

## Freedom of Contract--Inquiries and Speculations

THE impact of the new economic culture on the constitutional system promises an interesting study of the laws of logic and social mechanics which direct the changing fortunes of legal principles. But aside, perhaps, from the matter of the division of federal and state powers the acceptance of the new legislation may not produce the shock on constitutional and administrative law or demand the creative ingenuity on the part of the Supreme Court which is often anticipated. The actual legislation is more modest in its mandatory provisions than is always realized,<sup>1</sup> and although a progressively liberal administrative interpretation may be expected as to what the acts purport to make permissible, this interpretation will be adjusted to what is conceivably acceptable at any particular time. The contentions that the legislation represents an open invitation to abandon completely our own traditions of business and government for those of socialism or fascism are, judging at least from what has been done thus far, nothing more than gratuitous comment.<sup>2</sup> Nor will the Supreme Court in answering the new questions to

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<sup>1</sup> The only provisions expressly prescribed by the National Industrial Recovery Act are those in section 7 relating to labor which comprise the right of collective bargaining, the outlawing of the yellow dog contract and the requirement that employers comply with the decisions of the President regarding maximum hours, minimum wages and other conditions of employment.

<sup>2</sup> The labor provisions promulgated under the Act should not encounter any considerable objections on the ground of violation of due process of law in view of the support which can be derived from the following decisions: *Muller v. Oregon* (1908) 208 U. S. 412; *Miller v. Wilson* (1915) 236 U. S. 373; *Wilson v. New* (1917) 243 U. S. 332; *Bunting v. Oregon* (1917) 243 U. S. 426; *Radice v. New York* (1924) 264 U. S. 292; *Texas & New Orleans R. R. v. Brotherhood of Ry. and S. S. Clerks* (1930) 281 U. S. 548, as limiting *Adair v. United States* (1908) 208 U. S. 161, and *Coppage v. Kansas* (1915) 236 U. S. 1; *O'Gorman & Young v. Hartford Fire Ins. Co.* (1931) 282 U. S. 251 (which the dissenting justices believed weakened *Adkins v. Children's Hospital* (1923) 261 U. S. 525); see also *New York Cent. R. R. v. White* (1917) 243 U. S. 188; *Arizona Employer's Liability Cases* (1919) 250 U. S. 400; *Ward & Gow v. Krinsky* (1922) 259 U. S. 503; *Staten Island Ry. v. Phoenix Indemnity Co.* (1931) 281 U. S. 98; *Helfrick v. Dahlstrom Metallic Door Co.* (1931) 256 N. Y. 199, 176 N. E. 141, *aff'd per curiam*, (1932) 284 U. S. 594.

Whether the Act purports to permit price fixing and limitation of production is a matter of statutory construction not entirely free from doubt. The Administration's arguments that it does are based upon the phrasing of section 4(b) and the declaration of policy sanctioning the eliminating "of unfair competitive practices" and such "restriction of production" as "may be temporarily required." Probably there would be no serious constitutional objections against expedients to prevent selling below cost and to abolish destructive surpluses where supply and demand are admittedly out of balance. Price discrimination and predatory price cutting are already condemned by existing law. *Standard Oil Co. v. United States* (1911) 221 U. S. 1; *Story Parchment Co. v. Patterson Paper Co.* (1931) 282 U. S. 555; *Porto Rican Am. To-*

be propounded to it find itself strongly compelled by the existing decisions. With the obvious justification that there is no legislature which can change its rulings in accordance with changing economic conditions, the Court has never been hesitant in frankly modifying or repudiating doctrinaire concepts which do not meet the requirements of the time and the approval of the most enlightened public opinion.<sup>3</sup> A number of recent decisions suggest that the Court has already adopted a skeptical point of view towards the certitude with which for several decades it has been accustomed to approach questions of social value. Just as the Contracts Clause began to decline after the Civil War and finally became a minor source of law, at least in cases involving the obligations of private persons,<sup>4</sup> so also there have been substantial indications that the Due Process Clauses have begun to decline as important sources of law where the permissible boundary of legislation designed for the public welfare is concerned.<sup>5</sup>

Perhaps the most striking instance of this tendency has been the relegation of "freedom of contract" to a secondary position in the hierarchy of constitutional doctrines. Of more significance is the evidence that this has not been done without a clear consciousness of what was happening. Mr. Justice Brandeis, speaking for the majority of the Court in the case of *O'Gorman & Young v. Hartford Fire Insurance*

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acco v. American Tobacco Co. (C. C. A. 2d, 1929) 30 F. (2d) 234; *cf.* Fairmont Creamery Co. v. Minnesota (1927) 274 U. S. 1; Highland v. Russell Car & Snow Plow Co. (1929) 279 U. S. 253; Tagg Bros. & Morehead v. United States (1930) 280 U. S. 420; O'Gorman & Young v. Hartford Fire Ins. Co., *supra*; Champlin Refining Co. v. Corporation Comm. (1932) 286 U. S. 210; Stephenson v. Binford (1932) 287 U. S. 251; Public Serv. Comm. v. Great Northern Util. Co. (1933) 289 U. S. 130; see also *Nebbia v. New York* (1934) 291 U. S. 502, 54 Sup. Ct. 505. However, more extreme measures might be objected to on several grounds, *viz.*, that they are not authorized by the Act, that they are monopolistic practices within the meaning of section 3(a) of the Act, that they are forbidden by the anti-trust laws, and that they are unconstitutional. The Administration has made no attempt to regulate prices and production under the Act except in those instances where the industries themselves were quick to admit the need for such regulation.

<sup>3</sup> See Sharp, *Movement in Supreme Court Adjudication—A Study of Modified and Over-ruled Decisions* (1933) 46 HARV. L. REV. 361.

<sup>4</sup> See *Boyd v. Alabama* (1877) 94 U. S. 645; *Beer Co. v. Massachusetts* (1878) 97 U. S. 25; *Edwards v. Kearzey* (1878) 96 U. S. 595; *Manigault v. Springs* (1905) 199 U. S. 473; *Block v. Hirsh* (1921) 256 U. S. 135; *Chastleton Corp. v. Sinclair* (1924) 264 U. S. 543. But *cf.* *Coombes v. Getz* (1932) 285 U. S. 434.

<sup>5</sup> *Highland v. Russell Car & Snow Plow Co.*; *Tagg Bros. & Morehead v. United States*; *O'Gorman & Young v. Hartford Fire Ins. Co.*; *Champlin Refining Co. v. Corporation Comm.*; *Stephenson v. Binford*; *Nebbia v. New York*, all *supra* note 2; *Smith v. Illinois Bell Tel.* (1930) 282 U. S. 133; *Board of Tax Comm'rs v. Jackson* (1931) 283 U. S. 527; *Western Distributing Co. v. Public Serv. Comm.* (1932) 285 U. S. 119. But *cf.* *United States v. Chicago, M., St. P. & P. R. R.* (1931) 282 U. S. 311; *Coolidge v. Long* (1931) 282 U. S. 582; *Hooper v. Tax Comm.* (1931) 284 U. S. 206; *New State Ice Co. v. Liebmann* (1932) 285 U. S. 262; *Heiner v. Donnan* (1932) 285 U. S. 312.

*Company*,<sup>6</sup> expressly relied on the most venerable principle of our public law, the presumption of the constitutionality of legislation, and announced that "in the absence of some factual foundation of record for overthrowing the statute" the legislative function was not to be subordinated to the right of the individual to liberty of contract. Consonant with this pronouncement, a number of decisions<sup>7</sup> have indicated that the arsenal of ideological weapons to which social legislation has been forced to resort in order to sustain the public regulation of business—affection with public interest,<sup>8</sup> the public utility concept,<sup>9</sup> piercing the corporate veil,<sup>10</sup> recognized evils as a justification for all-inclusive legislation,<sup>11</sup> existence of an emergency<sup>12</sup>—have become unnecessary or obsolete except as a means of repelling a closely presented argument which has made out its case. Along with this line of decisions has gone another which emphasizes that the application of the Due Process Clause turns on peculiar sets of facts and that the Court may always interpret fresh evidence to arrive at different results. In particular, the cases supporting legislation designed to facilitate coöperative marketing by farmers offer an easy rationale which may be applied in sustaining other statutes regulating business activity.<sup>13</sup> Finally, in *Nebbia v. New York*,<sup>14</sup> a case on which extensive public interest had centered, the Court declared that the direct fixation of prices is no more restricted

<sup>6</sup> *Supra* note 2; cf. *Nebbia v. New York*, *supra* note 2.

