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LIBERTY OF CONTRACT

"The right of a person to sell his labor," says Mr. Justice Harlan, "upon such terms as he deems proper, is in its essence, the same as the right of the purchaser of labor to prescribe the conditions upon which he will accept such labor from the person offering to sell it. So the right of the employee to quit the service of the employer, for whatever reason, is the same as the right of the employer, for whatever reason, to dispense with the services of such employee. . . . In all such particulars the employer and the employee have equality of right, and any legislation that disturbs that equality is an arbitrary interference with the liberty of contract, which no government can legally justify in a free land." ¹ With this positive declaration of a lawyer, the culmination of a line of decisions now nearly twenty-five years old, a statement which a recent writer on the science of jurisprudence has deemed so fundamental as to deserve quotation and exposition at an unusual length, as compared with his treatment of other points,² let us compare the equally positive statement of a sociologist:

"Much of the discussion about 'equal rights' is utterly hollow. All the ado made over the system of contract is surcharged with fallacy." ²

To everyone acquainted at first hand with actual industrial conditions the latter statement goes without saying. Why, then do courts persist in the fallacy? Why do so many of them force upon legislation an academic theory of equality in the face of practical conditions of inequality? Why do we find a great and learned court in 1908 taking the long step into the past of dealing with the relation between employer and employee in railway transportation, as if the parties were individuals—as if they were farmers haggling over the sale of a horse? ³ Why is the legal conception of the relation of employer and employee so at variance with the common knowledge of mankind? The late Presi-

¹ Adair v. United States, 208 U. S. 161, 175.
⁴ See Mr. Olney's paper, 42 American Law Review, 164.
dent has told us that it is because individual judges project their personal, social and economic views into the law. A great German publicist holds that it is because the party bent of judges has dictated decisions. But when a doctrine is announced with equal vigor and held with equal tenacity by courts of Pennsylvania and of Arkansas, of New York and of California, of Illinois and of West Virginia, of Massachusetts and of Missouri, we may not dispose of it so readily. Surely the sources of such a doctrine must lie deeper. Let us inquire then, what further and more potent causes may be discovered, how these causes have operated to bring about the present state of the law as to freedom of contract, what the present doctrine of the courts is upon that subject, and how far we may expect amelioration thereof in the near future.

It is significant that the subject, so far as the form it now takes is concerned, is a new one. The phrase “liberty of contract” is not to be found in Lieber’s Civil Liberty and Self-Government, published in 1853. It is not to be found in Professor Burgess’s Political Science and Constitutional Law, published in 1890. The first decision turning upon it was rendered in 1886. The first extended discussion of the right of free contract as a fundamental natural right is in Spencer’s Justice, written in 1891. The eighteenth century writers on natural law say nothing about it. Fichte’s discussion of the natural basis of civil law is silent with respect to it. Even Bentham says that the function of government is to create and confer upon individuals “rights of personal security, rights of protection for honor, rights of property, rights of receiving aid in case of need.” Ahrens (1837) argues, not natural liberty of contract, but natural restraints on that liberty. Grotius, indeed, at the very outset of the school of natural law, mentions liberty of contract as a natural right. But his idea was not at all the one with which we are concerned here. He was insisting; not on the unrestricted right to make promises, but on the natural force of promises when made. For the chief

5 Jellinek, System der subjectiven öffentlichen Rechte, 101, n. 1.
7 Spencer, Justice, Chap. XV.
8 Theory of Legislation (Hildreth’s translation), 95.
9 Theory of Legislation (Hildreth’s translation), 95.
10 Cours de droit Naturel, Bk. II, Sect. 83.
11 Bk. III, Chap. 11, Sect. 4.
12 “And again, no reason can be found why laws, which are, as it
problem of the natural law jurists was to square the practical with the ideal, to test all things by reason and to throw off empty forms. They warred against rules derived from antiquity that enforced contracts rather than promises. They argued that enforceability of promises should depend on a more reasonable basis than form or than the traditional categories of Roman law. Hence to Grotius, to Puffendorf,\textsuperscript{13} to Burlamaqui,\textsuperscript{14} the problem was the source of the binding power of a promise.\textsuperscript{15} To the eighteenth century jurist, the all important thing was that promises should be kept. Montesquieu's description of the Troglodytes, who perished utterly because they wilfully violated contracts,\textsuperscript{16} expresses their feeling. That promises have in fact had to depend during the greater part of legal history much more upon individual honesty than upon positive law, seemed to them at variance with the law of nature.\textsuperscript{17} We see an echo of this discussion in the opinion of Chief Justice Marshall in \textit{Sturges v. Crowninshield}.\textsuperscript{18}

The idea that unlimited freedom of making promises was a natural right came after enforcement of promises when made, had become a matter of course. It began as a doctrine of political economy, as a phase of Adam Smith's doctrine which we commonly call \textit{laisser faire}.\textsuperscript{19} It was propounded as a utilitarian principle of politics and legislation by Mill.\textsuperscript{20} Spencer deduced it from his formula of justice. In this way it became a chief article in the creed of those who sought to minimize the functions of the state, that the most important of its functions was to

\begin{itemize}
  \item \textit{Law of Nature and Nations}, Bk. III, Ch. 4.
  \item \textit{Principles of Natural and Politic Law}, Bk. II, Pt. 4, Ch. 10, Sect. 4.
  \item See also the end of Chap. 7, in Bk. I, Pt. 1.
  \item Ahrens, \textit{Cours de droit Naturel} (8th Ed.), Bk. II, 238.
  \item \textit{Lettres Persanes}, Lettre XIV, et seq.
  \item Maine, \textit{Ancient Law}, Pollock's Ed., 325.
  \item 4 Wheat. 122, 197.
  \item \textit{Wealth of Nations}, Bk. IV, Chap. IX, Thorold Rogers' Ed. II, 272-3.
  \item Ricardo laid it down as a principle of political economy that legislation should not interfere with contracts. \textit{Works} (McCulloch's Ed.), 57.
\end{itemize}

See a discussion of the juristic bearings of these doctrines in Berolzheimer's \textit{System der Rechts und Wirtschaftsphilosophie}, II. § 32.

\textit{Liberty}, Chap. IV.
enforce by law the obligations created by contract. But we must remember that the task of the English individualists was to abolish a body of antiquated institutions that stood in the way of human progress. Freedom of contract was the best instrument at hand for the purpose. They adopted it as a means, and made it an end. While this evolution of juristic and political thought was in progress, the common law too had become thoroughly individualistic; partly from innate tendency, partly through theological influence, partly through the contests between the courts and the crown in the sixteenth and seventeenth centuries, and partly as a result of the course of thought in the eighteenth and nineteenth centuries. This bit of history may suggest the chief, although not all, of the causes of the phenomenon we are considering.

In my opinion, the causes to which we must attribute the course of American constitutional decisions upon liberty of contract are seven: (1) The currency in juristic thought of an individualist conception of justice, which exaggerates the importance of property and of contract, exaggerates private right at the expense of public right, and is hostile to legislation, taking a minimum of law-making to be the ideal; (2) what I have ventured to call on another occasion a condition of mechanical jurisprudence, a condition of juristic thought and judicial action in which deduction from conceptions has produced a cloud of rules that obscures the principles from which they were drawn, in which conceptions are developed logically at the expense of practical results and in which the artificiality characteristic of legal reasoning is exaggerated; (3) the survival of purely juristic notions of the state and of economics and politics as against the social conceptions of the present; (4) the training of judges and lawyers in eighteenth century philosophy of law and the pretended contempt for philosophy in law that keeps the legal profession in the bonds of the philosophy of the past because it is to be found in law-sheep bindings: (5) the circumstance that natural law is the theory of our bills of rights and the impossibility of applying such a theory except when all men are agreed in their moral and economic views and look to a single authority to fix them; (6) the circumstance that our earlier labor legislation

came before the public was prepared for it, so that the courts largely voiced well-meant but unadvised protests of the old order against the new, at a time when the public at large was by no means committed to the new;2 and (7) by no means least, the sharp line between law and fact in our legal system which requires constitutionality, as a legal question, to be tried by artificial criteria of general application and prevents effective judicial investigation or consideration of the situations of fact behind or bearing upon the statutes.

