctrine and American constitutional law concerning which characteristics trigger strict scrutiny, but the idea is clearly the same.[928]

Concerning the ECtHR's jurisprudence, it was cautioned that no one variable – such as the differentiating characteristic – was always decisive. However, considerations similar to those that form the basis of American equal protection jurisprudence also inform the evaluation of the interests at stake in a case, which is another variable influencing the ECtHR's jurisprudence.[929] Arnardóttir points out that

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[926] *Ibid.*, p. 186.

[927] On "insignificant" badges of differentiation in general, *see ibid.*, pp. 129–141.

[928] Due to the fact that it is enumerated in the First Amendment, discrimination based on religion would receive strict scrutiny in American Courts just as in the ECtHR. From the perspective of American law, it is interesting to note the position occupied by property in this scheme "[i]n contradiction to the common approach in the literature that singles the badge of differentiation of 'property' particularly out as governing lenient review, the study demonstrates that of all the non-personal insignificant badges of differentiation, cases involving the badge of differentiation of 'property' are the most likely to be susceptible to the influence of other influencing factors able to *counteract* the indication towards lenient scrutiny." *Ibid.*, p. 186.

[929] There are other ways in which the European doctrine is comparable to American constitutional doctrine. The ECtHR's stand on 'indirect discrimination' could for instance be compared to American treatment of disproportionate impact – which is a factor in establishing discriminatory intent but not sufficient in itself. *See e.g., Washington* v. *Davis,* 426 U.S. 229 (1976), in which the Supreme Court upheld a qualifying test administered to would-be policemen even though it excluded more African-Americans than whites from being hired, on the ground that it was facially neutral and there was no discriminatory purpose. Under these

> "[i]f the interest at stake in a case concerns property rights *lenient scrutiny* will be indicated, but the indication towards strict scrutiny inherent in the significant personal badges of differentiation is particularly likely to be able to *counteract* the lenient scrutiny indicated by this interest at stake. A situation of a socially marginalised or disadvantaged situation will be a factor indicating *strict scrutiny* while a situation of a privileged position will indicate a more *lenient scrutiny*. If the badge of differentiation is clearly relevant to the interest at stake this may also indicate more *lenient scrutiny*. And, finally, an emergency situation indicates *lenient scrutiny*."[930]

In sum, the doctrine echoes the *Carolene Products* footnote and the theories that have since been built on it: discrimination based on people belonging to a socially marginalised or disadvantaged group will entail strict scrutiny, while discrimination on the basis of belonging to socially or economically privileged groups – groups which are well able to look after themselves in the political process – will indicate lesser scrutiny.[931]

Perhaps most importantly, Arnardóttir concludes, "the category of influencing factors of the interest at stake seems to be of lesser weight than the other two categories of influencing factors, the type of claim being made and the badge of differentiation".[932] This brings the conclusion even closer to American equal protection law: the three most important factors are the basis on which the discrimination takes place, whether there is direct discrimination – in American parlance, whether a statute is facially neutral – and whether the discrimination arises from a state action or lack thereof.

In sum, the theory that now comes closest to explaining the case law of the European Court of Human Rights concerning the equal protection clause in art. 14 is in many respects remarkably similar to American doctrine. There are similarities within the models themselves: each looks to whether the statute is facially neutral and whether there has been state action. There are also similarities in the characteristics which are forbidden bases of discrimination. Is the characteristic personal? Is it immutable? Does it carry a history of discrimination? Such characteristics will trigger stricter scrutiny than will others. The final factor which influences the level of scrutiny in ECtHR jurisprudence is the interest at stake, and in that case it matters whether the complainant is a member of a socially or politically weak group and which kind of right is at stake.

The considerations underlying American equal protection jurisprudence are thus recognisable. Much of the European doctrine is just emerging; many of the cases are recent. It is quite probable that American law played, and continues to play, some

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circumstances, only rational basis review is exercised, even though the impact of the facially neutral measure may be disparate.

[930] Arnardóttir, *supra* note 912, p. 186.

[931] In addition, the emphasis on which right is at stake seems to echo the American doctrine that fundamental rights should trigger strict scrutiny.

[932] Arnardóttir, *supra* note 912, p. 186.

role in these developments, even though American law has not been referred to in any of the equal protection cases.

4.3.3. Abortion and the Right to Privacy – An Example of Mingling Constitutional Ideas

This section will focus on an example of how American constitutional law has influenced both domestic constitutional law in the states parties to the ECHR and the ECtHR's application of the ECHR, and how ECtHR judgments have influenced domestic constitutional law and vice versa.[933] The example of privacy and abortion rights shows how easily ideas travel between national and international law and among all the countries discussed here. It is therefore illustrative of the way in which American law, the law of the ECHR, and national law all contributed to the doctrine later adopted in the Nordic countries. In reality, law from all of these jurisdictions formed one current of legal thought, which then influenced Nordic constitutional law.

The European Commission decided its first case concerning abortion rights in 1977.[934] In a 1975 decision, the German Constitutional Court had amended a newly promulgated abortion law. The law – before the Constitutional Court stepped in – provided that abortions performed with the pregnant woman's consent in the first 12 weeks of pregnancy should not be punishable. While it looked to *Roe* v. *Wade*,[935] which was decided two years previously and set out a trimester-based system for the legality of abortions, the German Constitutional Court came to the conclusion that the Act was incompatible with art. 2 of the German Basic Law, which states that "[e]veryone has the right to life" in conjunction with the article providing that "[t]he dignity of man is inviolable. To respect and protect it is the duty of all state authority." The Court therefore set out a narrower right to abortion.[936]

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[933] On this criss-crossing of influence, *see e.g.,* R. Aðalsteinsson, '"einungis eftir lögunum…" ["only in Accordance with the Law"]' 53:4. *Úlfljótur* (2000), pp. 569–600 at p. 597: "In Europe, the development has been such that the decisions of the ECtHR have been influenced by constitutional developments in the member states and have taken them into account, but the ECtHR's decisions have also been influential in coordinating the constitutional law of the member states."

[934] *Brüggemann and Scheuten* v. *The Federal Republic of Germany*, 10 Dec. and Rep. 100 (1977).

[935] 410 U.S. 113 (1973). In *Roe* a Texas statute prohibiting abortions except to save the pregnant woman's life was invalidated.

[936] In its decision of Feb. 25, 1975, the Federal Constitutional Court stated that abortions should not be punishable if a "competent authority" certified that the pregnancy endangered the woman's life or health or that there was reason to assume that the child would be born with an incurable health problem "so serious that the pregnant woman cannot be expected to continue the pregnancy". The Court also stated that abortions performed when the pregnancy was the result of rape were not punishable and allowed for the option of courts not imposing punishment when the abortion was performed "in order to avert from the pregnant woman the risk of serious distress" that could not otherwise be averted. The German Parliament later

Subsequently, two German women complained to the European Commission of a violation of respect for their private life under art. 8 of the Convention. The Commission stated in its opinion that there was no violation of art. 8,[937] and did not refer to American law in its decision. However, the Commission was clearly aware of American law on this point,[938] if only because *Roe* was discussed in the German Constitutional Court decision at issue.[939]

In 1980, another abortion case reached the Commission.[940] *X* v. *The U.K.* concerned the right of a woman's husband to prevent her having an abortion or to be heard in that context. In his argument, the applicant pointed *inter alia* to *Planned Parenthood of Central Missouri* v. *Danforth*.[941] The Commission mentioned in its opinion that the question of the foetus' protection under the right to life provision of the ECHR[942] had been "expressly left open" in *Brüggemann and Scheuten*.[943] It then cited a decision by the Constitutional Court of Austria which held, "noting the different views expressed on this question in legal writing", that the foetus was not covered by art. 2 of the convention; the aforementioned decision of the German

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adopted another Act permitting abortions when the pregnant woman consents and it is necessary to avert a danger to her life or "a serious prejudice to her physical and mental health". Even so, there were additional conditions that needed to be fulfilled.