<sup>7</sup> *Abie State Bank v. Bryan* (1931) 282 U. S. 765; *Missouri Pac. R. R. v. Norwood* (1931) 283 U. S. 249; *Champlin Refining Co. v. Corporation Comm.*; *Stephenson v. Binford*; *Public Serv. Comm. v. Great Northern Util. Co.*, all *supra* note 2; *Western Distributing Co. v. Public Serv. Comm.*, *supra* note 5; *Boston & M. R. R. v. Armbrugg* (1932) 285 U. S. 234.

<sup>8</sup> See Hamilton, *Affection with Public Interest* (1930) 39 YALE L. J. 1089; McAllister, *Lord Hale and Business Affected with a Public Interest* (1930) 43 HARV. L. REV. 759.

<sup>9</sup> See Robinson, *The Public Utility Concept in American Law* (1928) 41 HARV. L. REV. 277.

<sup>10</sup> *Citizens of Homewood v. Birmingham Elec. Co.* (Ala. P. S. C. 1930) P. U. R. 1930D 463; *Re Alabama Power Co.* (F. P. C. 1932) P. U. R. 1932D 345; *Re Board of Trade Warehouse Corp.* (Ill. C. C. 1928) P. U. R. 1928E 65; *Public Serv. Comm. v. Chesapeake & Potomac Tel. Co.* (Md. P. S. C. 1924) P. U. R. 1925B 545; *People v. Michigan Bell Tel. Co.* (1929) 246 Mich. 198, 224 N. W. 438, P. U. R. 1929B 455; *Ohio Mining Co. v. Public Util. Comm.* (1922) 106 Ohio St. 138, 140 N. E. 143.

<sup>11</sup> *Powell v. Pennsylvania* (1888) 127 U. S. 678; *Booth v. Illinois* (1902) 184 U. S. 425; *Otis v. Parker* (1903) 187 U. S. 606.

<sup>12</sup> *Block v. Hirsh*, *supra* note 4; *Marcus Brown Holding Co. v. Feldman* (1921) 256 U. S. 170; *Chastleton Corp. v. Sinclair*, *supra* note 4.

<sup>13</sup> *Liherty Warehouse Co. v. Burley Tobacco Growers' Ass'n* (1928) 276 U. S. 71; *Corporation Comm. of Okla. v. Lowe* (1930) 281 U. S. 431; cf. *Champlin Refining Co. v. Corporation Comm.*, *supra* note 2. But see *Frost v. Corporation Comm. of Okla.* (1929) 278 U. S. 515. See Hamilton, *Judicial Tolerance of Farmers' Co-operatives* (1929) 38 YALE L. J. 936.

<sup>14</sup> *Supra* note 2.

by the Due Process Clause than is the regulation of "other incidents of property." As a result it is no longer necessary in constitutional argument to presume that the issue is restricted to the simple one of a choice between free enterprise and government interference. While any attempt to construct the framework of the postulates towards which the law is moving would be sure to prove a vain effort, it is not inappropriate to examine in the perspective of present policies the events and conjectures which during the last generation have set limits to the judicial conception of social welfare.

### I.

The exception of contract from the ordinary exercise of the police power of the state was established not in the period of the dawning rights of man but in the period of expanding corporate business in the last decade of the nineteenth century.<sup>15</sup> The task which the Supreme Court undertook was that of translating into constitutional doctrine the powerfully presented demands of the corporation lawyer for protection against the restrictive legislation which farmer and small shop-keeper might enact.<sup>16</sup> To the uninitiated inquirer into the workings of a legal system, the achievement of this objective would have seemed to involve no light task. The reputable texts of American law contained little on the side of unregulated freedom of enterprise. Major propositions of existing legal doctrine would need to be made over and precedents reinterpreted to give legitimate support to such an innovation. No mere evolutionary process, but a sharp break with the past was involved.

Nevertheless, the manner in which this feat was performed requires no detailed recital. The quest led only to the emerging concept of "victorious contract"<sup>17</sup> and the reading of that into the cabalistic lan-

<sup>15</sup> Another instance of the responsiveness of the Court to the demands of corporate business was its construction of the statutes relating to jurisdiction in order to divert corporate litigation to the federal courts on the ground of diversity of citizenship. See *Ex parte Schollenberger* (1877) 96 U. S. 369.

<sup>16</sup> See, for example, the argument of Roscoe Conkling before the Supreme Court in *San Mateo County v. Southern Pac. R. R.* (1885) 116 U. S. 138, which is quoted in KENDRICK, *JOURNAL OF THE JOINT COMMITTEE OF FIFTEEN ON RECONSTRUCTION* (1914) 28 *et seq.* For a discussion of the Granger legislation, see BUCK, *THE GRANGER MOVEMENT* (1913).

<sup>17</sup> This article does not attempt to trace the many sources of the dogma of freedom of contract, for which see Cohen, *The Basis of Contract* (1933) 46 HARV. L. REV. 553. Only a brief reference is required to point out the comparative newness of the individualistic philosophy. For a statement of the medieval view that trade is lawful only when carried on for the public good, see AQUINAS, *SUMMA THEOLOGICA*, ETHICUS II (Rickaby's Transl. 1905) ques. 77, art. 4. The Protestant churches adopted a more commercial attitude. See, e.g., on the question of usury the historical survey in 8 HOLDSWORTH, *HISTORY OF ENGLISH LAW* (3d ed. 1926) 100. However, down to almost the end of the nineteenth century wages were fixed in England by the justice of the peace under the statute 5 ELIZ. (1562) c. 4, §33, and the price of

guage of the Fifth and Fourteenth Amendments. A great economic system had just been built around the philosophical doctrine of individualism and this in turn had already been identified in England and on the continent with natural law.<sup>18</sup> To identify it with "Due Process of Law" was under the circumstances an easy and possibly even natural process.<sup>19</sup> The great economic classics of the first three-quarters of the nineteenth century had all subscribed to individual initiative and free competition as the organic principles of a commercial society and had sought to epitomize in liberty of contract the results of an unfortunate mercantilistic experience. The multitude of purely arbitrary restrictions imposed upon trade by the landed aristocracy of the eighteenth century had led the middle-class enlightenment of the nineteenth to the conclusion that the one positive social good is the absence of limitations on business enterprise.<sup>20</sup> Government came to be described as an evil whose necessity was fortunately limited because of a happy coincidence between social well-being and the concentration by each rational creature on his own economic advancement.<sup>21</sup> From these propositions and from the fact that a contract may result in a gain to both contracting parties, Bentham had deduced that contract is always a mutual gain.<sup>22</sup> Maine, going further, had crystallized all legal history into the compact expression that "the movement of progressive societies has been from status to contract"<sup>23</sup> and the sweep of this generalization captured even

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staples was regulated by law both in England and this country. See Hamilton, *The Ancient Maxim Caveat Emptor* (1930) 40 YALE L. J. 1133. It is hardly possible to make even Locke a forerunner of the individualistic philosophy. Locke attempted nothing more ambitious than to justify the revolution against the Stuart monarchy by appealing to the laws of nature. See Hamilton, *Property—According to Locke* (1932) 41 YALE L. J. 864. The decisive intellectual argument in the history of *laissez faire* thought was furnished by ADAM SMITH, *AN INQUIRY INTO THE NATURE AND CAUSES OF THE WEALTH OF NATIONS* (1776). Cf. BL. COMM. \*40: "He [the Creator] has been pleased so to contrive the constitution and frame of humanity, that we should want no other prompter to inquire after and pursue the rule of right, but only our self-love . . ."

<sup>18</sup> For the role that the concept of "natural law" has played in the growth of the Due Process Clause, see Grant, *The Natural Law Background of Due Process* (1931) 31 COL. L. REV. 56.

<sup>19</sup> In his dissent in the Slaughter House Cases (1872) 16 Wall. (83 U.S.) 36, Field, J., expressly quoted "The Wealth of Nations" to sustain his interpretation of the Privileges and Immunities Clause.

<sup>20</sup> Brewer, J., dissenting in *Budd v. New York* (1882) 143 U. S. 517, 551, said: "The paternal theory of government is to me odious." Jackson, White, and Field, J. J., concurred in this dissent.

<sup>21</sup> ADAM SMITH, *op. cit. supra* note 17, bk. IV, c. 2.

<sup>22</sup> For a presentation of Bentham as an apostle of individualism to his contemporaries and of state socialism to the next age, see DICEY, *LAW AND PUBLIC OPINION IN ENGLAND DURING NINETEENTH CENTURY* (1905) lectures VI, IX.