Four stages may be observed in the development of the juristic idea of justice. Understand me. I am not speaking of the ethical conception nor of the political conception, closely as they are related to and much as they may have determined the juristic idea. We say that the end of law is the administration of justice. What do we mean here by the term “justice?” What is it that courts and jurists have sought to accomplish in the adjustment of human relations in public tribunals? The primitive idea was simply to keep the peace. Justice, juristically, was a device to keep the peace. Whatever served to avert private vengeance and prevent private war was an instrument of justice. The Salic Law awarded twice the compensation to the vigorous and half-civilized Frank that it did to the effete and civilized Roman, because it required more to move the Frank to restrain his anger and withhold his vengeance.24 But Greek philosophy and Roman law soon got beyond this conception and gave us in its place an idea of justice as a device to preserve the social status quo, to keep each man in his appointed groove and thus prevent friction with his fellows. Plato sets this out very clearly.25 In his ideal state, “every member of the community must be assigned to the class for which he proves himself best fitted. Thus, a perfect harmony and unity will characterize both the state and every person in it.”26 The Stoic doctrine of conformity to universal reason came to much the same practical result.27 To Aristotle, rights existed only between those who were free and equal.28

23 Professor Seager has made a similar suggestion. Introduction to Economics (3rd Ed.), 417.
24 Salic Law, §§ XIV.
25 Republic, III, 424.
26 Dunning, Political Theories, Ancient and Mediaeval, 28.
27 Ibid., 105.
28 Zeller, Aristotle and the Earlier Peripatetics (translated by Costelloe and Muirhead), II, 175.
justice demanded a unanimity in which there would be no violation of mutual rights,\textsuperscript{29} and law and right took “account in the first instance of relations of inequality, in which individuals are treated in proportion to their worth, and only secondarily of relations of equality.”\textsuperscript{30} Roman legal genius gave practical effect to this idea of justice by making it the province of the state to define and protect interests and powers of action which in the aggregate made up the legal personality of the individual.\textsuperscript{31} The precepts of law, as laid down in the \textit{Institutes}, \textit{honeste vivere, alienum non laedere, suum cuique tribuere}—come to this. As Courcelle-Seneuil has put it, the Roman ideal was a stationary society, corrected from time to time by a reversion to the ancient type.\textsuperscript{32} Roman natural law was simply an appeal to reason against formalism. The natural law of the middle ages and of the seventeenth century—an appeal to reason against authority—is a very different thing.

Appeal to reason against authority led to a new conception in philosophy, in theology, in politics and ultimately in legal theory, as a result of which justice came to be regarded as a device to secure a maximum of individual self-assertion. The beginnings of this are in philosophy. As Lord Acton put it: “Not the devil, but St. Thomas Aquinas was the first Whig.”\textsuperscript{33} Teutonic individualism, kept back by Roman authority in religion and law, broke over. Puritan theology gave rise to ultra individualism in church polity and religion. The appeal to reason against the crown developed political doctrines of civil liberty and natural rights of the individual. And as Coke, the great light of our legal system, was in the forefront of the controversy with the crown and read all legal history in the light of the exigencies of that controversy,\textsuperscript{34} the liberties of the individual Englishman came to assume a central point in that system that would have been taken by public good and the powers of the state if Bacon

\textsuperscript{29} Eth. Nicomach. VIII., 1, 24.
\textsuperscript{30} Zeller, op. cit. II, 197.
\textsuperscript{31} This is well put in Willoughby, \textit{Political Theories of the Ancient World}, 64.
\textsuperscript{33} Figgis, \textit{From Gerson to Grotius}, 7.
\textsuperscript{34} Compare his interpretation of Tregor’s Case (Y. B. 8 E. 3. 30) and the case in Fitzh. Abr. Cessavit, 42. in Bonham’s Case. 8 Rep. 108a. 118a, with the cases themselves.
rather than Coke had been the inspiration of eighteenth century commentators and nineteenth century courts. Moreover, our constitutional models and our bills of rights were drawn in the period in which the natural law school of jurists was at its zenith, and the growing period of American law coincided with the high tide of individualistic ethics and economics. Hence his school course in political economy and his office reading of Blackstone taught the nineteenth century judge the same things as fundamentals. He became persuaded that they were the basis of the jural order, and, as often happens, the individualist conception of justice reached its complete logical development after the doctrine itself had lost its vitality. Social justice, the last conception to develop, had already begun to affect not merely legal thought but legislation and judicial decision, while the courts were working out the last extreme deductions from the older conception.

M. Worms, taking no account of the first stage above suggested, has summed up the other three in these words: "To sum up, justice has tried to organize society to the profit of force, later independently of force, and it dreams to-day of organizing it against force." But our ideal of justice has been to let every force play freely and exert itself completely, limited only by the necessity of avoiding friction. As a result, and as a result of

33 "Like all other contracts, wages should be left to the fair and free competition of the market, and should never be controlled by the interference of the legislature." Ricardo, Principles of Political Economy, Chap. V. § 7. Chapter XI of Bk. V. of Mill's Political Economy, entitled "Of the Grounds and Limits of the Laisser-faire or Non-Interference Principle." was studied by every liberally educated lawyer of the last fifty years. Mill (Ibid., Sect. 12) disapproves of, but at the same time suggests an argument in favor of legislation limiting the hours of labor. In Laughlin's Edition (1884) the editor argues against such legislation (p. 193). We are now prepared to read in the opinion of O'Brien, J., in People v. Coler, 166 N. Y. 1, that "A law that restricts the freedom of contract on the part of both the master and servant cannot in the end operate to the benefit of either" (p. 16). Also: "It was once a political maxim that the government governs best which governs the least. It is possible that we have now outgrown it, but it was an idea that was always present to the minds of the men who framed the Constitution, and it is proper for the courts to bear it in mind when expounding that instrument." (p. 14.)


35 Philosophie des Sciences Sociales, II, 222.
our legal history, we exaggerate the importance of property and of contract, as an incident thereof. A leader of the bar, opposing the income tax, argues that a fundamental object of our polity is “preservation of the rights of private property.”

Text writers tell us of the divine origin of property. The Supreme Court of Wisconsin tells us that the right to take property by will is an absolute and inherent right, not depending upon legislation. The absolute certainty which is one of our legal ideals, an ideal responsible for much that is irritatingly mechanical in our legal system, is demanded chiefly to protect property. And our courts regard the right to contract, not as a phase of liberty—a sort of freedom of mental motion and locomotion—but as a phase of property, to be protected as such. A further result is to exaggerate private right at the expense of public interest. Blackstone’s proposition that “the public good is in nothing more essentially interested than in the protection of every individual’s private rights,” has been quoted in more than one American decision, and one of these is a case often cited in support of extreme doctrines of liberty of contract. It is but a corollary that liberty of contract cannot be restricted merely in the interest of a contracting party. His right to contract freely is to yield only to the safety, health, or moral welfare of the public. Still another result is that bench and bar distrust and object to legislation. I have discussed the history and the causes of this attitude toward

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38 Argument of Mr. Choate in the Income Tax cases, 157 U. S. 534.
41 See my paper, Enforcement of Law, 20 Green Bag, 401, 408.
42 Occasionally it is said to be “both a liberty and a property right.” Frorer v. People, 141 Ill. 171, 181. Professor Seager suggests another reason for American exaggeration of the importance of property. Introduction to Economics (3rd Ed.), 21. He points out that this exaggeration has resulted in “an industrial civilization which has been marked thus far by intense individualism in thought and practice.”
43 1 Comm. 139.
45 Wynhamer v. People, supra.
46 People v. Marcus, 128 N. Y. 257, In re House Bill 203, 21 Col. 27.
legislation on another occasion.\textsuperscript{47} Suffice it to say here that the doctrine as to liberty of contract is bound up in the decisions of our courts with a narrow view of what constitutes special or class legislation that greatly limits effective law-making. If we can only have laws of wide generality of application, we can have only a few laws; for the wider their application the more likelihood there is of injustice in concrete cases. But from the individualist standpoint a minimum of law is desirable. The common law antipathy to legislation sympathizes with this, and in consequence we find courts saying that it is not necessary to consider the reasons that led up to the type of legislation they condemn\textsuperscript{48} and that the maxim that the government governs best which governs least is proper for courts to bear in mind in expounding the Constitution.\textsuperscript{49}

The second cause, a condition of mechanical jurisprudence, I have discussed in its relation to the legal system generally in another place.\textsuperscript{50} The effect of all system is apt to be petrifaction of the subject systematized. Legal science is not exempt from this tendency. Legal systems have their periods in which system decays into technicality, in which a scientific jurisprudence becomes a mechanical jurisprudence. In a period of growth through juristic speculation and judicial decision, there is little danger of this. But whenever such a period has come to an end, when its work has been done and its legal theories have come to maturity, jurisprudence tends to decay. Conceptions are fixed. The premises are no longer to be examined. Everything is reduced to simple deduction from them. Principles cease to have importance. The law becomes a body of rules. This is the condition Professor Henderson refers to when he speaks of the way of social progress as barred by barricades of dead precedents.\textsuperscript{51} Manifestations of mechanical jurisprudence are conspicuous in the decisions as to liberty of contract. A characteristic one is the rigorous logical deduction from predetermined conceptions in disregard of and often in the teeth of the actual facts, which