[937] The reasons were that "pregnancy cannot be said to pertain uniquely to the sphere of private life". Also, "not every regulation of the termination of unwanted pregnancies constitutes an interference with *the right to respect* for the private life of the mother. Art. 8 (1) cannot be interpreted as meaning that pregnancy and its termination are, as a principle, solely a matter of the private life of the mother." The Commission supported this by pointing out that all member states regulated abortion to some degree. *Brüggemann & Scheuten,* 10 Dec. and Rep. 100, 116. In addition, the Commission pointed out that the pregnant woman herself was exempt from punishment.

[938] The only dissenter was the British commissioner. Fawcett found that there had been interference with the women's right to privacy. In addition, the Norwegian Commissioner Opsahl wrote a special concurrence, in which the Danish and Swedish commissioners joined, expressing the view "that laws regulating abortion ought to leave the decision to have it performed in the early stages of pregnancy to the woman concerned," but adding that "such a view cannot easily be read into the terms of art. 8". They also noted that "traditional views of the interpretation and application of this Article have to be taken into account notwithstanding the rapid development of views on abortion in many countries". *Ibid.*, p. 120.

[939] In addition, some the Commissioners were supposedly knowledgeable about American law, having studied law or worked in the U.S.

[940] *X* v. *The United Kingdom,* 19 Dec. and Rep. 244 (1980).

[941] *Ibid.*, p. 246, citing *Planned Parenthood of Central Missouri* v. *Danforth*, 428 U.S. 52 (1976), in which the U.S. Supreme Court struck down a spousal consent provision in an abortion law. There is no clear explanation for the fact that X cited a case which did not support his argument.

[942] The First paragraph of Art. 2 of the ECHR states: "Everyone's right to life shall be protected by law. No one shall be deprived of his life intentionally save in the execution of a sentence of a court following his conviction of a crime for which this penalty is provided by law."

[943] *X* v. *The United Kingdom,* 19 Dec. and Rep. p. 249.

Constitutional Court, which held a similar provision in the German Basic Law to "include unborn human beings"; *Roe* v. *Wade*; and the American Convention of Human Rights. Concerning *Roe*, the Commission noted that the U.S. Supreme Court had concluded that, "with respect to the State's important and legitimate interest in potential life, the 'compelling' point is at viability".[944] The Commission concluded that there could be no question of absolute protection of the foetus' life, and that it was not, under the circumstances, necessary to decide whether the foetus enjoyed no protection at all under art. 2, or whether it had a right to live under the article, but with certain implied limitations.[945] It found that there had been no violation of art. 2 or art. 8 of the Convention.

The Norwegian Supreme Court spoke on the constitutionality of the country's abortion law in 1983.[946] The Supreme Court discussed the law's relation to art. 2 of the ECHR. It referred to the aforementioned decision of the Austrian Constitutional Court and added:

> "In any case the provision must be regarded as not imposing any far-reaching restrictions on the legislator's right to set the conditions for abortion. The Norwegian Act, under which the woman herself makes the final decision whether or not to terminate her pregnancy, provided the operation can be performed before the end of the twelfth week of pregnancy, is similar to the legislation of a number of other countries belonging to the same culture and which also have acceded to the [ECHR]. This is hardly immaterial to the consideration of a matter of international law."[947]

The Court also pointed to the German decision from 1975, emphasizing that the material provision there was a provision of the German Basic Law.

In 1989, an abortion case reached a Norwegian Appellate Court. The facts were similar to those of *X* v. *The United Kingdom*, discussed above. The Appellate Court applied art. 2 of the ECHR and concluded that it had not been violated in this case. It cited the 1983 case and stated:

> "This view on the protection of the foetus under the Convention was expressed by the Supreme Court after considering the Commission's decisions in the case of *X v. the United Kingdom* ... and the case of *Brüggemann & Scheuten v. Germany* ... Thus the High Court finds that a possible protection of the foetus under Article 2 must be decided on the basis of a balance of interest to the extent that the protection

[944] *Ibid.*, p. 251, citing *Roe* v. *Wade,* 410 U.S. 113 (1973).
[945] *Ibid.*, p. 252–3.
[946] Rt. 1983.1004. The case was an administrative action to remove a parish priest (in the state church), who had abandoned his 'worldly' duties after the abortion law providing for abortions on demand during the first trimester of pregnancy was promulgated. While the Court could have decided the case as an administrative one only, the first to vote noted that "it would be less than satisfactory" to do so and that the priest's defence that he was protesting against the abortion law must lead to an examination of that law.
[947] Rt. 1983.1004, opinion of Judge Aasland for the majority. Here taken in English translation from the commission's decision in *R.H.* v. *Norway*, decided May 19, 1992 (Hudoc, *supra* note 826).

> is adapted to the degree of biological maturity of the foetus at every stage of its development on the one hand and the considerations which likewise speak in favour of allowing the woman to terminate a pregnancy on the other."[948]

Certiorari to the Norwegian Supreme Court was denied, and the potential father complained to the European Commission. In its opinion,[949] the Commission again cited the decision of the Austrian Constitutional Court from 1974, where the right to life was not believed to apply to the foetus, and the German Constitutional Court decision of 1975 coming to the opposite conclusion. The Commission came to the conclusion that "in such a delicate area the Contracting States must have a certain discretion," and "[did] not find that the respondent State has gone beyond its discretion which the Commission considers it has in this sensitive area of abortion". That same year, the U.S. Supreme Court held in *Casey* that a spousal notification requirement constituted an undue burden and was therefore unconstitutional.[950]

When a similar case came to the Icelandic Ombudsman in 1996, the Ombudsman cited the Commission's opinion in *X.* v. *The United Kingdom* when concluding that the potential father's rights under art. 8 of the ECHR and under Icelandic law had not been violated.

The abortion example shows clearly how ideas travel and how influence between national and supra-national courts can cut both ways. First, the German and Austrian Constitutional Courts discussed *Roe* v. *Wade*. Then, the European Commission referred to the decisions of these courts. A few years later, in *X* v. *the United Kingdom,* the Commission itself referred to *Danforth* as well as *Roe* v. *Wade*. Its opinion in *X* was one of the factors taken into account in the Norwegian abortion cases, one of which ended up reaching the Commission again. In its opinion in that case – *R.H.* v. *Norway* – the Commission referred once again to the German and Austrian decisions as well as to *X* and built also on the analysis by the Norwegian court. Finally, the Icelandic Ombudsman built on *X* v. *the United Kingdom* in a similar case.

The abortion example illustrates, first of all, that legal developments in our cultural area are often interconnected, so that it is easier and more accurate to speak of one current of thought, which can be affected by courts in any country and by international organs, than of individual causal connections between domestic legal systems.[951] During the 20 years described here, the trend was towards liberalising

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[948] Decision of Eidsivating Lagmannsrett Nov. 17, 1989. Here taken in English translation from the commission's decision in *R.H.* v. *Norway*.

[949] *Ibid.*

[950] *Planned Parenthood of South-Eastern Pennsylvania* v. *Casey*, 505 U.S. 833 (1992). In this case, *Roe's* "essential holding" was reaffirmed, but a new standard was set out – that of undue burden – and the trimester framework set out in *Roe* rejected.

[951] Warbrick notes that "there are not two streams of law in the European system equivalent to State and Federal legal systems. To the extent that there is any integration at all between Convention law and national law, it is a hierarchical relationship of sorts." Warbrick, 'Aspects', *supra* note 822, pp. 704–705. I believe, and have attempted to show above, that there is such integration. On the other hand, I agree that there is more difference in the

abortion laws and recognising that the right of a potential father was secondary to the pregnant woman's right to privacy. Towards the end of this period, this was the legal situation under the ECHR, in Norway, Iceland, Denmark, and in the U.S., although these developments were controversial and *Casey* may have pointed in the opposite direction.[952] Even though the Nordic courts did not directly refer to American cases on this point, they were probably aware of them, and even if they were not, the American cases still influenced Nordic jurisprudence through the ECHR. That is precisely the second point: even though citations and references to American constitutional law in Nordic legal writings and cases were fewer during this period than they had been before, American law did not cease to be influential. Instead it contributed, like Nordic, German, Austrian and other European constitutional law, to shaping the current of constitutional thought, which in turn influenced domestic constitutional law. What we are looking at, therefore, is not a linear picture of one jurisdiction's law influencing another's, but a web of causal connections to which American law has contributed.