<sup>23</sup> See MAINE, *ANCIENT LAW* (2d ed. 1863) c. 5, p. 170. Cohen, *op. cit. supra* note 17, at 558, makes the following criticism: "Maine's observation that the progress

the common sense of individualism; while its author was universally acclaimed as "having done no less than create the science of comparative jurisprudence." Even the natural science discovery of evolution was brought to the aid of these hypotheses for *laissez faire* by an identification of survival with strength and a romantic appeal to free and heedless vigor.<sup>24</sup>

But not only could a learned tradition of political economy and natural science be invoked for the protection of free contract but also the workaday equalitarian culture of the America of that age.<sup>25</sup> Authoritarian control had found but little sympathy either in the indigenous agrarianism<sup>26</sup> or in a proletariat class which was not as yet self-conscious.<sup>27</sup> Worker as well as entrepreneur shared a vigorous prejudice for untrammelled movement. Untouched economic resources invited whomever would to become a free agent.<sup>28</sup> The long political tradition of Jeffersonian democracy, with its militant faith in the capacity of the common man to look out for himself and its opposition to any concentration of power in the hands of either federal or state government, readily adopted "freedom of contract" as a means of securing the individual from the oppression of law, without waiting to remember that its founder had been concerned with preventing the large landed proprietors and traders from using the government to exploit the processes of production and distribution. It is no matter for wonder that when an imperative occasion presented itself, a comprehensive chapter of judicial history could be written in a brief decade. The legal system could hardly have been expected to withstand the impact of a capitalistic bias. That the very words of the Constitution were found to have been framed with particular reference to a problem of late nineteenth century industrialism is only a comment upon the dominant climate of opinion.

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of the law is from status to contract is, therefore, partly true in certain periods of expanding trade. But close on the heels of expansion comes consolidation or closer organization; and in the wake of increased freedom of contract we find increased regulation, either through the growth of custom and standardization or through direct legislation." Cf. Pound, *Liberty of Contract* (1909) 18 YALE L. J. 454.

<sup>24</sup> This was largely the result of the romantic extolling by Spencerian liberals in the field of politics of the biological law which decrees that only the fit survive. The implication that the man who succeeds in amassing a fortune in the economic struggle is the one with strong social virtues was not long in being challenged.

<sup>25</sup> But it is noteworthy that in England even the objections to the legality of agreements fixing prices and production gave way before "freedom of contract," a position which the American courts in general did not adopt. See Jaffe and Tobriner, *The Legality of Price Fixing Agreements* (1932) 45 HARV. L. REV. 1164.

<sup>26</sup> This statement must of course be qualified by a reference to the Granger movement. For a study of the nature and causes of this movement, see BUCK, *loc. cit.* *supra* note 16.

<sup>27</sup> That there is even yet no widespread self-conscious proletariat class, see WILLIAMS, *HUMAN ASPECTS OF UNEMPLOYMENT RELIEF* (1933).

<sup>28</sup> See HADLEY, *UNDERCURRENTS IN AMERICAN POLITICS* (1915) lecture II.

As a constitutional doctrine, however, liberty of contract followed a long step behind its triumph as a doctrine of economic theory. Its first appearance in the law reports in the little remembered case of *McMillan v. McNeil*<sup>29</sup> was by way of a suggestion that the Contracts Clause might be invoked to protect liberty to contract from the hampering consequences of state insolvency statutes and, more generally, from any innovating legislative action purporting to restrain the right to enter into ordinary contracts. Eight years later this issue was actually brought before the Court in *Ogden v. Saunders*.<sup>30</sup> The majority held that the Constitution did not invalidate an insolvency law which was designed to discharge contracts made subsequently to its enactment. However, the dissenting opinion, written by Chief Justice Marshall,<sup>31</sup> contended that "freedom of contract" as well as the "obligation of contract" was guaranteed by the Contracts Clause.<sup>32</sup> The structure of his argument, which anticipates that later to be used successfully with reference to due process of law, supposes that when the formation of contracts is subjected to legislative regulation the inherently free institution of contract has been violated.<sup>33</sup> Behind the stately march of his reasoning, unburdened with any attempt to bring precedent to his support, lay the uncompromising logic of the still new and growing *laissez faire* philosophy.

Not till after the Fourteenth Amendment had been written into the Constitution was there any attempt to discover another guarantee which might be called to the support of commercial liberty. Indeed, in the intervening years the Court, under the leadership of Chief Justice Taney, displayed no great sympathy for private rights.<sup>34</sup> However, it was not unsympathetic to the freer development of business enterprise, and finally, after some hesitancy,<sup>35</sup> established the negative implications of the Commerce Clause as limiting state interference with interstate transactions.<sup>36</sup>

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<sup>29</sup> (1819) 4 Wheat. (17 U. S.) 209; cf. *Hicks v. Hotchkiss* (N. Y. 1823) 7 Johns. Ch. 296, 311.

<sup>30</sup> (1827) 12 Wheat. (25 U. S.) 213.

<sup>31</sup> Concurred in by Story and Duvall, J. J.

<sup>32</sup> See Isaacs, *John Marshall on Contracts* (1921) 7 VA. L. REV. 413.

<sup>33</sup> Marshall did not intend to deny that the legislature might exercise a certain measure of control in the nature of what subsequently has come to be designated as the police power. See HALL, *CASES ON CONSTITUTIONAL LAW* (1913) 856, n. 2.

<sup>34</sup> See particularly *Charles River Bridge v. Warren Bridge* (1837) 11 Pet. (36 U. S.) 419.

<sup>35</sup> *City of New York v. Miln* (1837) 11 Pet. (36 U. S.) 102; *The License Cases* (1847) 5 How. (46 U. S.) 504.

<sup>36</sup> *The Passenger Cases* (1849) 7 How. (48 U. S.) 282; cf. *Pennsylvania v. Wheeling & Belmont Bridge Co.* (1851) 13 How. (54 U. S.) 518; *Cooley v. Board of Wardens* (1851) 12 How. (53 U. S.) 298. This doctrine had been first laid down a generation earlier in *Gibbons v. Ogden* (1824) 9 Wheat. (22 U. S.) 1. Taney, however, seems to have opposed this limitation on the power of the states. See Taney, C. J., dissenting in *The Passenger Cases*, *supra*, at 470.

Prior to the adoption of the Fourteenth Amendment the Due Process Clause of the Fifth Amendment had seldom appeared before the Court and had not yet been applied as limiting the legislative power of Congress.<sup>37</sup> Consequently, it hardly seems probable that the somewhat expanded language of the Fourteenth Amendment was intended in any sweeping way to be a bulwark of corporate business against state regulation, although no doubt a part of the radical congressional committee which framed the Amendment would have approved of such a result. It is true that a great political revolution had followed the Civil War and power had passed from the hands of the agriculturist to the industrialist. But that the subsequent evolution of the Fourteenth Amendment could have been foreseen or intended is hardly creditable.<sup>38</sup> For five years there was not even an attempt to invoke its protection, although numerous state taxing statutes purporting to tax property without the state were held unconstitutional.<sup>39</sup>

However, an appreciation of its possibilities was not long in developing, and to these possibilities the reasoning of the rising business system turned its attention. Nevertheless, an older generation of jurists was not lightly to be convinced by argument which involved so far a departure from the course marked out by precedent. In 1873 in the *Slaughter House Cases*,<sup>40</sup> the first attempt to invoke the Amendment against state legislation was made. To the keen disappointment of the industrialist,<sup>41</sup> the Court held that the Amendment was designed only to protect the negroes against discrimination.<sup>42</sup> For a generation learned counsel continued to tempt the Court by ingenious arguments which

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<sup>37</sup> The first Supreme Court case requiring the construction of the Due Process Clause in the Fifth Amendment seems to have been *Murray v. Hoboken Land & Improvement Co.* (1855) 18 How. (59 U. S.) 272. Very soon thereafter it was brought before the Court again in the *Legal Tender Cases* in which a persuasive argument for a broad interpretation was finally rejected. *Hepburn v. Griswold* (1870) 8 Wall. (75 U. S.) 603; *Legal Tender Cases* (1871) 12 Wall. (75 U. S.) 457. However, in *Dred Scott v. Sandford* (1857) 19 How. (60 U. S.) 393, Taney, C. J., relied in part on the Due Process Clause.