\textsuperscript{48} "For some reason, not necessary to consider, there has in modern times arisen a sentiment favorable to paternalism in matters of legislation." Lowe v. Rees Printing Co., 41 Neb. 127, 135. Cf. State v. Krutzberg, 114 Wis. 530, 537.
\textsuperscript{49} People v. Coler, 166 N. Y. 1, 14.
\textsuperscript{50} Mechanical Jurisprudence, 8 Columbia Law Review, 605.
\textsuperscript{51} 11 American Journal Sociology, 847.
was noted at the outset. Two courts, in passing on statutes abridging the power of free contract have noted the frequency of such legislation in recent times but have said that it was not necessary to consider the reasons for it. Another court has asked what right the legislature has to “assume that one class has the need of protection against another.” Another has said that the remedy for the company store evil “is in the hands of the employee,” since he is not compelled to buy from the employer, forgetting that there may be a compulsion in fact where there is none in law. Another says, that “theoretically there is among our citizens no inferior class,” and of course no facts can avail against that theory. Another tells us that man and woman have the same rights, and hence a woman must be allowed to contract to work as many hours a day as a man may. We have already noted how Mr. Justice Harlan insists on a legal theory of equality of rights in the latest pronouncement of the Federal Supreme Court. Legislation designed to give laborers some measure of practical independence, which, if allowed to operate, would put them in a position of reasonable equality with their masters, is said by courts, because it infringes on a theoretical equality, to be insulting to their manhood and degrading, to put them under guardianship, to create a class of statutory laborers, and to stamp them as imbeciles. I know of nothing akin to this

52 See cases in note 48 supra.
53 State v. Haun, 61 Kans. 146, 162.
54 State v. Fire Creek Coal & Coke Co., 33 W. Va. 188, 190. Those who have studied the actual situation do not look at it in this way. “He is not free to make such a contract as might please him because, like every party to a contract, he must come to such conditions as can possibly be agreed upon. He is less free than the parties to most contracts, and, further, he cannot utilize his labor in many directions; he must contract for it within restricted lines.” Wright, Practical Sociology (5th Ed.), 225.
55 Ritchie v. People, 155 Ill. 99, 111.
56 Godcharles v. Wigenman, 113 Pa. St. 431, 437 (wages in iron mills to be paid in money).
57 Braceville Coal Co. v. People, 147 Ill. 66, 74 (coal to be weighed for fixing wages); State v. Haun, 61 Kans. 146, 162 (wages to be paid in money).
58 People v. Beck, 10 Misc. 77 (dissenting opinion of White, J.). The statute fixed hours of labor on municipal contracts.
59 State v. Goodwill, supra; Frerer v. People, 141 Ill. 171, 187 (company stores).
artificial reasoning in jurisprudence unless it be the explanation
given by Pomponius for the transfer of legislative power from the
Roman people during the Empire: "The plebs found, in course
of time, that it was difficult for them to meet together, and the
general body of the citizens no doubt found it more difficult still." 62 No doubt they did. Caesar or the praetorian prefect
would have seen to that.

Survival of a purely juristic notion of the state and of
economics and politics, in contrast with the social conception of
the present, the third cause suggested, can be looked at but
briefly. Formerly the juristic attitude obtained in religion, in
morals, and in politics as well as in law. This fundamentally
juristic conception of the world, due possibly to Roman law
being the first subject of study in the universities, which gave a
form of legality even to theology, has passed away elsewhere.
But it lingers in the courts. Jurisprudence is the last in the
march of the sciences away from the method of deduction from
predetermined conceptions. The sociological movement in juris-
prudence, the movement for pragmatism as a philosophy of law,
the movement for the adjustment of principles and doctrines to
the human conditions they are to govern rather than to assumed
first principles, the movement for putting the human factor in the
central place and relegating logic to its true position as an instru-
ment, has scarcely shown itself as yet in America. Perhaps the
dissenting opinion of Mr. Justice Holmes in *Lochner v. New
York* 63 is the best exposition of it we have.

Another factor of no mean importance in producing the line
of decisions we are considering is the training of lawyers and
judges in eighteenth century theories of natural law. In a book
just published by a well-known writer on legal subjects who has
also been a teacher of law, the whole basis of discussion is natural
law. The learned author does not indicate a suspicion that any

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62 Dig. I, 2, Sect. 9. Professor Seager says of these objections:
"The opposition to such regulations . . . . is based on the fear that
they may serve to undermine the spirit of independence of the protected
persons. Experience seems to indicate that they have in fact a directly
contrary effect." *Introduction to Economics* (3rd Ed.), 421. See also
p. 403: "Those who advance it fail to consider that deadening and
monotonous toil too long continued is much more inimical to the spirit
of independence than any amount of legislation."

63 198 U. S. 45, 75. But see also Holmes, *The Path of the Law*, 10
doubt has been cast upon or may attach to his philosophical premises. In another book published last year by a well-known practitioner, it is recommended gravely that one subject of required study in preparation for the bar be “natural and civil law, and the principles, foundation, and spirit of law,” and the student is expected to learn these from Grotius, Paley’s Moral and Political Philosophy, Burlamaqui’s Natural Law, Puffendorf, and MacIntosh’s Discourses on the Study of the Law of Nature and Nations. Until a comparatively recent date, all legal education, whether in school or in office, began with the study of Blackstone. Probably all serious office study begins with Blackstone or some American imitator today. Many schools make Blackstone the first subject of instruction today, and in others Blackstone is a subject of examination for admission or of prescribed reading after admission, or there are courses on elementary law in which texts reproducing the theories of the introduction to and the first book of the Commentaries are the basis of instruction. A student who is college-trained may have had a course or courses that brought him in contact with modern thought. It is quite as likely he has not, or if he has, the natural law theories which are a matter of course in all our law books are not unlikely to persuade him that what he learned in college is immaterial in the domain of law.

Constitutional law is full of natural law notions. For one thing, there is the doctrine that apart from constitutional restrictions there are individual rights resting on a natural basis, to which courts must give effect “beyond the control of the state.” In the judicial discussions of liberty of contract this idea has been very prominent. The Supreme Court of Massachusetts, in passing on legislation directed against fines in cotton mills, tells us that a statute which violates “fundamental” rights “is unconstitutional."

64 Schouler, Ideals of the Republic (1808).
67 Harlan, J., in Railway Co. v. Chicago, 206 U. S. 226, 237 (saying that compensation for property taken for a public use is a “settled principle of universal law reaching back of all constitutional provisions”); Field, J., in Butchers’ Union, etc., Co. v. Crescent City, etc., Co., 111 U. S. 746, 762 (“When such [police] regulations do not conflict with any constitutional inhibition or natural right, their validity cannot be successfully controverted.”); Miller J., in Loan Association v. Topeka, 20 Wall 655, 662; Marshall, C. J., in Fletcher v. Peck, 6 Cranch. 87; Iredell, J., in Calder v. Bull, 3 Dall. 386.
tional and void, even though the enactment of it is not expressly forbidden." 68 Another court reminds us that natural persons do not derive their right to contract from the law. 69 Another court, in passing adversely upon legislation against company stores, says any classification is arbitrary and unconstitutional unless it proceeds on "the natural capacity of persons to contract." 70 Another, in passing on a similar statute, denies that contractual capacity can be restricted, except for physical or mental disabilities. 71 Another holds that the legislature cannot take notice of the de facto subjection of one class of persons to another in making contracts of employment in certain industries, but must be governed by the theoretical, jural equality. 72 These natural law ideas are carried to an extreme by the Supreme Court of Illinois in Ritchie v. People, 73 in which case it is announced that women have a natural equality with men and that no distinction may be drawn between them with respect to power of engaging to labor.