It is probably not disputed that American law has influenced the ECtHR's jurisprudence to some degree. While an extensive comparison of the jurisprudence is beyond the scope of this thesis, it has been shown here that cases before the ECtHR have been argued on the basis of American law, and that the Court and the Commission have referred to American law. All in all, it thus seems American law is frequently in the background. It has also been shown that certain doctrines of American constitutional law have influenced the jurisprudence even though there are no direct references to American law in the opinions and finally, that American law contributes to the current of 'European' constitutional thought along with the ECtHR and the domestic constitutional law of the states parties to the convention.

4.4. THE IMPACT OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS ON NORDIC CONSTITUTIONAL LAW

The European Convention on Human Rights entered into force in 1953, and unlike most international treaties, the Convention provided for a commission and a court. Individuals could complain directly to the Commission. Cases were few and far between in the first decades, but in the 1970s and 1980s the activity increased. This had two main consequences: first of all, it became clearer through the case law what the Convention entailed.[953] Secondly, as more cases were brought against states,

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European system and that the role of the Convention is in many ways different from that of a national constitution. *See also ibid.*, pp. 705–706.

[952] I find it unnecessary to discuss that further, since *Casey* did not overrule *Roe* and the Supreme Court has taken no further steps in that direction. *See also Stenberg* v. *Carhart,* 530 U.S. 914 (2000), invalidating a Nebraska law prohibiting "partial birth" abortions.

[953] A Danish commentator has noted that "[i]n Europe, the breakthrough of the idea of individual rights is not least due to the central role that the [ECHR] has played, due to the [Court's] extensive and dynamic case law … As a consequence of the central role of the

awareness of the Convention increased in the member states.[954] The aim of the following discussion is primarily to illustrate the Convention's impact on domestic constitutional law, but the Convention's impact on national law has also been an extremely important topic in Nordic legal theory.[955] The focus will not be on illustrating that American law has influenced various strands of human rights law, which has in turn influenced Nordic law. Instead, the aim of this chapter is to show that the influence of the ECHR permeates most areas of Nordic constitutional law.

Traditional wisdom has it that the Nordic countries adhere to a dualist theory of national and international law.[956] Thus, domestic law and international law are supposed to be two distinct systems of law. The obligations that the state has undertaken under international law are a matter between it and other states. So if a state has agreed to change domestic laws and does not do so, only the other contracting parties can claim that it is breaching the treaty; its citizens cannot base a claim on the treaty. Due mostly to the influence of the ECHR, this is changing, which obviously entails fundamental changes in legal theory. The focus in most research on the subject is therefore jurisprudential rather than constitutional.[957]

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courts and the mutual influence, shared European standards of protection of rights and control are beginning to emerge." Rytter, *supra* note 16, p. 48.

[954] As to the Nordic countries, one can take the *Hauschildt* case as an example. In that case, the European Court stated that certain practices in Danish criminal procedure were inconsistent with the Convention's art. 6. This led to legal changes, not only in Denmark, but in Norway and Iceland as well. *Hauschildt* v. *Denmark*, Eur. Ct. H.R. (ser. A-154) (1989). On the responses by the Danish government and the influence of the ECHR in general, *see* P. Germer, 'Denmark', *in Fundamental Rights in Europe – The European Convention on Human Rights and its Member States*, *1950–2000* (Oxford University Press, Oxford, 2001) p. 259, 273. On the Norwegian Supreme Court's utilisation of *Hauschildt, see* E. Møse, 'Norway'*, in Fundamental Rights in Europe – The European Convention on Human Rights and its Member States, 1950–2000* (Oxford University Press, Oxford, 2001) p. 625, 646–647, and on the Icelandic Supreme Court's treatment of that case, *see* G. Gauksdóttir, 'Iceland', *in Fundamental Rights in Europe – The European Convention on Human Rights and its Member States, 1950–2000* (Oxford University Press, Oxford, 2001) p. 399, 411.

[955] On Norwegian law, *see* Møse, *supra* note 954. As far as Icelandic law is concerned, Gauksdóttir attributes the increasing "status of the Convention within the Icelandic legal system which finally led to its incorporation" to the following factors: The decisions of the ECtHR that Icelandic law was in violation of the convention, a 1990 Supreme Court decision which came close to overruling certain legislative provisions which were inconsistent with the Convention (Hrd. 1990.2), the deficiency of the constitutional protection of some rights, which enhanced the importance of the convention and, finally, the developments in other Nordic countries. Gauksdóttir, *supra* note 954, pp. 399–400.

[956] Most continental European countries adhere to monist theories of the relation between national and international law. The Nordic countries and Britain, on the other hand, do not. *See e.g.,* Nergelius, *supra note* 702, pp. 174–175 and 188 and the sources referred to therein.

[957] This is one of the most researched topics in Nordic constitutional law. In addition to writings on individual domestic legal situations, studies have been undertaken on the influence of the ECHR on Nordic law in general. *See, e.g.,* S.S.Jensen, *The European*

PART 4

Until around 1990 the main question in all three Nordic countries was to what extent the ECHR was binding in domestic courts. In Denmark, this question was, to a great degree, answered by the Danish Supreme Court in 1989 and 1990, when the Court referred to the ECHR in its rationale.[958] In 1990, the Icelandic Supreme Court interpreted a law in a way which would certainly not have been chosen – and would probably have been unthinkable – were it not for the Convention.[959] The dualist theory of the relation between national and international law also took a beating in Norway. Prior to 1999, when the Convention was incorporated into Norwegian law, the Norwegian courts were never faced with a conflict between the Convention and domestic legislation, and had suggested that even if faced with such a scenario, national law would prevail.[960] Theoretically, the same would probably have been true of the other countries as well, but no Nordic court had to face such a scenario

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Convention on Human Rights in Scandinavian Law: A Case Law Study (Jurist- og Økonomforbundets Forlag, Copenhagen, 1992).

[958] *See* J. Lundum, 'Anvendelse af menneskerettighedskonventionen – De danske domstoles anvendelse af Den Europæiske Menneskerettighedskonvention ved afgørelsen af retssager mellem to private partier efter inkorporeringen af konventionen i dansk ret (direkte Drittwirkung) [The Utilisation of the Human Rights Convention – The Danish Courts' Utilisation of the ECHR In Decisions Concerning Two Private Parties After the Incorporation of the Convention in Danish Law. (Direct Drittwirkung)]' *in Grundloven og menneskerettigheder i et dansk og europæisk perspektiv [The Constitution and Human Rights in a Danish and European Perspective*] 399, 400 (Jurist- og Økonomforbundets Forlag, Copenhagen, 1997). Before the Convention was incorporated in Danish law, the Supreme Court applied the Convention in UfR 1989.928H (the ECHR was important to the interpretation of the social security Act); UfR 1990.13H (the Danish Supreme Court interpreted and applied the ECtHR's decision in *Hauschildt*); and UfR 1990.181H (the Supreme Court stated that it was "doubtful" whether a certain division of labour within the courts was consistent with the ECHR but said, due to the practical consequences of changing it, that Parliament must consider the matter and make a decision. *Ibid.*, p. 187). In 1986, by contrast, the Supreme Court had held that the ECHR could not be applied directly in Danish law. UfR. 1986.898H.