<sup>38</sup> For the thesis that the Fourteenth Amendment was secretly intended at the time of its enactment to protect business against state regulation, see BEALE, *THE CRITICAL YEAR* (1930) 217 *et seq.* But *cf.* Corwin, *The Doctrine of Due Process of Law Before the Civil War* (1911) 24 HARV. L. REV. 366; 2 BEARD, *THE RISE OF AMERICAN CIVILIZATION* (1927) 112 *et seq.*; Warren, *The New "Liberty" Under the Fourteenth Amendment* (1926) 39 HARV. L. REV. 431. In *Nixon v. Herndon* (1926) 273 U. S. 536, 541, Holmes, J., said: "That Amendment, while it applies to all, was passed, as we know, with a special intent to protect the blacks from discrimination . . ."

<sup>39</sup> See 2 WARREN, *THE SUPREME COURT IN UNITED STATES HISTORY* (Rev. ed. 1926) 599 *et seq.*

<sup>40</sup> (1873) 16 Wall. (83 U. S.) 36.

<sup>41</sup> WARREN, *op. cit.* *supra* note 39, at 539.

<sup>42</sup> *Supra* note 40, at 71 (per Miller, J.); see also *Strauder v. West Virginia* (1880) 100 U. S. 303.



purported to take up new positions in which the issue might still be considered open.<sup>43</sup> By 1885 political and industrial developments and substantial changes in the personnel of the Court made inevitable another interpretation,<sup>44</sup> but the language which had been employed in the *Slaughter House Cases* was stubborn and it was not until another decade had passed that the Court discovered just the occasion for which it had been waiting. In the meantime the novel but erudite views of Mr. Justice Field, who had dissented in the *Slaughter House Cases*, commenced to prevail in the state courts,<sup>45</sup> and casually or carefully a pervasive process began to appear in the utterances of the Supreme Court itself.<sup>46</sup> Finally in 1897 in *Allgeyer v. Louisiana*,<sup>47</sup> which had for its subject matter an obviously oppressive state statute purporting to impose heavy penalties for contracting insurance with companies not qualified in the state, the Court found its opportunity.<sup>48</sup> Unbuttressed by precedent a unanimous opinion was handed down which held that "in the privilege of pursuing an ordinary trade or calling . . . must be embraced the right to make all proper contracts in relation thereto." By 1905 the choice, if one ever existed, had finally been taken and the new structure of business organization placed in the care of this young hero of *laissez faire* economy to protect it from the unwelcome attentions of government. However dubious may have been the status of "individualism" in the law before, in the years which reached from *Allgeyer v. Louisiana* to *Lochner v. New York*<sup>49</sup> it was given a full incorporation. For the space of nearly a generation thereafter it was to be spoken of as a "universal" transcending verification.

## II.

Undoubtedly the Supreme Court, when it handed down the decision in *Allgeyer v. Louisiana*, envisaged the development of the corporation

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<sup>43</sup> The argument in the *Slaughter House Cases* had been based on the Privileges and Immunities Clause. The dissent of Bradley, J., however, suggested the possibility of a resort to the Due Process Clause. *Davidson v. New Orleans* (1878) 96 U. S. 97, indicated the recognition by counsel of the opportunity in this suggestion.

<sup>44</sup> Compare similarly the history of public utilities from *Munn v. Illinois* (1877) 94 U. S. 113, to *Chicago, M. & St. P. R. R. v. Minnesota* (1890) 134 U. S. 418.

<sup>45</sup> *In re Jacobs* (1885) 98 N. Y. 98; *God-charles v. Wigeman* (1886) 113 Pa. 431; cf. *Wynehamer v. People* (1856) 13 N. Y. 378.

<sup>46</sup> See *Barbier v. Connolly* (1885) 113 U. S. 27; *Butchers' Union Slaughter-House Co. v. Crescent City Slaughter-House Co.* (1884) 111 U. S. 746; *Mugler v. Kansas* (1887) 123 U. S. 623.

<sup>47</sup> (1897) 165 U. S. 578.

<sup>48</sup> *Paul v. Virginia* (1869) 8 Wall. (75 U. S.) 168, had held that insurance contracts could receive no protection from state legislation by virtue of the Commerce Clause. *Quaere* the extent to which *Allgeyer v. Louisiana* was influenced by this consideration.

<sup>49</sup> (1905) 198 U. S. 45.

along the approved lines of democratic growth. The slogans of Jeffersonian democracy—equality of opportunity and liberty of enterprise for all—had come to be as revered in high places as in low. The nature and problems of the emerging business world could hardly have been foreseen. Markets were comparatively limited and the era of highly specialized and expensive machinery was just being ushered in. Competition still operated with relative smoothness in directing capital into the trades where it was needed or withdrawing it from overcrowded fields. The giant corporations, the concentration of power in the hands of a few men, the separation of ownership and control, and the extensive development of new devices of business management were as yet unplanned and unanticipated.<sup>50</sup>

It is not necessary to indicate the rush with which the new industrial system came. We have just been told that "very much more than half of the industry in the United States is controlled, directly or indirectly, by two hundred corporations which are under the control of approximately two thousand individuals."<sup>51</sup> To what extent this small proportion of the population actually dominates our economic life may not be determined.<sup>52</sup> But as applied to the corporation the doctrines of *laissez faire* have been vastly different from the theories of Adam Smith and his simple one-man business. The corporation both in its inception and to the nineteenth century political economists was not an individualistic institution. The idea of contract as an instrument of social control was expressly confined to the relationships between individuals, and, even more particularly, individuals who were members of the same class.<sup>53</sup> When extended to the "big business" world which the corporation has introduced, the maintenance of contract as the principal directive force of the legal system has left itself open to the criticism of focusing attention solely upon a quantitative output and leaving the coordinate elements without satisfactory guidance.<sup>54</sup> Undue multiplica-

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<sup>50</sup> See VEBLEN, *ABSENTEE OWNERSHIP AND BUSINESS ENTERPRISE IN RECENT TIMES* (1923) 86: "Business enterprise may be said to have reached its majority when the corporation came to take the first place and became the master institution of civilized life."

<sup>51</sup> BERLE AND MEANS, *THE MODERN CORPORATION AND PRIVATE PROPERTY* (1932) This statement refers only to industrial and not to banking or agricultural wealth.

<sup>52</sup> See VEBLEN, *THE VESTED INTERESTS AND THE COMMON MAN* (1919).

<sup>53</sup> John Stuart Mill expressly excluded the corporation from the operation of *laissez faire* philosophy. See MILL, *PRINCIPLES OF POLITICAL ECONOMY* (1848) bk. XI, §11.

<sup>54</sup> The anti-trust laws indicate, of course, the early recognition of the necessity of directing the operations of free contract to some extent. However, American courts have generally held that this type of regulation, which is designed to insure the maintenance of competitive conditions (thus insuring the untrammelled functioning of free contract), is the only legitimate type of governmental interference so far as "ordinary" business is concerned.

tion of plants and equipment, periodical unemployment, skimping quality, constant warfare in industrial relations, predatory attacks and reprisals among competitors, wastes of selling and advertising and the general evaporation of any disciplinary force which should keep attention centered upon steady output and fair prices are some of the consequences of the attempt to accommodate "freedom of contract" to an order for which it was never intended.<sup>55</sup> No doubt it is possible to characterize much of this as catch-penny objections predicated upon an industrial Utopia, but this would be aside from the point. The development of the corporation has aggravated the anti-social elements of free contract to such an extent as to create a chronically unhealthy condition in business.

Nor is it necessary to labor the arguments that the essence of the ordinary contract is no longer contractually determined. The fact that there is legal freedom to choose does not mean that there is economic freedom. Contracts in the present day are rarely cast in the simple factual mold of competent parties on an equal bargaining basis.<sup>56</sup> The right of the individual to contract as he wishes, however adequate it may once have been, has under a corporate structure of business evolved into wage scales and shop rules, market procedure and financial technique which corporate employers, producers and financiers are able to prescribe, and employees, consumers and investors must take or leave. The element of consent on the part of the employee in a labor contract is a small one; the pressure of necessity and the greater economic resources of the employer largely transform the bargain into an affair of compulsion. Labor is not as mobile as money—a new life is not lightly to be adventured—while the growing specialization of machinery and the cyclical crises of business threaten the security of certain classes of workers with concentrated severity. Nor does the supposition that the corporation and the laborer bargain with each other on equal terms take account of the contradictions that the corporation is able to rely on a class of professional strike breakers or to shut down in time of depression.<sup>57</sup>

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<sup>55</sup> See BOUCKE, *LAISSEZ FAIRE AND AFTER* (1932); CHAMBERLAIN, *FAREWELL TO REFORM* (1932); CHASE, *OUT OF THE DEPRESSION AND AFTER* (1931); SOULE, *A PLANNED SOCIETY* (1932).