Closely related to the ideas just considered, and, indeed, a product of the same training, is a deep-seated conviction of the American lawyer that the doctrines of the common law are part of the universal jural order. Just as in nine cases out of ten, natural law meant for the seventeenth century and eighteenth century jurist the Roman law which he knew and had studied, for the common law lawyer it means the common law. 74 For one thing, this feeling leads to a narrow attitude toward legislation; a tendency to hold down all statutory innovations upon the common law as far as possible. 75 In like spirit, on this subject of

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68 Com. v. Perry, 155 Mass. 117 (1871).
70 State v. Loomis, 115 Mo. 307, 315.
71 State v. Fire Creek Coal & Coke Co., 33 W. Va. 188.
72 State v. Haun, 61 Kan. 140, 162.
73 155 Ill. 99.
74 The classical instance of this is Cutting's Case, Snow, Cases on International Law, 172. See also Marcy's confusion of the rules as to citizenship in the several states of the United States with the rules of International Law as to national character. Cockburn, Nationality, 118 et seq.
75 See for some examples of this, my paper, Common Law and Legislation, 21 Harvard Law Review, 383. Another example is to be seen in the judicial restrictions on the applications of Lord Campbell's Act. Deni v. Pennsylvania Co., 181 Pa. St. 527; Brannigan v. Union Min. Co., 93 Fed. 154; McMillan v. Spider Lake, etc., Co., 115 Wis. 332; Roberts v. Great Northern R. Co., 161 Fed. Rep. 239. The spirit of the courts in these cases is well illustrated by the following remark of the Supreme
liberty of contract, most of the courts which have overthrown legislation as being in derogation of liberty, have insisted that only common law incapacities can be given legal recognition; that new incapacities in fact, growing out of new conditions in business and industry, cannot be taken advantage of in legislation; that the ordinary farm-hand and the laborer in the beet fields, for example, must be treated alike. But, even more important for our purpose, this feeling operates in constitutional law to lead judges to try statutes by the measure of common law doctrines rather than by the Constitution.

Not only, however, is natural law the fundamental assumption of our elementary books and of professional philosophy, but we must not forget that it is the theory of our bills of rights. Not unnaturally, therefore, courts have clung to it as being the orthodox theory of our constitutions. But the fact that the framers held that theory by no means demonstrates that they intended to impose the theory upon us for all time. It is contrary to their principles to assume that they intended to dictate philosophical or juristic beliefs and opinions to those who were to come after them. What they did intend was the practical securing of each individual against arbitrary and capricious governmental acts. They intended to protect the people against their rulers, not against themselves. They laid down principles, not rules, and

Court of Pennsylvania: "We must remember that the injury complained of is due to the negligence of a fellow workman, for which the master is responsible neither in law nor morals." Durkin v. Coal Co., 171 Pa. St. 193, 202. Cf. Best, C. J., in Fairlee v. Herring, 3 Bing. 625, 630: "I am happy to find in this case that which I find in most others, where statutes have not interfered, that the common law will enable us to do justice."

76 State v. Goodwill, 33 W. Va. 179; State v. Fire Creek Coal & Coke Co., 33 W. Va. 188, 190; Proser v. People, 141 Ill. 171, 186; State v. Loomis, 115 Mo. 307, 315. In State v. Loomis, the court speaks of the common law incapacities as "natural incapacities." But these cases all distinguish usury laws, because such legislation has come to be part of our American common law.

77 Cf. the attempt of the Supreme Court of Pennsylvania to read contributory negligence into the Federal Safety Appliances Act, Schlemmer v. Buffalo R. & P. R. Co., 205 U. S. 1. But the most remarkable example is to be seen in Grossman v. Caminez, 79 App. Div. (N. Y.) 15, in which one of the judges, regarding the Statute of Frauds as part of the legal order of nature, said of a statute which required agents attempting to sell city lots to have written authority: "It is a denial . . . of a right or privilege, guaranteed to citizens, to make verbal contracts which are to be performed within a year."
rules can only be illustrations of those principles so long as facts and opinions remain what they were when the rules were announced. For instance: The cases agree that the term "liberty" is broader than Coke's use of it; that the fact that Coke confined it to freedom of physical motion and locomotion does not exclude a broader interpretation to-day. Yet the same courts that recognize that "liberty" must include more to-day that it did as used in Coke's Second Institute, lay it down that incapacities are to remain what they were at common law; that new incapacities of fact, arising out of present industrial situations, may not be recognized by legislation. This is, in truth, but another illustration of the purely personal character of all natural law theories.

Last of the causes suggested, but by no means the least efficient in bringing about the line of decisions under consideration, is the sharp line between law and fact in our legal system, due originally to the exigencies of trial by jury. The line between what is for the court to pass upon and what is for the jury, has come to be called a line between law and fact. For purposes of jury trial the line itself has to be drawn often very artificially. But, beyond that, when it is drawn the tendency is to assume that questions which analytically are pure questions of fact, when they become questions for the court to decide, must be looked at in a different way from ordinary questions of fact and must be dealt with in an academic and artificial manner because they have become questions of law. The tendency to insist upon such a line and to

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79 See some illustrations in my paper, Common Law and Legislation, 21 Harvard Law Review, 383, 392-393. See also the statement of Curtis, J., in Scott v. Sanford, that "all writers" agree that slavery "is created only by municipal law." 19 How. 393. 626. But Aristotle (Politics, Bk. I, Chap. V), Grotius (II, 5, 27, Sect. 2 and 29, Sect. 2) and Rutherforth (Natural Law, Bk. I, Chap. XX, Sect. 4), who are not insignificant authorities, argue that slavery has a natural basis in some cases, beyond and apart from law. Again, in Wynhamer v. People, 13 N. Y. 378, 454, Hubbard, J., said: "Liquor is not a nuisance per se, nor can it be made so by a simple legislative declaration." Since that time, people have changed their minds, and we find another judge saying: "The entire scheme of prohibition as embodied in the Constitution and laws of Kansas might fail, if the right of each citizen to manufacture intoxicating liquors for his own use or as a beverage were recognized. Such a right does not inhere in citizenship." Harlan, J., in Mugler v. Kansas, 123 U. S. 623.
draw it arbitrarily, has spread from the law of trials to every part of the law. One example is to be seen in decisions as to what is a reasonable time in the law of negotiable instruments. Another may be seen in judicial pronouncements as to negligence, which are leading so many of our state legislatures to turn the whole matter over to juries in cases of personal injury. Still another may be seen in the refinements as to constructive fraud and badges of fraud which led to wide-spread legislation, making fraud a question for the jury. It is one of the chief factors in producing what I have ventured to call mechanical jurisprudence in our legal system. In constitutional law, the necessity for drawing this line and the assumption that whatever is left to the court to decide must be dealt with artificially and disposed of mechanically, operates to the disadvantage of new types of legislation. It is felt that a law cannot be constitutional now if it would have been unconstitutional one hundred years ago. In fact it might have been an unreasonable deprivation of liberty as things were even 50 years ago, and yet be a reasonable regulation as things are now. But the question is not one of fact. Being for the court to decide, it must be decided upon some universal proposition, valid in all places and at all times. Rate laws, in the investigation of which it may prove that a rate is confiscatory at one time and not at another, are compelling courts to recognize that the constitutionality of a statute may depend upon a pure question of fact, to be investigated and determined as such. Hence, they are likely to induce a change of judicial attitude toward other legislation, the reasonableness of which must depend upon questions of fact which only those who have investigated special industrial situations can fairly determine. As it is, in the ordinary case involving constitutionality, the court has no machinery for getting at the facts. It must decide on the basis of matters of general knowledge and on accepted principles of uniform application. It cannot have the advantage of legislative reference bureaus, of hearings before committees, of the testimony of specialists who have conducted detailed investigations, as

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80 Hence when a court had to decide whether the common law doctrine of riparian rights was applicable to and hence in force in a state where one part was arid, so that the doctrine could not be applied, another part had abundant rainfall, so that the doctrine was well suited thereto, and still another sometimes had rain and sometimes not, it could not say the rule applies here, and does not apply there, depending on the facts, but had to insist upon one rule for the whole state. *Meng v. Coffey*, 67 Neb. 500.
the legislature can and does. The court is driven to deal with
the problem artificially or not at all, unless it is willing to assume
that the legislature did its duty and to keep its hands off on that
ground. More than anything else, ignorance of the actual situ-
tions of fact for which legislation was provided and supposed
lack of legal warrant for knowing them, have been responsible
for the judicial overthrowing of so much social legislation.