[959] *See* Hrd. 1990.2 and Gauksdóttir, *supra* note 954. In the comments accompanying the bill that incorporated the ECHR, it was noted that "[i]t is … clear that the Supreme Court has not only adopted a clearer position of interpreting domestic law so that it is in harmony with the state's duties under the ECHR, even though this means that long-standing traditions concerning the interpretation of legislation are abandoned, but it has gone further and found it possible to, in fact, set legislation which is incompatible with the ECHR aside". Alþt. 1992-3, A, 796.

[960] In a 1984 case, the Court stated that "as far as possible" Norwegian law "must be presumed to be in accordance with treaties by which Norway is bound, in this case the [ECHR]". Rt. 1984.1175. *See* Møse, *supra* note 954, p. 628 and 630–634; Smith, *supra* note 3, p. 194 and 213; Nergelius, *supra* note 702, pp. 188–190 and the sources referred to therein. It is noteworthy that in a case decided 16 Nov. 2000, the Norwegian Supreme Court refused to give effect to a rule in the traffic law that was, according to the EFTA court, inconsistent with Norway's obligations under the EEA treaty. Chief Justice Smith was in the minority of five Justices who disagreed with the majority on the issue of the effect of international treaties.

since laws were always interpreted in such a manner that they did not clash with the Convention.[961]

After thorough consideration by a committee of experts, the ECHR was incorporated into Danish law in 1992.[962] This was done by enacting legislation which specifically stated that the Convention should have the force of law in Denmark. The Convention does thus not have constitutional status. It is formally a statute, but it has been argued that the formal description undervalues its importance because a law which has the full weight of an independent, supranational enforcement mechanism behind it is not an ordinary statute.[963]

In 1994, Iceland followed suit and incorporated the Convention into domestic law,[964] where it has the formal status of ordinary legislation, just like in Denmark.[965] The committee which drafted the 1994 Act incorporating the Convention into Icelandic law, stated in its report that "it was necessary to revise the Constitution's Bill of Rights, not least because of the Convention".[966] This was done in 1995 when the Bill of Rights was completely rewritten.[967] The new Bill of Rights was, to a great extent, modelled on the ECHR.[968]

In 1993, a Norwegian parliamentary committee suggested incorporating the main human rights conventions, including the ECHR, into Norwegian law, and at the same time adding a general provision on the inviolability of human rights to the Constitution.[969] A new provision was added to the Norwegian constitution in 1994, in accordance with these suggestions. It states that "[i]t is the responsibility of the

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[961] In some cases, this interpretation was so far removed from the text of the documents that some commentators have argued that the Convention has in fact superseded national legislation. *See e.g.,* Schram, *supra* note 21, p. 41 discussing Hrd. 1992.174, in which the Icelandic Supreme Court held, considering the Convention, that it was illegal to expect a convicted man to pay for a court-appointed translator at the criminal proceedings. The Icelandic Law of Criminal Procedure explicitly stated that the cost of hiring a translator should be borne by whoever had to pay the legal costs – in this case the convict. This is contrary to the situation before 1990, *see e.g.,* Hrd. 1985.1290, in which the Supreme Court refused to apply convention rules.

[962] Act no. 285 of 29.4.1992. On the effect of this enactment, *see* Zahle, *supra* note 202, pp. 47–51.

[963] *Ibid.*, p. 47. Similar questions have been raised in Icelandic law.

[964] Act 62/1994.

[965] One scholar notes that "Icelandic scholars seem to agree that the Convention ranks higher than ordinary law." Gauksdóttir, *supra* note 954, p. 403.

[966] Alþt. 1994-5, A, 2080.

[967] Act 97/1995.

[968] The committee drafting the Amendment wrote: "[T]he goals we strive for when reviewing the Bill of Rights are … three … First, to enhance and coordinate its provisions, so that they can better fulfil their role of protecting the public from those entrusted with public power. Secondly, to modernize the provisions. Thirdly, to take account of the obligations that the Icelandic state has undertaken internationally." Alþt. 1994-5, A, 2080-2081. The Committee also discussed and referred to the incorporation law.

[969] The committee's report, *Lovgivning om menneskerettigheter [Legislation on Human Rights]* was published in NOU 1993.18.

authorities of the State to respect and ensure human rights. Specific provisions for the implementation of treaties hereof shall be determined by law."[970] To follow up on the amendment, a statute on "the strengthening of the status of human rights in Norwegian law" was enacted in 1999.[971] It states, *inter alia*, that the ECHR shall have the force of a Norwegian law and that in case of conflict, it – and the other conventions incorporated by the law – shall take precedence over provisions in other laws.

In sum, the Convention had been argued before the Supreme Courts of all three countries and they had, to differing degrees, applied it and interpreted laws in such a way that they were consistent with it even before the Convention was incorporated into the domestic law of the three Nordic countries. It is illustrative of the impact of the Convention that special laws were enacted to give it statutory status in all three countries. In two, the Constitution was amended either to make room for the Convention as a set of semi-constitutional rules or to adapt the constitution's Bill of Rights so that constitutional protection of rights would not be less than that offered by the Convention. And this is not counting the laws which were changed because of judgments of the European Court, or because the governments believed they were inconsistent with the Convention.[972] It must be noted, however, that the protection offered by the ECHR does not coincide completely with the protection under the Nordic constitutions. Related to this, there have been developments in Nordic constitutional law in the last decade, which are relatively independent of the ECHR. An important one is the constitutionalisation of welfare rights, which are not protected under the ECHR,[973] whereas they are expressly protected under the Icelandic constitution and probably under the Norwegian constitution as well.[974]

The Convention has also had some impact on constitutional interpretation and on the practice of judicial review. When the Convention was incorporated into Danish law, the Ministry of Justice stated its opinion that

> "the balance between the Danish legislature and the Danish courts which has been established by the case law of the Supreme Court should not be disturbed … incorporation of the Convention should not lead to increased law-making on the part

[970] Art. 110c of the Norwegian constitution.

[971] Lov om styrking av menneskerettighetene i norsk rett [Law on the strengthening of human rights in Norwegian law] was enacted 21 May 1999 and is no. 30.

[972] The most dramatic of those is probably the fundamental change of the Icelandic court system by Act 92/1989 and the new laws of civil and criminal procedure, which followed the friendly settlement with Jón Kristinsson in the wake of the Committee's finding of a violation when he was convicted of a traffic offence by a judge who was also the chief of police in his district. *Jón Kristinsson* v. *Iceland*, Eur. Ct. H.R. (ser. A-171b) (1990).

[973] The ECHR protects mainly classical civil and political rights.

[974] *See* Hrd. 2000.4480, in which lower payments to married welfare recipients were held to be unconstitutional under the Icelandic constitution arts. 76 and 65, guaranteeing the right to welfare and equal protection. *See also* Hrd. Oct. 16, 2003, which reaffirmed this; Rt. 1996.1415 and Rt. 1996.1440 concerning the status of welfare rights in Norway.

> of the Danish courts."[975]

This did not turn out to be an accurate prediction. Scholars note that one of the consequences of importing the ECHR into Danish law is that the Danish Courts have to use methods of interpretation which are different from those they use when working with domestic law. Zahle writes that

> "Danish courts can not exhibit any judicial restraint but must follow the lead of the European Court concerning interpretation. This can lead to Danish courts using different jurisprudential perspectives and analytical models than those used when interpreting Danish law, including the Danish constitution. Roughly similar provisions [in the law incorporating the ECHR and in the constitution] can thus be interpreted in different ways."[976]

Others have taken this argument further. When giving an overview over the influence of the incorporation, Christoffersen argues that the

> "ECHR has had much more impact on Danish law than was presumed and foreseen at the time of the incorporation. It may be argued [i] that the courts have repeatedly set Danish law aside and used methods of interpretation and reached conclusions of interpretation that they would not have done without the ECHR, [ii] that the courts generally had no basis for changing Danish law except general principles from the European Court's case law, [iii] that the courts have not shown the expected restraint towards the legislature and that they have accepted that their interpretation of laws should have wide-ranging consequences, [iv] that the courts have let the ECHR influence their interpretation of the constitution, [v] that they have in many cases, gone further than necessary to secure harmony with the ECHR and [vi] that the ECHR is utilised as a source of interpretation just like other Danish law, instead of being used only as a corrective when there is doubt of the compatibility of Danish law and the ECHR."[977]

It is thus argued in Danish law, that due to the ECHR's - and, to some extent the EU's - influence, there are "signs of and tendencies towards, a more active constitutional role for the courts – not least in relation to Parliament – and an increasing acceptance of a more independent judicial interpretation, especially a freer and more independent development of the protection of basic rights".[978]

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[975] Germer, *supra* note 954, p. 266. Such *travaux préparatoires* are important guidelines for interpretation in all the Nordic countries.