<sup>56</sup> Compare the recent decision that the Interstate Commerce Commission could not interfere with the compensation agreed to be paid to the reorganizers of a railroad by the security holders. *United States v. Chicago, M. & St. P. R. R.* (1931) 282 U. S. 311.

<sup>57</sup> The older decisions recognized that freedom of contract between persons who have widely different economic resources will not result in an equal bargain. See *Vernon v. Bethwell* (1762) 2 Eden 110, 113; Pound, *op. cit. supra* note 23, at 471. Compare the statement of Harlan, J., that the employer and employee in deciding on the terms of employment possess an equal freedom, and any regulation of this is "an arbitrary interference with freedom of contract, which no government can legally justify in a free land." *Adair v. United States* (1908) 208 U. S. 161, 175.

Indeed it may be argued that all bargaining has become a form of coercion.<sup>58</sup> At least it is no longer an affair which does very much towards protecting the vital interests of the human race in general. Although the word "contract" may still give the impression of a concept standardized and simple, easily recognized and readily proved, both the form and substance of present day transactions negate any such simplicity in meaning. Advertising hypnotism, necessitated by the pressure of trade rivalry, has become a dominant force in modern salesmanship, while the marvels of synthetic chemistry have multiplied adulterations in such a manner that it is no longer possible to judge effectively what is being offered. The individual consumer has only his crude experience and incompetent judgment to oppose the complicated technique and science of that great collectivism which is the market and which knows as its only precept what bare vendibility requires.<sup>59</sup> Standardized contracts (or "franchises" as they are often called) by which producers of nationally sold products provide for their distribution are elaborately designed by cancellation and exemption clauses to contain enforceable obligations on one side only.<sup>60</sup> Exploitation by public utility holding companies of operating subsidiaries through service charges and other devices which endanger the stability of the utility as well as reflect themselves in unconscionable rates can hardly be put in terms of offer and acceptance.<sup>61</sup> Free contract as applied to intracorporate relationships has meant that the "real" persons concerned, the promoters and directors, may follow their personal interests at the expense of those of the corporation until lack of integrity in corporate business organizations has become a byword.<sup>62</sup> The legal rights for which stockholders bargain have a habit of turning out to be inconsequential and of little economic value.<sup>63</sup> By the process of reorganiza-

<sup>58</sup> See Hale, *Coercion and Distribution in a Supposedly Non-Coercive State* (1923) 38 POL. SCI. Q. 470.

<sup>59</sup> See Hamilton, *loc. cit. supra* note 17.

<sup>60</sup> See Note, "Mutuality" in *Exclusive Sales Agency Agreements* (1931) 31 COL. L. REV. 830. For the extent to which contracts are becoming standardized for whole trades, see Isaacs, *The Standardizing of Contracts* (1917) 27 YALE L. J. 34; Llewellyn, *What Price Contract? An Essay in Perspective* (1931) 40 YALE L. J. 704; Pound, *The New Feudalism* (1930) 16 A. B. A. J. 553.

<sup>61</sup> There are three devices by which the parent company may exploit the operating company, *viz.*, high service charges, unreasonable dividend payments and improper loans to the holding company. See BONBRIGHT AND MEANS, *THE HOLDING COMPANY, ITS PUBLIC SIGNIFICANCE AND ITS REGULATION* (1932); Lilienthal, *Regulations of Public Utility Holding Companies* (1929) 29 COL. L. REV. 404; Lilienthal, *Recent Developments in the Law of Public Utility Holding Companies* (1931) 31 COL. L. REV. 189.

<sup>62</sup> See BERLE AND MEANS, *loc. cit. supra* note 51.

<sup>63</sup> *E.g.*, through the power to reduce capital stock so as to create a paid in surplus available for dividends, the directors can negate a fundamental part of the contract of the preferred stockholders, the right on dissolution to be preferred. See Berle, *Corporate Devices for Diluting Stock Participation* (1931) 31 COL. L. REV. 1239; Note (1933) 42 YALE L. J. 952.

tion a bondholder may be deprived of the security for which he invested and find himself reduced to the status of a stockholder.<sup>64</sup> The elaborate technique of the "easy financing" practiced before 1929 is far removed from any connection with the socially useful privilege of individuals to contract as they wish.

Of equal significance is the actual fashion in which the competitive ideal of classical economic theory may function in a complex corporate business world. The questionable wisdom of a government regulation of industry which went no further than to prescribe competitive conditions was pointed out over twenty years ago by a number of careful thinkers.<sup>65</sup> It is no doubt possible to argue that the anti-trust laws have not had a fair opportunity as a result of the judicial interpretation that mere size is no violation even though a particular management may have achieved control of the greater part of the production in a given field.<sup>66</sup> However, it is not certain that the anti-trust laws could be made sufficiently effective in this direction in view of the luxuriant growth of devices for integrating business control. In any event, the recent emphasis placed on the necessity of coöperative action indicates that the anti-trust laws are not to be allowed to continue on the statute books without serious modification in principle. The paradoxical situation of a surplus market and widespread lack of purchasing power has demonstrated that unregulated competition may not longer be expected to perform successfully the function assigned to it by classical economic liberalism of directing and maintaining a sufficient but not immoderate amount of capital in the various fields of industry. Under the pressure of an excessive productive capacity which the machine age and the corporate organization have made possible,<sup>67</sup> competition has tended more and more to become cut-throat and predatory on the one hand or discriminatory and modified by informal agreements on the other.<sup>68</sup> The investigations of the Federal Trade Commission have exposed an infinite array of devices for unfair competition and the issue has at last been recognized as to whether the law can

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<sup>64</sup> See Frank, *Some Realistic Reflections on Some Aspects of Corporate Reorganization* (1933) 19 VA. L. REV. 698.

<sup>65</sup> VAN HISE, *CONCENTRATION AND CONTROL: A SOLUTION OF THE TRUST PROBLEM IN THE UNITED STATES* (1914); WYMAN, *CONTROL OF THE MARKET: A LEGAL SOLUTION OF THE TRUST PROBLEM* (1911).

<sup>66</sup> *United States v. United Shoe Mach. Co.* (1918) 247 U. S. 32; *United States v. United States Steel Corp.* (1920) 251 U. S. 417; *United States v. International Harvester Co.* (1927) 274 U. S. 693.

<sup>67</sup> And lack of imagination in developing new outlets for the increased productive power.

<sup>68</sup> FREDERICK (editor), *A PHILOSOPHY OF PRODUCTION* (1930); HAMLIN (editor), *THE MENACE OF OVERPRODUCTION* (1930); SPILLMAN, *BALANCING THE FARM OUTPUT* (1927).

adequately cope with them or whether it may not also be necessary to allow industry itself to enforce a code of economic ethics.<sup>69</sup> Ruinous price wars and unnecessary business failures have meant uncertain employment for both labor and capital. In the face of the tremendous investment required for modern machinery and of its highly specialized character, the recurrent withdrawals from particular industries, made necessary by the quickly changing character of the market, synthetic substitutes and new inventions, may be accomplished only at the cost of disaster:

Indeed, even in the last quarter of the nineteenth century English legal thought began to doubt the proposition that anything but continual warfare between competing enterprises should be looked on with suspicion,<sup>70</sup> and this point of view has received final approval in a number of significant recent decisions.<sup>71</sup> Nor have the English courts ever found an example of that one type of competitive agreement which they concede might be opposed to the public welfare—the “pernicious monopoly.”<sup>72</sup> Whether this attitude is altogether the result of a more objective approach to legal problems or partly the consequence of a more sublime faith in the principles of *laissez faire* would be testifying to what the opinions do not entirely disclose.<sup>73</sup>

Furthermore, the maintenance of the competitive principle has created an oppressive disparity in the bargaining power of labor and capital. In an age of corporate production it is obvious that the bargaining power of the individual workman is of no practical value unless collectively organized. However, on the assumption that the labor association must not be permitted unduly to interfere with the “natural” regulation of wages through supply and demand, the judiciary has not infrequently resorted to the development of a variety of common law doctrines to prevent organized labor from effectively controlling the labor

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<sup>69</sup> See Montague, *Proposals for the Revision of the Anti-Trust Laws*, in HANDLER, *THE FEDERAL ANTI-TRUST LAWS—A SYMPOSIUM* (1932); LAIDLER, *CONCENTRATION OF CONTROL IN AMERICAN INDUSTRY* (1931). Consider particularly the problems raised by advertising. See Handler, *False and Misleading Advertising* (1929) 39 YALE L. J. 22.