Turning now to the actual state of the decisions, let us look
first at the cases in which the idea of liberty of contract has been
invoked to defeat legislation. The fountain head of this line of
decisions seems to be the opinion of Mr. Justice Field in Butchers'
Union Co. v. Crescent City Co., 81 in which he restates the views
of the minority in the Slaughter House Cases.82 This opinion
has been one of the staple citations in causes involving liberty of
contract.83 In it he took a vigorous stand against legislative in-
terference with the "right to follow lawful callings." Although
it did not represent the views of the Federal Supreme Court, this
opinion had a far-reaching influence in the State Courts. It pro-
duced a reactionary line of decisions in New York on liberty to
pursue one's calling,84 and through these cases its echoes are still
ringing in the books. Mr. Justice Field was eminently the man
to lead this belated individualist crusade. In him a Puritan
ancestry and a Puritan bringing up 85 were followed by a pro-
fessional career upon the frontier in the time and at the place
where the individual counted for more and the state-imposed law
for less than at any other period in our history. Thus predis-
posed, his thorough study and minute knowledge of the common
law authorities could not fail to make him a prophet of common
law authorities could not fail to make him a prophet of common
the vogue to-day of his dissenting opinion of thirty-five years ago,
uttered to another generation and in view of a distinct industrial
situation, bears abundant witness. But the line of decisions
culminating in the Adair case begins directly with a dictum of

81 111 U. S. 746, 762.
82 16 Wall, 36.
83 Cited and relied on particularly in State v. Goodwill, 33 W. Va. 179,
183, and through this case and the New York cases, in nearly all the later
decisions. It is interesting to note that the Supreme Court of Illinois, at
least, has fallen into a settled practice of citing the opinion of the minority
in the Slaughter House Cases as if it were that of the court.
85 See H. M. Field, Life of David Dudley Field, Chaps. I and II.
the Supreme Court of Illinois, a court which has since attained a
dbad eminence in this connection, to the effect that legislation pro-
viding how coal should be weighed in fixing the compensation of
miners, was an undue interference with liberty of contract. 

Two years later, two cases were decided upon the express point.
The pioneer, and, so far as influence upon the later decisions is
concerned, the leading case is Godcharles v. Wigeman, in which,
in an off-hand and positive pronouncement, without discussion or
citation, the court declared that a statute requiring payment in
money of wages in iron mills, was "degrading and insulting" to
the laborer and "subversive of his rights as a citizen." It said:
"An attempt has been made by the legislature to do what cannot
be done; that is, prevent persons who are sui juris from making
their own contracts." In other words, it assumed that incapacities
not known to the common law could not be recognized by the
legislature, and ignored the palpable fact that courts of chancery
had wielded a not inconsiderable power of interference with
freedom of contract. In the same year the Supreme Court of
Illinois passed expressly upon the subject of its dictum of two
years before. The case of Millet v. People turned chiefly upon
the point that the statute was restricted to certain employers and
was not applicable to employers generally. But the court (Schol-
field, J.) said:

"What is there in the condition or situation of the laborer in the
mine to disqualify him from contracting in regard to the price of
his labor or in regard to the mode of ascertaining the price? And
why should the owner of the mine not be allowed to contract in
respect to such matters as to which all other property owners and
agents may contract?"

The court assumes that this question answers itself. It does
not conceive any examination necessary in order to ascertain
whether there is not in fact a difference. It does not consider that
laborers in mines may be in a continual condition of poverty, and,
that, as Lord Northington put it:

"Necessitous men are not. truly speaking, free men, but.

86 Jones v. People (1884); 110 Ill. 590. Sheldon, J., said: "We do not
regard this as requiring that in all contracts for the mining of coal the
wages of the miners must be computed upon the basis of the weight of the
c0al mined. That would be a quite arbitrary provision and seemingly an
undue interference with mens' rights of making contracts."

87 (1886), 113 Pa. St. 427.

88 117 Ill. 294.
answer a present exigency, will submit to any terms that the
crafty may impose upon them." 89

Godcharles v. Wigeman and Millet v. People soon obtained a
considerable following. They were cited three years later in
State v. Goodwill,90 holding unconstitutional a statute against
payment of wages in mines and factories in store orders, and
State v. Fire Creek Coal and Coke Co.,91 deciding against legisla-
tion prohibiting mine and factory owners from selling merchan-
dise to their laborers at a greater profit than when selling to
others. The former case is especially interesting because of its
argument that no new forms of incapacity to contract can be
recognized by the legislature. Speaking of usury legislation, the
court says:

"The right to regulate the rate of interest existed at the time
the Constitution was adopted, and cannot, therefore, be considered
as either an abridgement or restraint upon the rights of the
citizen guaranteed by the Constitution. The power to pass usury
laws exists by innominal usage; but such is not the case with
such acts as we are now considering."

In the decade 1890-1899, the current of decisions following God-
charles v. Wigeman flowed fast. In 1890, in Ex Parte Kuback92
the Supreme Court of California held adversely to a municipal
ordinance prescribing eight hours as a day’s work on public
works, on the ground that it was an infringement of the right of
persons “to make and enforce their contracts.” That the munic-
ipality might have some right to dictate the terms of its own con-
tracts, seems not to have been considered. The following year,
the Supreme Court of Massachusetts held adversely to a statute
prohibiting the imposition of fines in cotton mills.93 The court
Goodwill; also the New York cases as to the right to pursue one’s
calling. It said that the statute was “an interference with the
right to make reasonable and proper contracts in conducting a
legitimate business.” But are the contracts forbidden “reason-
able and proper?” The legislature thought they were not. To
the court, the contrary seemed a matter of course. It was
assumed to be a matter of law. Viewed as one of fact, the ques-
tion assumes a very different aspect. It is interesting to observe

89 Yerman v. Bethell, 2 Eden, 110, 113.
90 (1889), 33 W. Va. 179.
91 (1889), 33 W. Va. 188.
92 85 Cal. 274.
93 Com. v. Perry, (1891), 155 Mass. 117.
that Mr. Justice Holmes dissented. The Supreme Court of Illinois followed with three decisions. In Foxer v. People, the statute was directed against company stores and required employees to be paid weekly. This was held invalid, citing the New York cases above referred to, Godcharles v. Wiggeman, the West Virginia cases, Ex Parte Kuback and Com. v. Perry. Its position is that the statute interferes with the absolute right to make what contracts one chooses. But the court recognizes that usury laws also might be thought to contravene this right, and it attempts to distinguish them thus:

"Usury laws proceed upon the theory that the lender and the borrower of money do not occupy toward each other the same relations of equality that parties do in contracting with each other in regard to the loan or sale of other kinds of property, and that the borrower's necessities deprive him of freedom in contracting and place him at the mercy of the lender and such laws may be found on the statute books of all civilized nations of the world, both ancient and modern."

It does not seem to have occurred to Mr. Justice Scholfield that the necessities of a miner or factory employee might impair his freedom of contract or put him at the mercy of his employers in the same way, nor that labor legislation was enacted in all modern civilized countries, nor that England, which might be supposed to be a modern civilized country, had abrogated her legislation against usury.

In Ramsey v. People, the same court had before it a statute requiring mine operators to weigh coal on pit cars before it was screened, and to compute the pay of the miners on the basis of the weight of the unscreened coal. In holding the law unconstitutional, the court (per Bailey, J.) said:

"[The statute] attempts to take from both employer and employee engaged in the mining business, the right and the power of fixing by contract the amount of wages the employee is to receive and the mode in which such wages are to be ascertained."

That is, the court considered the basis of computation of miners' wages something that could only affect the miner and the operators—something in which the public could have no reasonable concern. How false this assumption was and how much more sound was the judgment of the legislature, experience soon made manifest. Ramsey v. People was followed and relied

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84 (1892) 141 Ill. 171.
85 17 and 18 Vict. C. 90.
86 (1892) 142 Ill. 380.
upon three years later in *In re House Bill 203,* in which the Supreme Court of Colorado advised the legislature of that state that a bill providing for the weighing of coal at the mine in order to fix the compensation of miners, was not in accord with the state nor with the Federal Constitution. As to the latter proposition, we know now that the court was in error. But the assumption that the public had no interest in the way in which miners' wages were paid, which dictated the decision, was speedily refuted by the ensuing wrangles, strikes and disorders, due to attempts to secure by force what could not be had by law. "Working people have striven to obtain by strikes what they had failed to secure by statute. The lawlessness which has disgraced Colorado, like the lawlessness which has long disgraced Illinois, is traceable ultimately to the denial of law by the authorities which alone can constitute and establish it."

The third decision of the Supreme Court of Illinois referred to, *Braceville Coal Co. v. People,* involves the same questions and reaches the same conclusion as in the Frorer case.

Legislation requiring payment in money of wages of employees in mines and factories was held unconstitutional by the Supreme Court of Missouri in *State v. Loomis.* The court, as usual, cited the New York cases, *Godcharles v. Wigenan,* and *Millet v. People.* It insisted chiefly, however, that the statute tried to create a new sort of incapacity. Black, C. J., said:

"This denial of the right to contract is based upon a classification which is purely arbitrary, because the ground of classification has no relation whatever to the natural capacity of persons to contract."