[976] Zahle, *supra* note 202, p. 50.

[977] J. Christoffersen, 'Højesteret og Den Europæiske Menneskerettighetskonvention, [The Supreme Court and the ECHR]' *UfR* 2000B, p. 593, 600.

[978] Rytter, *supra* note 16, p. 62. *See also* Germer, *supra* note 954, pp. 267–268: "In some cases decided after the incorporation of the European Convention on Human Rights, the Supreme Court has referred to the case law of the European Court of Human Rights as supporting arguments for its decisions. These supporting arguments may have weighted the scales in favour of more liberal decisions on the part of the Supreme Court." It is noteworthy that this was written prior to the latter *Maastricht* (UfR 1998.800H) and the *School Funding* cases (UfR. 1999.841H).

These seem to be two interrelated claims: that the courts are taking a more active role in the constitutional order, and that their methods of interpretation, especially of the constitution, have changed. The cases that are usually referred to as supporting these broader claims are the cases from 1989 and 1990, in which the Danish Supreme Court applied the ECHR,[979] the two Maastricht cases from 1996 and 1998,[980] and the *School funding case* of 1999.[981] In fact, a general consensus seems to exist that the constitutional role of the Danish courts is changing, and that the ECHR is at the root of that change.[982]

When the Norwegian legislature added art. 110c to the Constitution and adopted the incorporation law it was presumed, just as in Denmark, that the balance between the legislative and judicial authorities should not be shifted.[983] Obviously, the Norwegian Supreme Court plays an important role in interpreting and applying the Convention nationally. Møse writes:

> "[I]t is clear that the Supreme Court has played a leading role in the interpretation and application of human rights conventions. It is reason to believe that its thorough discussions of the Convention and Strasbourg case law have influenced the attitude of the subordinate courts when confronted with such arguments. The text of the Convention and the case law have not only been invoked by the lawyers pleading the cases, but have been applied by the Court and in many cases thoroughly discussed. On several occasions a Strasbourg solution has had a direct impact on the outcome of a Norwegian case."[984]

Unlike the Courts in the other Nordic countries, which interpret the Convention and the available European case law liberally – which then affects constitutional interpretation – the Norwegian Supreme Court has avoided doing so.[985] The Supreme Court has noted that if the Norwegian "courts were as dynamic in their interpretation of the ECHR as that Court [the ECtHR], there is the risk that they might go further than required by the ECHR. This would imply an unnecessary limitation of the powers of the Norwegian legislature and interfere with the balance between the legislature and the judiciary."[986] By contrast the Norwegian Ombudsman has, like his Icelandic counterpart, actively applied the Convention.[987]

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[979] *See supra* note 958.
[980] UfR. 1996.1300H and UfR 1998.800H. *See supra* note 816.
[981] UfR. 1999.841H. *See supra* note 570.
[982] *See* Rytter, *supra* note 16, pp. 61–69 and the sources referred to therein. This is true in spite of the fact that judicial review is undertheorised in Denmark. *See* R. Gralla, *Der Grundrechtsschutz in Dänemark* [*Constitutional Protection in Denmark*] (Peter Lang, Frankfurt, 1987) and Nergelius, *supra* note 702, pp. 176–177.
[983] *See* NOU 1993.18.
[984] Møse, *supra* note 954, p. 649.
[985] The Norwegian Supreme Court has pointed out that it does not have the resources of the ECtHR and that it intends, when balancing interests, to draw on priorities that are the basis of Norwegian law and thus to engage the Strasbourg court in a dialogue.
[986] Møse *supra* note 954, p. 637, citing Rt. 2000.996.
[987] *Ibid.*, p. 653, citing the Ombudsmann's report 1990, 23.

So while the Norwegian Supreme Court applies the ECHR and has discussed and interpreted the ECtHR's decisions, there is less evidence that this has led to changes in the interpretation of the Norwegian constitution than there is in Denmark.

The issue of the balance between legislative and judicial power was not discussed in the report of the Icelandic committee recommending the incorporation of the Convention.[988] When the Constitution was amended in 1995, it was noted in Parliament that it had been suggested when the Convention was incorporated "that the incorporation would have the indirect effect of increasing the tendency to interpret the Constitution liberally and so as to make it consistent with the Convention, wherever possible".[989] Due to the relationship between the Icelandic constitution's Bill of Rights and the ECHR, the Convention and the European Court's case law are key when it comes to interpreting the Bill of Rights.[990] One commentator notes that "[t]he Supreme court has applied the principle of interpreting law and practice in harmony with the Convention. However, the principle has been applied liberally and the Court has changed the interpretation of domestic law, including the Constitution, to meet with the Convention's requirement."[991]

Jens Elo Rytter wrote of the parties to the ECHR in general that

> "[t]he domestic courts have not only respected the practice of the [European Court], but also been inspired by it … the national courts have tried to approximate the Court's understanding of the concept of rights and its principles of interpretation. The Court's case law thus has an important and ever-increasing meaning for domestic law, both directly through the decisions made and indirectly through the influence on the national control of basic rights."[992]

This seems to be especially true of the Nordic countries. With the possible exception of the Norwegian courts, the Supreme Courts are clearly influenced in their constitutional interpretation by the work they do when interpreting the ECHR. In the case of Denmark, this has led to a more active judicial role.

In sum, the ECHR and the case law of the European Court of Human Rights have immensely influenced Danish, Icelandic and Norwegian law on a variety of levels. The most obvious is the substantive one: rights that were not protected in the constitutions' bills of rights have either been added to them or are protected by the convention, which has legal force. Anything that influenced the ECHR and the ECtHR's case law therefore matters for Nordic constitutional law. But the ECHR and the ECtHR's case law have also affected the way courts interpret the constitution and the way they perceive their role in the constitutional order as well as the law in individual fields, like abortion rights.

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[988] Gauksdóttir, *supra* note 954, p. 422.
[989] Alþt. A-deild, 1994-5, 2080.
[990] *See, e.g.,* Aðalsteinsson, *supra* note 933, pp. 589–596.
[991] Gauksdóttir, *supra* note 954, p. 421. She also noted that the "approach of the Supreme Court is not firmly established and further developments can be expected." *Ibid.*, p. 417.
[992] Rytter, *supra* note 16, p. 52.

4.5. CONCLUSIONS – THE PERIOD AFTER 1970

What is the conclusion, then, about American influence on Norwegian, Danish and Icelandic constitutional law after 1970?

First of all, less attention was paid to American constitutional law than before. The most important writings on American law concerned free speech and even those did not directly impact the case law. It took the ECHR and amended constitutions for changes to occur in that respect, but ideas from American First Amendment jurisprudence are now widely known, partly through the jurisprudence of the European Court of Human Rights.