<sup>70</sup> Ontario Salt Co. v. Merchant's Salt Co. (Ontario 1871) 18 Grant's Ch. 540; Collins v. Locke (1879) 4 App. Cas. 674; see also the remarks in Mogul S. S. Co. v. McGregor [1892] A. C. 25; Maxim-Nordenfelt Guns & Ammunition Co. v. Nordenfeldt [1893] 1 Ch. 630.

<sup>71</sup> Attorney General v. Adelaide S. S. Co. [1913] A. C. 781; Northwestern Salt Co. v. Electrolytic Alkali Co. [1914] A. C. 461; English Hop Growers v. Dering [1923] 2 K. B. 174; Cade v. Daly [1910] Ir. R. 306.

<sup>72</sup> See Maxim-Nordenfelt Guns & Ammunition Co. v. Nordenfeldt, *supra* note 70, at 668. But *cf.* Attorney General v. Adelaide S. S. Co., *supra* note 71, at 795.

<sup>73</sup> See the remark often quoted by English judges of Jessel, M. R., in Printing Co. v. Samson (1873) L. R. 19 Eq. 462, 465: “You have this paramount public policy to consider, that you are not lightly to interfere with the freedom of contract.”

supply through the closed shop—the only way it could hope to achieve its objectives.<sup>74</sup> Finally, it is only too evident that we have an economy in which essential processes tend to become “cornered” and used as weapons of general coercion in the free competitive market.<sup>75</sup> All these considerations increasingly lead to the reflection that the truth of nineteenth century individualism consisted in great part in the mistakes of eighteenth century mercantilism and has drifted into disservice in an economic culture which is dominated by the corporation and the machine. As the English *laissez faire* was a middle class movement so that of twentieth century America has been the *laissez faire* of the large corporation.

### III.

In general, it may be said that the cases from 1897 until the changes of personnel in the Supreme Court in 1930 reveal, insofar as what was said, a fairly consistent logical theory of the nature and consequences of “freedom of contract.”<sup>76</sup> A doctrine so thoroughly subscribed to at the time could not but have made a profound impression upon the pages of the law reports. No doubt also to judges harassed by their task of making questionable guesses and passing on ambiguous issues, “freedom of contract” has provided an easy focus for judicial thought. It is not difficult to expound, its tradition is learned and the solution it

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<sup>74</sup> *Hitchman Coal & Coke Co. v. Mitchell* (1917) 245 U. S. 229; *Duplex Printing Press v. Deering* (1921) 254 U. S. 443; *American Steel Foundries v. Tri-city Cent. Trades Council* (1921) 257 U. S. 184; *Bedford Stone Cutters v. Stone Cutters' Ass'n* (1927) 274 U. S. 37; see also *Adair v. United States* (1908) 208 U. S. 161; *Coppage v. Kansas* (1915) 236 U. S. 1; *Truax v. Corrigan* (1921) 257 U. S. 312. In medieval England the government assumed the responsibility of seeing that the laborer received his just share of the returns of trade. Consequently, the government also forbade combinations of workmen to raise the lawful wage, a precedent which was later held to condemn labor combinations in a time when the government had abandoned its paternal attitude. See SIDNEY AND BEATRICE WEBB, *HISTORY OF TRADE UNIONISM* (Rev. ed. 1923); Sayre, *Criminal Conspiracy* (1922) 35 HARV. L. REV. 393.

<sup>75</sup> Thus, the United Shoe Manufacturing Co. was able to restrain competition by acquiring control of essential patents. Another example is the control of a necessary raw product such as the exclusive rights to bauxite ore acquired by the Aluminum Co. of America. For a survey of these and other types of unfair competition leading to monopoly power, see JONES, *THE TRUST PROBLEM IN THE UNITED STATES* (1921).

<sup>76</sup> A caveat to this statement should perhaps be entered for the years just before and during the World War when the Supreme Court appeared to be preparing to allow the utmost scope to the enactment of legislation. See *Muller v. Oregon*, *supra* note 2; *German Alliance Ins. Co. v. Lewis* (1914) 233 U. S. 389; *United States v. Ohio Oil Co.* (1914) 234 U. S. 548. The reaction which followed the war effectively destroyed this tendency. See *Adkins v. Children's Hospital* (1923) 261 U. S. 525; *Charles Wolf Packing Co. v. Court of Industrial Relations* (1923) 262 U. S. 522; *Burns Baking Co. v. Bryan* (1924) 264 U. S. 504; *Weaver v. Palmer Bros. Co.* (1926) 270 U. S. 402; *Tyson v. Banton* (1927) 273 U. S. 418; *Ribnik v. McBride* (1928) 277 U. S. 350.

provides is sure and easy. Indeed, it may often have seemed the only guiding symbol possible in an industrial development characterized by its turbulence—to leave every man to his own resources. If its wisdom has appeared to the layman to have increasing rigidity, the detachment which it seemed to offer was sure to attract the judicial mind. Border-line cases were often allowed to fall within its scope for fear of a disintegrating erosion. Occasionally this degenerated into a sterile, cold indifference that refused to make any terms with secular realities.<sup>77</sup> The confusion and uncertainty which prevails in the related subject of property devoted to a public use was successfully excluded. Even the slowly increasing concessions which stubborn market facts did force, if not clearly defined, at least were shown to be closely limited. In the mass of inherent contradictions of interest and heterogeneity of economic structure, the simplicity of its reasoning remained compelling until a time when its justification had finally degenerated into vindication of a legal principle that had become quaint rather than debatable.<sup>78</sup>

But broad as are the implications and far-reaching as are the inarticulate premises which underlie the doctrine of "freedom of contract" there has been but little unified growth since its inception. The proposition that was canonized in a brief decade by the tribunal which dedicated itself to the forces of corporate business and to the great historic experiment of "*laissez faire*" has merely been kept intact. Succeeding courts have done no more than focus their attention on this reef of adjudications. Indeed, many of the intellectual and emotional ingredients which went into its fashioning vanished very soon as vital forces in American life.<sup>79</sup> Consequently, even while professing faith in the gospel of classical economic liberalism, the Court, in the distinctly new questions which have been propounded to it from time to time, has given it no comprehensive application. Rather it has resorted to a more pragmatic viewpoint which has generally been characterized by the critics

<sup>77</sup> Such as the decisions which denied validity to legislation designed to protect transient workers in search of a job from being swindled by employment agencies. *Adams v. Tanner* (1917) 244 U. S. 590; *Ribnik v. McBride*, *supra* note 76. It would be difficult to imagine a business better able to resort to fraudulent practices. Another line of cases went far in denying to trade unions the right to attempt to maintain proper conditions of work and higher standards of living for employees. *Hitchman Coal & Coke Co. v. Mitchell*; *Duplex Printing Press v. Deering*; *Bedford Cut Stone Co. v. Stone Cutters' Ass'n*, all *supra* note 74.

<sup>78</sup> It is particularly in the matter of the employment contract that contemporary social thought regards the established legal theorems as outmoded. See FRANKFURTER AND GREEN, *THE LABOR INJUNCTION* (1930); OAKES, *THE LAW OF ORGANIZED LABOR AND INDUSTRIAL CONFLICTS* (1927); WITTE, *THE GOVERNMENT IN LABOR DISPUTES* (1932); COOK, *Privileges of Labor Unions in the Struggle for Life* (1918) 27 *YALE L. J.* 779; SAYRE, *Labor and the Courts* (1930) 39 *YALE L. J.* 682.

<sup>79</sup> Cf. BERTRAND AND DORA RUSSELL, *PROSPECTS OF INDUSTRIAL CIVILIZATION* (1923).



of the Court as one sympathetic to the more cautious group in industrial America.<sup>80</sup> But whether it is a matter of designating judges as liberal or conservative or simply recognizing that legal doctrines do have their life cycles, the law of trade regulation has become a body of doctrine which is far from consistent.<sup>81</sup> The curious distinction drawn between loose and integrated combinations in the application of the anti-trust laws despite the fact that the economic patterns of the two are actually the same is an instance. By means of the holding company device a group of competitors substantially dominating a trade may fix territories, prices and production, while such activities on the part of an unincorporated group of competitors will call down the displeasure of the Sherman Act. This result encourages loss of individuality in large scale combinations and makes the position of the individual entrepreneur a difficult one, a strange consequence to ensue from the Sherman Act which had for an objective the protection and preservation of the small producer.<sup>82</sup> Similarly, the Supreme Court has decided that a manufacturer may not control resale prices by means of independent contracts, although he may control the price at which *del credere* agents sell without violating the anti-trust laws.<sup>83</sup> These holdings may with others be interpreted to indicate a "big business" attitude on the part of the Court.<sup>84</sup> On the other hand, they may indicate simply a sterile application of doctrines of corporate personality and agency. It might even be suggested that it would not have been easy for the Supreme Court to have followed the ever changing demands of large-scale capitalistic business with any amount of direction. In the con-

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<sup>80</sup> In the ten years from 1920 to 1930 the Supreme Court has held state legislation invalid in over 30% of the cases which have come before it.