What is "natural capacity to contract?" Have married women natural capacity to contract? The Supreme Court of Illinois seemed to think so in *Ritchie v. People.* If so, there were some unconstitutional restrictions upon their contractual powers at common law which have by no means been removed entirely in all jurisdictions. If not, then it would appear that natural capacity means simply common law capacity, and that the court means to tell us that no incapacities, not recognized by the common law, can be given effect to by legislation.

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97 (1895) 21 Col. 27.
99 Kelley, *Some Ethical Gains through Legislation,* 162. See also p. 144.
100 (1893) 147 Ill. 66.
101 (1893) 115 Mo. 307.
102 (1895) 155 Ill. 99.
LIBERTY OF CONTRACT

Legislation of the same sort came before the Supreme Court of Arkansas the following year. The court upheld it, so far as contracts with corporations were concerned, upon grounds that shall be considered presently, but delivered a vigorous dictum to the effect that it was invalid as to contracts of individuals with individuals. This dictum was afterwards rejected and the legislation was upheld for all purposes in a later decision. The year 1894 produced another decision, upholding liberty of contract in Low v. Rees Printing Co., in which a general eight-hour law for all except farm laborers was held unconstitutional.

In 1895 we meet with three cases. The first of these, State v. Jilow, decided by the Supreme Court of Missouri, involved the point passed upon in the Adair case. The court ruled adversely upon a statute requiring employers not to prohibit their employees from joining unions or compel them to withdraw from unions. The second, decided by the Supreme Court of Colorado, has been spoken of already. The third, a decision of the Supreme Court of Illinois, probably establishes the high-water mark of academic individualism. Ritchie v. People involved a statute regulating the hours of labor of women employed in the manufacture of clothing. It was held unconstitutional, first, because (the court said) the legislature has no right to deprive one class of persons of privileges allowed to other persons under like conditions, and second, because liberty of contract is a property right and cannot be taken away. With respect to the first of these propositions, one would think it might make some difference what the respective classes were. Certainly legislation does not allow women the same political privileges as other persons. Moreover, one would think the question whether the conditions under which women are employed in the manufacture of clothing are

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104 McLean v. State, 81 Ark. 304. The dictum in the former case repeated the doctrine of the Illinois cases, the court saying that a contract with respect to wages between individual and individual "is necessarily harmless, of purely and exclusively private concern, and cannot affect anyone except the parties." Since the coal miners' strike of 1901, courts have not been so sure of this.
105 41 Neb. 127. A decision of an inferior court during 1894 may be noted here. In Wheeling Bridge & Terminal Co. v. Gilmore, 8 Ohio Cir. Ct. 658, the court held adversely to a statute requiring extra compensation for all labor-over ten hours a day upon railroads.
106 129 Mo. 163.
107 155 Ill. 99.
the same as those under which ordinary contracts are made, deserves investigation. But, to the court, the fact that the jural conditions were the same was enough. On the second point, the court cites the New York cases, *Godcharles v. Wigeman*, and the Goodwill, Frorer, Perry and Loomis cases. It says that consequences injurious to the public health, welfare and safety cannot flow from the manufacture of clothing, and hence that such manufacture is not a subject of regulation. But we may grant this and still suggest that the manner of manufacture, by women and in sweatshops, for instance, may be of grave public concern.108

The year 1896 produced two dicta in the same line. *Harding v. People* 109 involved a statute regulating the weighing of coal for the purpose of fixing miners' wages in all mines the product whereof was shipped by rail or water. The court held that the classification of mines was unreasonable and the statute in violation of the provision of the state constitution prohibiting special laws where general legislation could be made to apply. But Mr. Justice Cartwright delivered a very confident dictum that the statute could not be upheld for the further reason that "it takes away the freedom of contracting by the parties for the ascertainment of the weight of coal except by a certain method." (p. 457.) Possibly in view of the recent decision of the Supreme Court of the United States in *McLean v. Arkansas*, the court would not be so sure of this point to-day. In *Shaver v. Pennsylvania Co.* 110 a Circuit Court of the United States had before it a statute pro-

108 In the opinion in this case, Magruder, J., says: "It will not be denied that woman is entitled to the same rights under the Constitution, to make contracts with reference to her labor as are secured thereby to men." (p. 111.) It is worth while to compare this with what the same court said as to usury legislation in *Frorer v. People*, 141 Ill. 171, 186. In the latter case, the court said the legislature could deprive necessitous debtors of their natural right to contract to pay the highest rate of interest an avaricious creditor could extort from them because usury laws existed when the Constitution was adopted. Looking at the matter in this way, is it not pertinent to inquire whether married women could have made any contract when the Constitution was adopted? If they could not, would it follow that legislation could regulate the labor and wage contracts of married women but not those of unmarried women, or would the faith of the court in its distinction be shaken? It may be noted here conveniently that there is also in 1895 a decision of an inferior court of Pennsylvania following *Godcharles v. Wigeman*. *Con. v. Sarnberg*, 8 Kulp. 116.

109 160 Ill. 459.

110 71 Fed. 931.
hibiting railway employees from contracting away their right to recover for injuries. The statute was held bad because of unreasonable classification. But the court was also of opinion that it involved an unconstitutional interference with freedom of contract.

Three cases were decided in accordance with the doctrine in question in 1899. In *Johnson v. Goodyear Mining Co.*, the Supreme Court of California ruled adversely upon a statute requiring corporations to pay their laborers at least once a month the wages earned during the preceding month. The Supreme Court of Colorado in *In re Morgan*, had before it a statute regulating hours of employment in underground mines and in smelting and ore-reduction works. The court said that legislation which prohibited an adult man from working or contracting to work more than eight hours a day in any lawful private business which involved no injury to the general public, on the ground that longer hours of labor would injure his health, was unconstitutional. It cited the views of the minority in the *Slaughter House Cases*, as restated in the Butchers' Union Company case, the New York cases, and the several cases on liberty of contract already discussed, relying especially on *Ritchie v. People*. In *State v. Haun*, the Supreme Court of Kansas held invalid a statute requiring wages to be paid in money. The Court said:

"While it might be desirable and profitable to the employee of such corporation to receive a horse or a cow or a house and lot in payment for his wages, yet the legislature prohibits payment in that way and places the laborer under guardianship, classifying him in respect of freedom of contract with the idiot, the lunatic, or the felon in the penitentiary."

That it is neither desirable nor profitable to the employee to receive wages in orders upon a company store, was possibly irrelevant to the purely academic view of such legislation. But surely the court might have said that the legislation classed the laborer in mines with the sailor, over whose contracts courts of equity exercise a jealous supervision, or a necessitous borrower, whom equity will not suffer to clog his equity of redemption by any sort of collateral provisions, however much his necessities and the exactions of the lender may persuade him they are desirable or profitable. No one ever supposed that equity classed sailor or borrower with idiots, lunatics or felons.

111 127 Cal. 4.
112 26 Col. 415.
113 61 Kan. 146.
The next year, 1900, the Supreme Court of Illinois had before it a statute against prohibiting employees from joining or remaining in unions. The court following the Julow case, held it an unconstitutional interference with liberty of contract. Magruder, J., said that the employer had a "right" to terminate the contract of employment for any reason he chose, subject to liability for damages if his act was unwarranted. But damages are awarded as compensation for wrongs. How can we say that one must respond in damages for the exercise of a sacred right, protected by the Constitution and beyond the reach of legislation? The Julow and Gillespie cases have been followed in all the subsequent decisions.¹¹⁵

After 1900, the pendulum had clearly begun to swing the other way. But there are a number of striking decisions taking extreme views as to liberty of contract prior to the Adair case. The most extreme is People v. Coler,¹¹⁶ in which the Court of Appeals of New York passed adversely upon legislation with reference to hours of labor and wages in municipal contracts. The opinion of O'Brien, J., in this case, is a vigorous discussion of the economic and political objections to labor legislation from the individualist standpoint, insisting that such legislation is of no real benefit to the laborer and is subversive of his natural rights. Perhaps the most interesting point made in the opinion is a suggestion that the statute invades a constitutional right of the contractor to make freely whatever contract he can with the city. This overriding of the public interest in municipal contracts in the interest of the private contractor with the municipality, goes beyond any other recorded judicial utterance. It can be compared only with Blackstone's dictum that the public good is in nothing more essentially interested than in the protection of every individual's private rights. In Mathews v. People,¹¹⁷ the statute, providing a state employment bureau, prescribed that the bureau should not furnish a list of unemployed laborers to any employer whose workmen were on a strike. This was held bad on other grounds, but the court (per Magruder, J.) declared that it