Nordic lawyers writing about judicial review continued to make brief comments about American constitutional history and the story of the New Deal Court was frequently cited as an example of the inherent limits of judicial power. The only idea borrowed from American doctrine that broke through in the courts was that of different levels of scrutiny. It was introduced into Nordic law in the 1940s and mentioned in most writings about judicial review through the 1960s, but it was only in the 1970s that Germer discussed it in detail and suggested that the Danish courts adopt it. It was also in the early 1970s that Carsten Smith forcefully argued for such an approach in the Norwegian courts. Even though it was acknowledged in the Nordic theory that the U.S. Supreme Court had not used the term since the early fifties, Nordic lawyers used, and still use, the term 'preferred position principle' to designate the doctrine that courts should use a higher level of scrutiny when reviewing the constitutionality of legislation impairing non-economic rights than when reviewing the constitutionality of economic or social legislation.

The proponents of this theory made two main arguments to support their contention that Nordic courts should adopt this doctrine. Firstly, and most importantly, they argued that it was more important to jealously guard non-economic rights because they were simply more fundamental than economic rights and, additionally, that some non-economic rights, the freedom of speech in particular, played such a role in democratic society that they should receive special protection. These arguments are familiar from American law and were in all likelihood borrowed from there. Secondly, it was argued that focusing on the non-economic rights was the best way to avoid clashes with the legislature. Some commentators noted that by focusing on non-economic rights, the courts would stay out of issues connected to partisan politics, while others pointed out how the tension between the U.S. Supreme Court and Congress in the 1930s had been diffused when the Court started applying bifurcated review and giving the legislatures a greater leeway concerning social and economic legislation. Not only are those arguments borrowed from American law, but the story of the 'switch-in-time' was frequently invoked to support the latter argument.

This theory was endorsed by the Supreme Court of Norway in 1976 and in 1996. The system set out in the 1976 case is based on three levels of scrutiny: the lowest level is applied when the law in question concerns the separation of powers or the competence of the legislative or administrative branches; a middle level is

applied to laws impairing economic rights; and the highest level of scrutiny is reserved for laws impairing non-economic rights, particularly those that matter for democratic governance, such as the freedom of expression. Welfare rights are, according to the 1996 cases, in a middle position between economic and non-economic rights.

There are many uncertainties in the Norwegian doctrine. First of all, it is not clear from the cases whether the Court really adheres to this theory when judging, even as it states that it does. The conviction of a racist political party leader in 1997 and the invalidation of a law concerning compensation for takings in 1976 cast some doubt on that. Secondly, the Court seems to indicate in its 1976 decision that it will apply different standards of review only when the legislature has clearly evaluated the legislation's constitutionality. This suggestion has not been fleshed out or clarified in later cases so it is unclear how much would be needed for the courts to conclude that Parliament had assessed the law's constitutionality and possibly even which effect the application of the different standards of review would have.

This theory has not caught on in the same way in the courts of the other Nordic countries. In recent years there have been statements, from notably Danish Chief Justice Pontoppidan, which suggest that the Danish Supreme Court might adopt a similar stance, but it has not yet done so. Neither have the Icelandic courts.

Apart from this theory of judicial review, it is hard to find examples of direct influence of American law in the Nordic constitutional law of this period. More importantly, references to either American cases or Nordic writings on American law essentially disappeared from the case law in all three countries. Due to this, and because of the decrease in the number of writings discussing American constitutional law, it ceased being at the centre of doctrine concerning judicial review as it had been before. References to American constitutional law outside the context of judicial review and free speech were few and far between. The high tide of the influence of American constitutional law on Nordic law was probably in the late 1930s. Many short articles on American law were published in Nordic law journals in the 1930s, as were books and more substantial essays on American law. By comparison, there are, in Nordic theory from the last thirty years, innumerable mentions of American constitutional history, but only three or four essays in which there is a substantive discussion of this field of American constitutional law. These include the writings of Germer, Carsten Smith, possibly Eivind Smith, and Backer. It was described above how relatively generalised most of these writings are. So there were not only fewer people discussing American law in any depth, but also – overall – less careful analysis.

This did not mean, however, that American law ceased influencing Nordic constitutional law at all. During this period, the ECHR became increasingly important both in general and for constitutional developments in the Nordic countries. The interaction between national – including American – courts and the European Court of Human Rights increased. When applying the Convention, the European Court of Human Rights and the European Commission have looked towards American law. First of all, applicants frequently refer to arguments based on

American law.[993] Lately, this has happened most in free speech cases, but it has happened in a variety of cases. In a number of cases, the Court and the Commission have explicitly referred to American court cases or statutes in their opinions. Dissenting and concurring judges have frequently done so. It is tempting to see this as suggesting that American law is generally in the background of the ECHR jurisprudence. Even in areas of the law in which the Court has never cited American law, it is sometimes clear that doctrinal developments bear a close resemblance to American doctrine. This is particularly true of the application of the equal protection provision of the Convention.

The ECtHR's equal protection jurisprudence is developing and in many ways still unclear. However, it is clear that the 'badge of differentiation' – the characteristic that is the basis of the discrimination – is one of the factors that determine which level of scrutiny the ECtHR uses. The Court has applied strict scrutiny when the discrimination is based on race, nationality, gender, illegitimacy and religion. A lower level of scrutiny is used when the 'badge of differentiation' is not personal, or is personal but mutable, such as geographical location or profession. The considerations behind this differentiation are the same as those that lie behind the U.S. courts' equal protection jurisprudence: a concern about groups historically suffering discrimination, about discrete and insular minority groups, and about immutable characteristics being used to justify discrimination. There are probably more instances of American influence on the ECtHR jurisprudence at the level of ideas, but obviously the scope of this dissertation does not allow a systematic comparison of ECtHR and American jurisprudence.

In sum, tracking American influence in Nordic constitutional law becomes harder in this period than before. While theory, in particular, shows that legal writers were knowledgeable about developments in American law, and while American law had some direct influence on Nordic law, Nordic discussion of American constitutional law was also hampered by generalisations and over-simplifications. Much of the influence was not direct at all, but was instead transmitted through the law of the ECHR. American influence on that jurisprudence is mostly uncharted territory, but it is clear that in addition to the judges' knowledge of American law, often gained by studying or working in the U.S., American law has been frequently discussed by the parties. Sometimes those arguments had quite dramatic results, for instance in the *East African Asians* case. American law was also cited by the Court and by individual judges in a variety of cases and this makes it likely that there has been, in more cases than those in which American law is expressly mentioned, an awareness of American constitutional doctrine. Finally, and perhaps most importantly, ECHR doctrine sometimes develops in the direction and under the influence of American law, even though there is no mention of it.

[993] It is interesting to note that this may be especially true of British applicants; all the cases in which the Court has referred directly to American law have been against the United Kingdom and the Turkish applicants who have frequently referred to American law have frequently had British lawyers.

Even assuming that American constitutional law has considerably affected ECtHR jurisprudence, that does not fully answer the question of American influence on Nordic constitutional law. The ECHR has had a huge impact on Nordic constitutional law, resulting in two constitutional Amendments, the incorporation of the Convention into domestic law in Norway, Denmark and Iceland, and major legal changes. Yet when it comes to individual ideas, theories or arguments in constitutional law – be they specific doctrinal developments in a particular area of the law, like free speech doctrines, or more general, like the use of different levels of scrutiny – there is a veritable web of causal connections and influences. Domestic law in European countries can be influenced by the ECtHR and by domestic constitutional law elsewhere in Europe and in the U.S. and, in turn, the ECtHR can be influenced by domestic law in the European countries and by American law directly. Abortion rights were discussed as an example of this. What we can really ascertain, therefore, is only that American constitutional law has influenced European constitutional and human rights thought. That thought has again been immensely influential in the Nordic countries.

This suggests that while American constitutional thought continues to influence the law of the ECHR, and that law, in turn, continues to influence Nordic constitutional thought, the American influence on Nordic constitutional law and theory, which has been traced in this part and the two previous ones, will continue to be felt, albeit indirectly.