<sup>81</sup> Compare also the Supreme Court's easy approval of legislation designed to further the organization of agricultural coöperative marketing associations without any attempt to reconcile this line of decisions with the general body of trade regulation law. See *supra* note 13.

<sup>82</sup> Contrast especially the cases cited in note 66, *supra*, with *American Column & Lumber Co. v. United States* (1921) 257 U. S. 377; *United States v. American Linseed Oil Co.* (1923) 262 U. S. 371; *United States v. Trenton Potteries* (1927) 273 U. S. 392. See Jaffe and Tohriner, *loc. cit. supra* note 25. But see *Appalachian Coals, Inc. v. United States* (1933) 288 U. S. 344, which upheld the creation of a common sales agency for a number of coal mines.

<sup>83</sup> Contrast *Dr. Miles Medical Co. v. John D. Park Co.* (1911) 220 U. S. 373, and *Federal Trade Comm. v. Beech Nut Packing Co.* (1922) 257 U. S. 441, with *United States v. General Elec. Co.* (1926) 272 U. S. 476.

<sup>84</sup> See also the comments by the dissenting minority in *Coppage v. Kansas* and *Adair v. United States*, both *supra* note 2, on the different attitude manifested toward liberty of action in the organization of employee and employer combinations. Cf. Shulman, *The Supreme Court's Attitude Toward Liberty of Contract and Freedom of Speech* (1931) 41 *YALE L. J.* 262, where it is pointed out that the Supreme Court has been more careful in protecting property rights than in protecting personal liberties such as freedom of speech.

fusion of council that has characterized recent trends within business, no crystallization of attitude could have been possible. There is no easy way in which a capitalistic scheme of enterprise can be set down or cultivated.<sup>85</sup> This is not to deny that the individual judge balances many non-legal compulsions and that there is reality in economic prejudices. But law is as much a development as the other social sciences, and this may not be disregarded even here on this frontier of the law where a culture is in the process of being constructed. It is not impossible that the last thirty years will be characterized in constitutional history as a period of quiescence following and preceding periods of creative activity. Certainly freedom of contract in relation to the complementary chapter of public law has remained only as a vestige of the protest against the eighteenth century use of legislation in the interest of special classes<sup>86</sup> and as an expression of sentimental attachment to a romantic principle of government which the legislature and executive have been engaged in abandoning for almost a generation.<sup>87</sup>

But not only has there been no consistent development of "freedom of contract" in the last twenty-five years, but even before its formal degrading in the hierarchy of constitutional doctrines by the *O'Gorman* case a considerable though disorganized encroachment upon its scope had already occurred in the practical matter of deciding cases. Indeed, the triumph of "freedom of contract" never actually became a final one even in the day of its adoption. The very decade which saw *Allgeyer v. Louisiana* and *Lochner v. New York* witnessed also a vast expansion of implied warranties,<sup>88</sup> while the creation of new fiduciary duties of agents

<sup>85</sup> The suspicion of forward design on the part of industrial leaders owes much of its origin to the Beards' description of the enactment of the Fourteenth Amendment as part of a scheme for the protection of big business interests against state regulation. See BEARD, *loc. cit. supra* note 38.

<sup>86</sup> See LOCKE, AN ESSAY CONCERNING THE TRUE ORIGINAL EXTENT AND END OF CIVIL GOVERNMENT (1690), and the suggestive interpretation in Hamilton, *loc. cit. supra* note 17.

<sup>87</sup> See FRANKFURTER, THE PUBLIC AND ITS GOVERNMENT (1930) 25 *et seq.*, where it is pointed out that since Theodore Roosevelt every president of the United States has, despite formal pronouncements to the contrary, increasingly engaged in the control of business. In England the collectivistic and democratic movement beginning in 1867 brought to an end the period of *laissez faire*. In France, according to Hauriou, the united forces of *laissez faire* philosophy and the strong individualism of the French Revolution remained dominant until the Law of Associations of 1901. See HAURIOU, PRINCIPES DE DROIT ADMINISTRATIF DE DROIT PUBLIC (9th ed. 1919) 550; *cf.* Straus & Co. v. Canadian Pac. Ry. (1930) 254 N. Y. 407, 412, 173 N. E. 564, 566: "The rule of freedom of contract, which reflected the public policy of the state in the days of the canal boat and stage coach, has ceased to be applicable under modern conditions. That fact has been recognized by the legislature in various enactments."

<sup>88</sup> 1 WILLISTON, SALES (2d ed. 1924) c. 9; Williston, *Representation and Warranty in Sales* (1913) 27 HARV. L. REV. 1. Compare the Federal Securities Act, for a discussion of which see (1933) 43 YALE L. J. 171 *et seq.*

and directors<sup>89</sup> and a striking development of the common law concepts of negligence and fraud<sup>90</sup> have established obligations where it was impossible to infer contractual liability. The Sherman Act had already inaugurated the long story of federal prosecution of monopolistic associations and contracts in restraint of trade, and whatever issue it might have raised was resolved by the neat distinction that it was not "freedom of contract" which was being interfered with but obstructions to "free competition" and the maintenance of a "market."<sup>91</sup> Even the very words in the Due Process Clauses which were relied upon to justify "freedom of contract" were used to extend broadly the common law principle that a man cannot barter away his personal liberty to engage in trade or industry.<sup>92</sup>

To reduce this mass of "exceptional instances" to rational rules is impossible. They came in by no reputable economic route, but as a petty and disorderly assortment of indulgences. Behind their halting recognition lay the unfolding story of changes in business technique, the too hasty exploitation of a continent and a growing disillusionment in the liberal belief that the individual could look out for himself in industry. The police power of the state might assert itself whenever "compelling evidence" indicated that the "health, safety and morals" of her citizens were involved, and eventually "judicial notice" could be invoked to give the necessary "fullness of proof." Even price, the "heart of the contract," could be regulated when it might be said that one party to the contract was under such a disadvantage in the bargain as to "affect it with a public interest."<sup>93</sup> The legislature might make more stringent the obligations of good faith involved in the conduct of certain enterprises.<sup>94</sup> A war had to be fought, and freedom of contract cannot be observed in the throes of combat or of reconstruction. "Emergency," nowhere to be found in the words of the Constitution, became a constitutional principle which would permit regulations of varying sorts.<sup>95</sup>

<sup>89</sup> On the other hand, it is noticeable that in the business world there occurred a lessening emphasis on these fiduciary duties.

<sup>90</sup> See Bohlen, *Liability of Manufacturers to Persons Other Than Their Immediate Vendees* (1929) 45 L. Q. REV. 343; Note (1932) 45 HARV. L. REV. 1415.

<sup>91</sup> *United States v. E. C. Knight Co.* (1895) 156 U. S. 1, indicates the immediate disapproval with which this limitation on freedom of contract was regarded by the Supreme Court.

<sup>92</sup> *Meyer v. Nebraska* (1923) 262 U. S. 390; *Oregon Growers' Cooperative Ass'n v. Lentz* (1923) 107 Ore. 561, 212 Pac. 811; *Brennan v. United Hatters of North America* (1906) 73 N. J. L. 729, 65 Atl. 165, 9 L. R. A. (N. S.) 254, 118 Am. St. Rep. 727, 9 Ann. Cas. 698; see Kales, *Contracts to Refrain from Doing Business or from Entering or Carrying on an Occupation* (1917) 31 HARV. L. REV. 193; WARREN, *loc. cit. supra* note 38.

<sup>93</sup> *Supra* note 8.

<sup>94</sup> Such as promoters, underwriters and stockbrokers under state legislation and now under the Federal Securities Act. See (1933) 43 YALE L. J. 171 *et seq.*

<sup>95</sup> *Supra* note 12.