¹¹⁴ Gillespie v. People, 188 Ill. 176.
¹¹⁵ State v. Kreutzer (1902), 114 Wis. 539; Coffeyville Vitrified Brick & Tile Co. v. Perry (1904), 69 Kan. 297; People v. Marcus (1906), 185 N. Y. 257.
¹¹⁶ (1901) 166 N. Y. 1.
¹¹⁷ (1903) 202 Ill. 389.
infringed the liberty of contract guaranteed by the Constitution.\footnote{Possibly more might be said for this statute than the court assumed. In view of the disorders and breaches of the peace which experience had shown attend labor conflicts, it might be urged that the purpose of the proviso was to preserve the public peace. A provision that the state employment agency should be used to provide ordinary employment but not employment to break strikes, has some arguable basis in reason when we look to the actual facts.} In \textit{State v. Varney Electrical Supply Co.},\footnote{(1903) 160 Ind. 338.} the Coler case was followed by the Supreme Court of Indiana. In \textit{State v. Missouri Tie \& Timber Co.},\footnote{(1904) 181 Mo. 536.} the Supreme Court of Missouri held that a statute requiring employees to be paid in cash or negotiable instruments, was an unreasonable interference with the liberty of contract of adult employees. In \textit{Lochner v. New York},\footnote{(1905) 198 U. S. 45.} a bare majority of the Supreme Court of the United States took the reactionary view, as it had fairly become by this time, of a statute prescribing the hours of labor in bakeries. The view of the majority in this case, as usual, goes back to the restatement in the Butchers' Union Company case of the views of the minority in the \textit{Slaughter House Cases}. Mr. Justice Peckham cites his own definition of liberty in \textit{Allgeyer v. Louisiana},\footnote{165 U. S. 578.} and that definition is admittedly based upon the views of Mr. Justice Field and Mr. Justice Bradley in the cases referred to. In the Allgeyer case he had said: "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."

One may grant this definition and yet deny the consequence which Mr. Justice Peckham derived from it in the Lochner case. His position was, in effect, that a baker had a constitutional right to contract to work as long as he pleased. He says (p. 57):

"There is no contention that bakers as a class are not equal in intelligence and capacity to men in other trades or manual occupations, or that they are not able to assert their rights and care for themselves without the protecting arm of the State, interfer-
ing with their independence of judgment and of action. They are in no sense wards of the State. Viewed in the light of a purely labor law, with no reference whatever to the question of health, we think that a law like the one before us involves neither the safety, the morals nor the welfare of the public, and that the interest of the public is not in the slightest degree affected by such an act. The law must be upheld, if at all, as a law pertaining to the health of the individual engaged in the occupation of a baker. It does not affect any other portion of the public than those who are engaged in that occupation. Clean and wholesome bread does not depend upon whether the baker works but ten hours per day or only sixty hours a week."

It will be seen that this opinion assumes two propositions of fact: (1) That the public has no concern in how long a baker works, because the time he works has no effect on the product of his labor; (2) that there is nothing in the trade of baking, as carried on in large cities, inimical to the health of those who are employed in it for long hours at a stretch. Here again study of the facts has shown that the legislature was right and the court was wrong. Actual investigation has shown that the output of shops in which the only kind of men who can be had to work for unreasonable hours under unsanitary conditions are employed, is not at all what the public ought to eat, and that long hours in shops of the sort are distinctly injurious to health.128

But the decisive objection to the position of the majority is put by Mr. Justice Holmes in a few sentences that deserve to become classical:

"This case is decided upon an economic theory which a large part of the country does not entertain. If it were a question whether I agreed with that theory, I should desire to study it further and long before making up my mind. But I do not conceive that to be my duty because I strongly believe that my agreement or disagreement has nothing to do with the right of a majority to embody their opinions in law. . . . The Fourteenth Amendment does not enact Mr. Herbert Spencer's Social Statics. . . . A constitution is not intended to embody a particular economic theory, whether of paternalism and the organic relation of the citizen to the State or of laissez faire. It

128 City Club Bulletin, Chicago. Vol. 2, No. 25 (February 24, 1909). See also the authorities cited in the dissenting opinion of Harlan, J., pp. 70-71. Sir Frederick Pollock makes this very pertinent comment: "How can the Supreme Court at Washington have conclusive judicial knowledge of the conditions affecting bakeries in New York? If it has not such knowledge as matter of fact, can it be matter of law that no conditions can reasonably be supposed to exist which would make such an enactment . . . constitutional?" 21 Law Quarterly Review, 212.
is made for people of fundamentally differing views, and the accident of our finding certain opinions natural and familiar or novel and even shocking ought not to conclude our judgment upon the question whether statutes embodying them conflict with the Constitution of the United States." (pp. 75-76.)

Finally, we have two cases, one in the Court of Appeals of New York,124 and the other, the Adair case, in the Supreme Court of the United States,125 in which the doctrine of the Julow case is adopted and legislation to prevent employers from prohibiting employees from joining or requiring them to withdraw from labor unions is held unconstitutional, as infringing liberty of contract. In the former case, the court puts the matter thus:

"The free and untrammelled right to contract is part of the liberty guaranteed to every citizen by the Federal and State Constitutions. Personal liberty is always subject to restraint when its exercise affects the safety, health or moral and general welfare of the public, but subject to such restraint, an employer and employee may make and enforce such contract relating to labor as they may agree on." (p. 255.)

In other words, the public have no interest in bringing about a real equality in labor-bargainings, even though thereby strikes and disorders may be obviated, and have no concern with contracts for labor except where the safety, health or morals of the public at large may be concerned! This is practically the position from which we found the courts starting twenty years before.

Summing up the decisions which insist upon the inviolability of freedom of contract, we find that the following propositions have been decided: (1) Legislation forbidding employers from interfering with the membership of their employees in labor unions is invalid. All the courts have reached this conclusion. (2) Legislation prohibiting the imposition of fines upon employees is invalid. Only one court, however, has passed upon this subject. (3) Legislation providing for the mode of weighing coal in order to fix the compensation of miners is held invalid in Illinois, Missouri, Colorado and Kansas, and in West Virginia where the parties are natural persons. But the Supreme Court of the United States now holds to the contrary. (4) Legislation against company stores, requiring employers to pay wages in money, is held invalid in Pennsylvania, Illinois, Missouri, Kansas, Colorado and California, and in West Virginia as to contracts with natural persons. But, as we shall see presently, many states and the

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124 People v. Marcus (1906) 185 N. Y. 257.
125 (1908) 208 U. S. 161.
United States Supreme Court, take the contrary position on one ground or another. (5) Legislation as to the hours of labor has been held bad (a) where labor of adult males is concerned (unless very clearly of a dangerous or unhealthy character) in Nebraska and by the United States Supreme Court; (b) where labor of adult females is regulated, in Illinois—but most of the State Courts and the United States Supreme Court hold to the contrary; (c) where the hours of labor on public or municipal contracts are regulated, in California, New York and Indiana. But here again many state courts and the Federal Supreme Court are opposed. (6) One court has also held that legislation cannot prohibit contracts by railway employees for releasing their employers in advance from liability for personal injuries. Federal legislation has probably deprived this question of all practical interest.

Some of the statutes passed upon in the foregoing cases may have gone too far. Some of them involved bad or careless classifications. Some of them ran counter to local constitutional provisions, requiring general laws wherever possible. But one cannot read the cases in detail without feeling that the great majority of the decisions are simply wrong, not only in constitutional law, but from the standpoint of the common law, and even from that of a sane individualism. Looking at them upon common law principles, we must first of all recognize that there never has been at common law any such freedom of contract as they postulate. From the time that promises not under seal have been enforced at all, equity has interfered with contracts in the interests of weak, necessitous, or unfortunate promisors. One of the earliest cases of equitable interference was to prevent forfeitures to which promisors had agreed solemnly under seal. Not only did equity grant to a debtor a right of redemption for which he did not stipulate, but it would not and will not let him contract it away in advance or "clog" it by a collateral agreement that will operate to prevent a redemption. In like manner, equity in—

126 "A man will not be suffered in conscience to fetter himself with a limitation or restriction of his right of redemption." Lord Keeper Henley in *Spurgeon v. Collier*, 1 Eden 36, 59. "I take it to be an established rule that the mortgagor can never provide at the time of making the loan for any event or condition on which the equity of redemption shall be discharged and the conveyance absolute." Lord Northampton in *Vernon v. Bethell*, 2 Eden 110, 113. See *Rice v. Noakes* (1900), 2 Ch. 445; *Jarrah Timber, etc., Corporation v. Samuel* (1903), 2 Ch. 1.
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interfered to set aside contracts of sailors for the disposition of their wages or of prize money due them, where they appeared unfair, one-sided or inequitable. It interfered also with contracts of heirs or reversioners in case of inadequacy of consideration, on the theory that they were peculiarly liable to be imposed on and subject to the danger of "sacrificing their future interests in order to meet their present wants." It refused and refuses to grant specific performance of hard bargains, simply because they are hard, leaving promisees to confessedly inadequate and nugatory actions for damages. But there are no "natural incapacities" here! Courts of equity have simply recognized the facts of human intercourse, and have not suffered jural notions of equality to blind them thereto. Again, Lord Holt laid it down that the two sides of a bilateral contract were independent, because if a promisor was foolish enough to make his promise independent in form it was his own fault. But here too, equity made an inroad upon common law individualism, and on equitable grounds conditions are now said to be implied in law. It has been said that the common law will not help a fool. But equity exists to help and protect him. It is because there are fools to be defrauded and imposed upon, and unfortunates to meet with accidents and careless to make mistakes, that we have courts of equity. Surely what equity has done to abridge freedom of contract, legislation may do likewise.