PART 5. CONCLUSIONS

A picture of American influence on Nordic constitutional law from the late 19th century to the present has been drawn in the previous parts. The three Nordic countries all adopted the fundamental idea of judicially enforceable constitutional limitations on government either in the 19th or very early in the 20th century. When Norwegian lawyers started rationalising judicial review – long before their Danish and Icelandic colleagues – they sought their arguments in American law. Aschehoug, who played a key role in theorising judicial review in Norway, had studied in England, and he took advantage of American books on the subject and incorporated many of their arguments into his own theories. From his books, which relied heavily on Cooley's *Constitutional Limitations* in particular, the arguments which had been used to rationalise judicial review in the U.S. spread through the Nordic legal systems. There is no doubt about these arguments' American origins, and it is clear that they were influential to the point that they still appeared relatively unchanged in Nordic books published in the 1920s. In addition, individual doctrines and areas of constitutional law, such as the doctrine of vested rights, were heavily influenced by American constitutional law.

While the growth and economic development of the United States in the second half of the 19th century and the beginning of the 20th was unparalleled by the Nordic countries, there were certain similarities: industrialisation, with its inherent challenges for the legal order, happened late and fast in all four countries. In a few decades, mainly agrarian societies became industrialised and to some degree urban. We saw, in part 2, that the courts in all four countries went to work in this time with quite similar conceptual tools. Their tasks were also similar in that they were trying to delimit regulatory power and protect vested rights in a time of rapid change. The courts went into this period armed with a doctrine mandating the protection of vested rights and with a dislike of special legislation. All in all, many aspects of what American legal historians have called 'classical legal thought' were recognisable in Nordic law around the turn of the 20th century. In Norwegian law, in particular, many of the concepts and constructions which shaped constitutional law in this period were borrowed from American constitutional law. There were differences between American and Nordic law too, of course. The American doctrine of liberty of contract never had any analogue in Nordic law, perhaps because of its roots in abolitionist ideology and thus in particularly American circumstances. The American dichotomy between public and private entities did not really have a Nordic analogue either. Some of this slack in the Nordic law was, however, picked up by the doctrine of vested rights. That doctrine was more potent in its Norwegian form than it was in the U.S. in the latter part of the 19th century.

The differences between American and Norwegian law in the decades around 1900 can be illustrated by noting that Norwegian writers relied on American writings which predated the Civil War or were produced in the late 1860s. No wonder, then, that the Norwegian theory – and to some extent the jurisprudence – most closely resembled early 19th century American law, with its emphasis on

vested rights and the protection of property, but had less in common with contemporaneous American constitutional law, in which the same constitutional ideas had developed further.

The impetus for discussing and adopting American theories of judicial review came from Norway. Denmark and Iceland then followed suit. In all three of the Nordic countries dealt with in this study, certain factors in domestic law and legal history[994] made it compelling to view constitutions as regular, binding law, which was unusual in Europe at the time. Once the constitutions had been accepted as binding, it was a relatively small step to apply them also to the acts of the legislatures. This explains in part why these countries adopted judicial review while most European countries did not, but this does not explain why Norwegian law was at the forefront.

Historical and constitutional similarities between U.S. and Norway offer some explanations for that, however. The history of the Nordic constitutions was discussed briefly in the introduction, and we saw that the drafters of the Norwegian constitution in 1814 looked to American constitutions. When it came to the application of the constitution in the first decades after 1814, there may simply have been a lack of good role models in constitutional matters. Denmark was an absolute monarchy until 1848, while French politics were turbulent in this period and the French constitutions did not last very long. So along with Sweden, Britain and the U.S. provided as good a role model as any. Yet as was pointed out by Højer,[995] Norwegians in 1814 were not divided into an aristocracy and a tenant class; instead, there was a large class of small landowners and farmers. The U.S. Constitution and the various state constitutions were therefore more compelling examples than the British one, particularly when it came to representation.

Geography is also an important non-legal factor in explaining why Norwegian authors and judges were unusually willing to look towards American law. Norway has an extremely long coastline on the North Sea and the North Atlantic and a long tradition of trade – in goods and ideas – with Britain, as well as a long seafaring tradition. Last but not least, a large number of Norwegians emigrated to the U.S. and Canada from the 1840s to the 1920s. It has been estimated that almost half the

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[994] One of these factors was the Nordic middle ages tradition of compacts made with monarchs (håndfæstninger), for instance with Erik Glipping in 1282, but under those compacts, the monarchs could be displaced if they broke their oath. Another example is Gamli sáttmáli, entered into by the Icelandic people and the Norwegian King in 1262–4. Some 600 years later, Iceland claimed her independence arguing in part that the King's successors had not kept to the pact and in part that the pact had become void when it was transferred from the Norwegian throne to the Danish state. So the idea of a social pact or a 'constitution' binding the state was well-known and accepted. Another factor is the fact that while both the executive and the legislative bodies were far removed from the people, courts – juries in particular, of course – were local people. Examples exist, therefore, of court decisions which came quite close to being legislative decrees, but which no one appealed, since all parties agreed that it was better to resolve the issue close to home. Similar examples exist from colonial America.

[995] Højer, *supra* note 8, p. 24.

population of Norway at this time left for America – a proportion equalled only in Ireland. As was the case in many other countries, many of the emigrants later returned, temporarily or permanently, to their country of origin, and even if they did not, they kept in touch with family and friends. The flood of emigration thus forged ties between the two countries.

Just as the conceptual framework of constitutional law and constitutional rights in Norway around 1900 was quite similar to that of early 19th century American law, there were similarities in the manner this framework foundered in the two countries. It had been argued for decades, in both countries, that constitutional adjudication impeded the ability of the legislatures to address pressing social problems. The criticism in Norway, and later in Denmark, was often based, at least to a degree, on arguments borrowed from American court critics. A variety of responses were proposed, but those that prevailed in the Nordic countries were a flexible, non-originalist interpretation of the constitutions and a slightly changed view of the judicial role. According to that view, courts should be careful to give legislatures considerable leeway to address crises and changing circumstances and, related to this, apply a low level of scrutiny. In the Nordic countries, these responses were based on American arguments and bolstered by American examples, both individual cases, and lines of cases and the story of the U.S. Supreme Court's 'switch-in-time'.

The high-tide of American influence on Nordic constitutional theory may well have been in the decade immediately before World War II. We saw in part 3 that American law was followed closely in Nordic legal discourse, and so were the various arguments in the American debate on the proper role of the courts. There were dozens of law review articles, radio lectures, lectures, and seminars on American constitutional law in the 1930s, and most of the key players in Nordic law at the time wrote at some point about American law. Possible reasons for this were suggested in part 3: many Norwegian lawyers believed that Norwegian constitutional jurisprudence of the previous decades was problematic in the same way as American constitutional jurisprudence, in that it restrained the legislature and privileged the property and vested rights of the affluent few over the public weal. Therefore, the American discourse may have had special resonance in Norway. In addition, totalitarianism was on the rise in Europe, making it reasonable to look towards the U.S. in constitutional matters. During this period, American law was influential not only concerning constitutional interpretation and the proper role of the courts, but also in many areas of substantive constitutional law, such as the doctrine of vested rights, which was gradually disappearing, and the extent to which it is permissible to delegate legislative power.

After World War II, these considerations from theory before 1940 started to influence Nordic jurisprudence. The break was most dramatic in Norway, due to the fact that the 'classical' jurisprudence had been clearest there. So the Norwegian courts did not only abandon the older doctrines of, e.g., vested rights, but older cases were also expressly overruled. The rationale was usually the need to leave the legislature a certain leeway to address various crises and the need for a flexible interpretation of the constitution, but also underlying, although rarely addressed, was

the fear of a serious confrontation with the legislature. These considerations also influenced Icelandic constitutional jurisprudence. While there was no question of overruling older cases, the rhetoric changed and an awareness of the separate roles of the legislature and the judiciary became evident in court opinions. It had been clear since the Danish courts first exercised judicial review that they would apply a very low level of scrutiny, so there was no obvious change in Danish jurisprudence. The ideas that won out during this time were dominant in Nordic constitutional law for decades.