Moreover, usury laws, despite all that has been said to the contrary, furnish a perfect analogy. I have spoken already of the proposition that usury laws existed prior to our constitutions. A more ingenious proposition was advanced by Mr. Justice Field in Munn v. Illinois, and is adopted by the court in State v. Goodwill. He said that originally no interest at all could be taken; that legislation created the right and that usury laws were not a limitation of an undoubted right, but rather a bound put to a privilege the legislature had conceded. But the obvious answer to this is that enforcing a promise not under seal is also a late, law-granted privilege. The same historical argument that is re-

127 How v. Weldon, 2 Ves. Sr. 516, 518; Taylour v. Rochford, 2 Ves. Sr. 281. Legislation in America has carried this even further.

128 Earl of Chesterfield v. Janssen, 2 Ves. Sr. 125; McClure v. Raben, 125 Ind. 139.

129 Thorpe v. Thorpe, 12 Mod. 455, 454.

130 94 U. S. 113.

131 33 W. Va. 179, 186.
lied on to dispose of the analogy of usury, overthrows the whole doctrine of freedom of contract. The public interest in labor legislation to-day is much more real than its interest in usury laws. But the two are of the same type.

Rightly considered, even individualist and natural law principles lead to the same conclusion. The authorities are agreed upon the "natural" invalidity of a contract to become a slave.\textsuperscript{132} But, as Sidgwick points out, any "serious approximation to the condition of slavery" comes to the same thing.\textsuperscript{132} Mill, much more liberal than his followers, admits this, saying:

"Not only persons are not held to engagements which violate the rights of third parties, but it is sometimes considered a sufficient reason for releasing them from an engagement that it is injurious to themselves."

Some of the writers on natural law had argued that there were cases where natural law justified sale of oneself into slavery. To this Mill says:

"He therefore defeats, in his own case, the very purpose which is the justification of allowing him to dispose of himself."\textsuperscript{134}

The principle of this applies to any situation where a person by contract imposes substantial restraints upon his liberty. Freedom to impose these restraints, in the hands of the weak and necessitous, defeats the very end of liberty.\textsuperscript{135} Liberty and equality \textit{in fact} make for a rational individualism. Academic individualism defeats itself.

Let us turn now to the other side, as represented in the decisions. It is a saving characteristic of Anglo-American case law, that decisions upon an unsound principle are gradually surrounded by a mass of exceptions, distinctions and limitations which preclude extension for the future and soon enable the current of judicial decision to flow normally. Just as in the natural body foreign substances are encysted and walled in and thus deprived of power for evil, the body of our case law has the faculty of encysting and walling in rules and doctrines at variance with a sound condition of the law. Such a process has long been going on with respect to extreme doctrines of liberty of contract.

\textsuperscript{132} Spencer, \textit{Justice}, Sect. 70. "The principle of freedom cannot require that he should be free not to be free. \textit{It is not freedom to be allowed to alienate his freedom.}" Mill, \textit{Liberty}, Chap. V.

\textsuperscript{133} \textit{Elements of Politics} (2nd Ed.), 93.

\textsuperscript{134} \textit{Liberty}, Chap. V.

\textsuperscript{135} See a case in point in Dicey, \textit{Law and Public Opinion in England}, 264-265.
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As a result, we may now recognize six categories of cases in which it has been laid down that labor legislation may interfere with and infringe upon liberty of contract. The first of these is the case of corporations. Under the power to amend the charters of corporations, which all states now reserve, it is held that the state may define the power of corporations to contract, and that natural persons can have no claim of right to contract with these creatures of the state beyond their powers. This doctrine, as applied to labor legislation, originated in Maryland in 1880. It has been followed in Rhode Island, West Virginia, Arkansas, Tennessee, and the Supreme Court of the United States. It was adopted by an appellate court in Kansas, but rejected by the Supreme Court. It has been rejected also in California, Illinois, and Missouri. Second, it has been held that even if wages themselves may not be regulated, the data from which to fix wages by any contract to be entered into may be regulated in order to prevent fraud. But the decisions noted above as to weighing statutes, are to the contrary. Third, it is held that hours and conditions of labor in unhealthy occupations, such as mining, work in smelters, and the like, may be regulated. But just how unhealthy the occupation must be, so that the court will know it to be such from its general information, the Lochner case leaves in doubt. Fourth, the overwhelming weight of authority is to the effect that the legislature may regulate the hours and conditions of labor of women and children.
Here it is said there are "natural" incapacities. But Illinois holds to the contrary as to contracts of adult women.\textsuperscript{120} Fifth, it has been held to be within the power of the state to prescribe the conditions upon which it will permit public work to be done for itself or its municipalities, and hence to regulate wages and hours on public contracts.\textsuperscript{121} But California, New York and Indiana, as has been seen, hold the contrary. Finally, a number of cases have taken the sound position that the made of payment of laborers is a matter of public concern; that it is competent for the legislature to require that they be paid in money or negotiable paper, and that it is competent to require that they be paid promptly at stated intervals.\textsuperscript{122} Several of these cases reject the distinction between corporations and natural persons in this connection.\textsuperscript{123} But what is worth more, a number clearly recognize the actual facts of inequality as between employer and employee in bargaining for labor in many sorts of employment.\textsuperscript{124} And in Hancock v. Yaden, Elliott, J., makes it clear from abundant examples that limitations upon freedom of contract in the interest of individual contracting parties have always existed. It is unfortunate that the sweeping assertions of Godcharles v. Wigaman should have been made the model for subsequent cases with this decision at hand in the books.

What, then, is the hope for future labor legislation? On the whole one must say that it is bright. Not only do the cases last noted afford many means for escape from the line of decisions first considered, but there are indications that the courts are ready to seek such escape. The opinion of Mr. Justice Day in McLean v. Arkansas, especially is fraught with promise of a return on the

\textsuperscript{120} Ritchie v. People, 155 Ill. 99.

\textsuperscript{121} U. S. v. Martin (1876), 94 U. S. 400; State v. Atkin (1901), 64 Kan. 7; Atkin v. Kansas (1903), 191 U. S. 207; In re Broad (1904), 36 Wash. 449.


\textsuperscript{124} Notably International Text Book Co. v. Weissinger and McLean v. Arkansas.
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part of the Federal Supreme Court to its sounder views prior to the Lochner and Adair cases. Even the Court of Appeals of New York has recently approved this significant remark:

"Under a judicial system which has for centuries magnified the sacredness of individual rights, there is much less danger of doing injustice to the individual than there is in overlooking the obligations of those in authority to organized society." 155

Possibly the decisions first considered, or some of them, were not without good effect. Doubtless much of the earlier legislation was crude and some of it was premature. But, on the other hand, those decisions wrought an injury to the courts and to the public regard for law and for constitutional law in particular, far beyond any such incidental good. An acute and well-informed observer said recently:

"From my own experience, I should say, perhaps, that the one symptom among workingmen which most definitely indicates a class feeling, is a growing distrust of the integrity of the courts, the belief that the present judge has been a corporation attorney, that his sympathies and experience and his whole view of life is on the corporation side." 156

The attitude of many of our courts on the subject of liberty of contract is so certain to be misapprehended, is so out of the range of ordinary understanding, the decisions themselves are so academic and so artificial in their reasoning, that they cannot fail to engender such feelings. Thus, those decisions do an injury beyond the failure of a few acts. These acts can be replaced as legislatures learn how to comply with the letter of the decisions and to evade the spirit of them. But the lost respect for courts and law cannot be replaced. The evil of those cases will live after them in impaired authority of the courts long after the decisions themselves are forgotten.

156 Jane Addams in 13 American Journal Sociology, 772.