The changes in American law in the 1930s and 1940s and the apparent 'switch-in-time' were discussed in Nordic constitutional law through the 1960s. Changes in American law during the decades following World War II were, on the other hand, not discussed as anything of relevance to Nordic lawyers. This is not to say that, e.g., *Brown* v. *Board of Education*[996] was not discussed at all – it was. However, such changes were not believed to be of immediate importance in Nordic law.

An important part of the doctrinal change in American law between the wars was the bifurcation of judicial review. This was mentioned in Nordic law already in the 1940s, but this idea did not really command much attention in the Nordic countries until the early 1970s. As we saw in part 4, early 1970s writings on American First Amendment doctrine and Carsten Smith's 1974 lecture on judicial review discussed the bifurcation of judicial review seriously in the context of Nordic constitutional law. This led the Norwegian Supreme Court to state in 1976 that it would apply different levels of scrutiny to questions of separation of powers, economic rights, and non-economic civil rights.[997] There is no doubt that this idea was borrowed from American law. So were the considerations rationalising it: The 'fundamental' nature of non-economic rights; some fundamental rights' importance for democratic governance; and the fact that the bifurcation of judicial review combined two desirable results – a vigorous protection for non-economic rights and leaving the legislature some leeway to address economic problems. In its Norwegian form, however, this doctrine is somewhat mysterious. First of all, it is unclear whether it is a prerequisite for the bifurcation to apply that Parliament should have discussed the law's constitutionality. Secondly, it is not immediately apparent from the cases whether the Norwegian Supreme Court has followed through on its statements in this field. No similar developments are evident in Denmark or Iceland, although bifurcated review has been discussed in those countries and it is frequently taken as a given in the theory in both countries that civil rights are somehow more fundamental than economic rights.

The adoption of the theory of bifurcated review in Norway is the only clear example of direct American influence in Nordic constitutional law after 1970. In one of the sharpest turns described here, American influence essentially disappeared from Nordic constitutional theory and, with this exception, disappeared completely from the case law. For some reason, American constitutional law seemed more

[996] 347 U.S. 483 (1954).
[997] *See* the discussion of Rt. 1976.1, *supra.*

remote, less relevant, and less directly applicable to Nordic circumstances than before. Perhaps American law seemed less clear than before; perhaps Nordic constitutional lawyers did not immediately see the relevance of litigation concerning civil rights for Nordic constitutional law; perhaps Nordic lawyers started, when faced with European integration, to look to their European neighbours for foreign models rather than to the U.S.; perhaps the U.S.' sheer size and power made it less compelling an example for small countries than before.

When the focus is broadened to encompass the law of the European Convention of Human Rights (ECHR), however, a more complete picture both of Nordic constitutional law after 1970 and American influence on that law starts to emerge. Landmark American cases of the latter part of the 20th century did influence the European Court of Human Rights' (ECtHR) jurisprudence, as did developments in many concrete areas of constitutional law. It is clear from citations by the parties and from judges' opinions that American law has frequently been mentioned in proceedings before the ECtHR. More importantly, though, even in some areas of the law in which there are no direct references to American law in the opinions, the ECtHR doctrine is quite clearly based on American doctrine or, at the very least, on the considerations that also inform American doctrine. The equal protection jurisprudence is an example of this. All this suggests that American law has been an important influence on the ECtHR's jurisprudence. I do not think this claim is really in dispute, even if the extent of American influence in this respect has not been documented, but such an analysis is outside the scope of this dissertation.

In spite of the extensive American influence on the ECtHR's jurisprudence, there was no systematic effort here to isolate strains of the law of the ECHR which have been particularly heavily influenced by American law and to show how they have, in turn, influenced Nordic constitutional law. That is because this would ultimately have little relevance: whether there exists a particular detail in *e.g.*, the case law concerning art. 6 – guaranteeing the right to a fair trial – which was borrowed from American law and which has influenced Nordic law specifically is less important than illustrating that American influence on the ECtHR's jurisprudence has been extensive and that, in turn, the ECHR has more or less revolutionised Nordic constitutional law and constitutional adjudication. The ECtHR's decisions not only necessitated various changes in the legal systems and in legal theory, they also led to constitutional amendments in Norway and Iceland and to the Convention being incorporated into the domestic law of all three Nordic countries discussed here.

It is therefore perhaps important to look at examples of these influences converging. In part 4, abortion rights were examined for these purposes. First *Roe*[998] and then *Danforth*[999] strongly influenced abortion litigation, both in the ECtHR and in national courts in Europe. American thought merged with German, Austrian, and

[998] *Roe* v. *Wade,* 410 U.S. 113 (1973). *See supra* note 935 and accompanying text.
[999] *Planned Parenthood of Central Missouri* v. *Danforth*, 428 U.S. 52 (1976). *See supra* note 941, and accompanying text.

British constitutional thought to influence the doctrine on abortion set out by the ECtHR and the Commission, which in turn influenced Nordic constitutional law.

This brings us closer to an answer to the question of why American law more or less ceased to influence Nordic constitutional law directly after 1970. From judicial review's inception, Nordic lawyers were, as we have seen, very aware that they shared their model of judicial review with American law. The American example was therefore the most compelling one. In the second half of the 20th century, however, judicial review started to develop in continental Europe. By the mid-1970s, judicial review in some form was a feature of domestic constitutional law in many European countries. The ECtHR's stature was also considerable and increasing. So by that time, Nordic lawyers were knowledgeable about more ways of exercising and theorising judicial review. That is probably an important factor in the decline of direct American influence after 1970.

When we look at the whole period from 1880 to the present, one of the clearest shifts is therefore between the influence of American law up to the 1940s and later American influence. Up through the changes in doctrine that led to 'classical legal thought' being displaced, American law influenced Nordic law directly. It was certainly not the only factor influencing Nordic constitutional law, but it was an important one. Once the effects of those changes had appeared in Nordic law, direct American influence almost disappeared from Nordic constitutional law. Instead, American law influenced Nordic – as well as other European – constitutional law indirectly. American constitutional ideas were not necessarily much less influential after 1970 than before – we just know that they were not influential in the Nordic countries under the rubric of American ideas, but instead as part of 'European' or 'Western' constitutional thought.

So are we faced with a story of the rise and fall of American influence on Nordic constitutional law or a story of how this influence has changed? I believe it is quite clear that this is a story of how American influence on this field of constitutional law has changed while remaining significant through a long period of time. I also believe it is too early to tell whether the last 30 years signify the end of direct American influence in this field of Nordic law. Nordic lawyers may look more towards American constitutional jurisprudence in the future. It is particularly noteworthy in that context that some Nordic legal theorists already look to American constitutional jurisprudence of the last few years when criticising what they view as an extreme "rights-based jurisprudence" inspired by the ECHR.[1000] So the pendulum may yet swing back.

[1000] *See, e.g.,* J.S. Gunnlaugsson, 'Lausung í lagaframkvæmd, [Lack of Discipline in Legal Developments]' 50:2. *T.L.* 2000, pp. 143–152.

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TABLE OF CASES

JUDGMENTS OF THE EUROPEAN COURT OF HUMAN RIGHTS

Hudoc <www.echr.coe.int>, last visited on 4 August 2005

DECISIONS AND REPORTS

DANISH EASTERN HIGH COURT (ØSTRE LANDSRET)

DANISH SUPREME COURT

ICELANDIC SUPREME COURT

ICELANDIC HIGH COURT

NORWEGIAN SUPREME COURT

UNITED STATES FEDERAL COURTS

UNITED STATES STATE COURTS

UNITED STATES SUPREME COURT

INDEX

The Raoul Wallenberg Institute Human Rights Library

1. Göran Melander (ed.): The Raoul Wallenberg Institute Compilation of Human Rights Instruments
   ISBN 0-79233-646-1
2. U. Oji Umozurike: The African Charter on Human and Peoples' Rights
   ISBN 90-411-0291-4
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