"Recognized evils" was allowed as a justification for widely inclusive legislation, so that contracts for sales of shares on margin, whether *bona fide* or gambling contracts, might be declared void.<sup>96</sup> A broad declaration of legislative policy might uphold a statute which otherwise would be invalid, and the professed intentions of the legislature were not to be assumed to be in fraud of the Constitution.<sup>97</sup> When intercorporate relations were in issue, the corporate veil might on occasion be lifted or an abuse of discretion proven, to the end that the propriety of payments by public utility operating companies to parent corporations might be controlled by commissions.<sup>98</sup>

#### IV.

However, despite the gradually increasing readiness with which the Court might countenance the creation of exceptions in those instances where theory was obviously out of line with common sense, there was no imputation cast upon the principle as enunciated until *O'Gorman & Young v. Hartford Fire Insurance Company*. The confession that economics is an inexact science which may not too readily be put into the guise of conceptual legal logic was not easily to be exacted from those who had formally committed themselves to a firm faith in first principles. Whether in passing upon the recovery acts the *O'Gorman* decision will be fully extended so as frankly to reduce "freedom of contract" to a mere rule of caution or whether reliance will be placed upon the existence of an "emergency" may possibly be a matter of some importance as indicating the temper of the Court towards the legislation as a long time policy.<sup>99</sup> The change in personnel which allowed the *O'Gorman* decision is sufficient (although just sufficient) to allow the full substantive change. No doubt the optimistic can point to considerable other evidence which indicates that the doctrinal question will not be discreetly avoided.<sup>100</sup>

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<sup>96</sup> *Supra* note 11.

<sup>97</sup> *Stephenson v. Binford* (S. D. Tex. 1931) 53 F. (2d) 509, *aff'd*, (1932) 287 U. S. 251.

<sup>98</sup> *Supra* note 10.

<sup>99</sup> The decision in *Nebbia v. New York*, *supra* note 2, indicates the former. The dissenting opinion, however, apparently construes the decision as based upon the emergency doctrine.

<sup>100</sup> *Supra* note 5; see also *Abie State Bank v. Bryan*; *Missouri Pac. R. R. v. Norwood*, both *supra* note 7. A number of recent cases have indicated a lessening of hostility towards workmen's compensation acts as being in derogation of the common law freedom of contract. *Arizona Employers' Liability Cases*; *Ward & Gow v. Krinsky*; *Staten Island Ry. v. Phoenix Indemnity Co.*; *Helfrick v. Dahlstrom Metallic Door Co.*, all *supra* note 2. For the declaration that "the Supreme Court for a long period of time has been paving the way to declare the present recovery legislation constitutional," see Arnold, *The New Deal is Constitutional* (1933) 77 THE NEW REPUBLIC 8, 10. To date no decision involving the recovery legislation has been ren-

But even a reversal in substantive policy would not mean the swing of the pendulum from contract to status. Indeed, contract is itself as much of a scheme of regulation as is legislation and may even be used to assist in enforcing a program of government supervision. It is noteworthy that contract has been given a leading role in the National Industrial Recovery Act.<sup>101</sup> The reversal would mean only a frank recognition by the judiciary that it must limit itself to those tasks which it can adequately perform and leave to the legislature, the commission and the voluntary association within labor and business a constructive part in the planning for national welfare.<sup>102</sup>

The elements of the Adam Smith economy,—small enterprise, skilled craftsmanship, individual initiative,—have disappeared in large degree. Unemployment that comes when new mechanical methods outrun the relatively fixed demands of consumers is a totally new problem of our age and almost any measure that would be counteractive would be worth its cost. Even to those who were its organizers the pre-depression industrial organization has become unsatisfactory, bearing witness to the fact that rules of policy which survive new conditions may come to exhibit characteristics which are subversive of the policy which they originally served. The thrust of constitutional doctrine must become deeper than the application of old rules evolved from a simpler (or at

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dered by the Supreme Court. There have, however, been a number of decisions by inferior courts upholding the legislation. See *Beck v. Wallace*, and *Economy Dairy v. Same* (Supreme Ct., Dist. of Col., decided Aug. 29, 1933); *United States v. Calistan Packers, Inc.* (N. D. Cal. 1933) 4 F. Supp. 660; *United States v. Campbell* (S. D. N. Y. 1933) 5 F. Supp. 156; *Victor v. Ickes* (Supreme Ct., Dist. of Col., decided Dec. 1, 1933). But *cf.* *Purvis v. Bagemore* (S. D. Fla. 1933) 5 F. Supp. 230. *Holmes and Brandeis, J. J.*, have made clear that a liberal attitude towards legislation regulating business does not mean that proprieties of jurisdiction and procedure would be relaxed. See *McDonald v. Mabee* (1917) 243 U. S. 90; *Moore v. Dempsey* (1923) 261 U. S. 86.

<sup>101</sup> As in the case of the Iron and Steel Code, a code may purport to be a contract between the signatories giving them contractual remedies against violators. This may prove to be an effective supplement to action by the government in code enforcement. Compare also the provisions in most of the codes for the establishment of code authorities who are representative of the industry and invested with considerable duties of supervision and investigation. Furthermore, through the marshalling of group sentiment, expulsion and even fines, these voluntary associations should exert considerable power of persuasion. In *Fryns v. Fair Lawn Fur Dressing Co.* (N. J. Eq. 1933) 168 Atl. 862, the New Jersey Chancery Court, in conformity with views expressed by lower courts of New York and Wisconsin, decided that the President's Reemployment Agreement is a contract between the President and the particular employer for the benefit of the employees and entitling the latter to sue as third party beneficiaries.

<sup>102</sup> For an account of the Supreme Court's lack of forbearance toward the work of the Federal Trade Commission in its attempts to suppress what was generally recognized as flagrant instances of unfair competition, see *Montague, Anti-trust Laws and the Federal Trade Commission, 1914-1927* (1927) 27 COL. L. REV. 650. For the attitude of the Supreme Court towards self-regulation in industry, see *KIRSH, TRADE ASSOCIATIONS, THE LEGAL ASPECTS* (1928).

least a different) order to newer practices and customs which demand an appreciation and appraisal of different conditions of production and marketing. If a capitalistic regime is to maintain itself, a collective guidance operating from within industry and an effective control from without must be permitted to supplement individual initiative and private bargaining. No doubt it is easy enough to oppose the shortcomings of an individualistic contractual system with those of a collective and regulated one.<sup>103</sup> But the essential error of the creed of freedom lies in its hypothesis that broad premisses may be set up which cannot be gainsaid and of the resulting denial of the right to social experimentation.<sup>104</sup> The anomaly of freedom is that it is possible only when people remain relatively equal, and since economic power normally tends to become concentrated in the hands of the most competent, it is necessary to check its own pervasive tendencies. This is particularly evident in a society which permits of a tremendous pyramiding of the coercive pressure of capital by resort to the corporation without equally favorable terms of association for other social groups. Freedom must necessarily involve a practical alternative to accepting someone else's terms. Consequently, when considerable differences in bargaining strength have arisen, legislative interference is justifiable.<sup>105</sup>

Possibly the departure from *laissez faire* thought may be taken along with much other evidence to indicate that democracy itself as traditionally conceived is in for a decline. If the logic of events has decreed this, it is no evil. The unpredictable changes which the developments of modern industry are forcing upon us will necessitate a careful evaluation of what we have.<sup>106</sup> But there is no suggestion that contract as an economic institution has lost any of its usefulness. Human wisdom may

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<sup>103</sup> Even those most sympathetic towards strengthening collective labor associations must admit the vast possibilities of usurpation of authority, graft and oppression. Cf. Note, *The Judicial Resolution of Factional Disputes in Labor Unions* (1930) 30 Col. L. Rev. 1025. Nor does it seem unlikely that agreements to control prices and production, even when carefully supervised, may mean serious oppression of competitors and consumers and destruction of the incentive for technological research and efficiency. See McLAUGHLIN, *CASES ON THE FEDERAL ANTI-TRUST LAWS OF THE UNITED STATES* (1933) 719.

<sup>104</sup> Compare Holmes, J., dissenting in *Truax v. Corrigan* (1921) 257 U. S. 312, 344: "There is nothing I more deprecate than the use of the Fourteenth Amendment beyond the absolute compulsion of its words to prevent the making of social experiments...even though the experiments may seem futile or even noxious to me and to those whose judgment I most respect." See also Brandeis, J., dissenting in *New State Ice Co. v. Liebmann* (1932) 285 U. S. 262.

<sup>105</sup> "...and it must be remembered that legislatures are ultimate guardians of the liberties and welfare of the people in quite as great a degree as the courts." *Missouri, Kan. & Tex. Ry. v. May* (1904) 194 U. S. 267, 270, per Holmes, J.

<sup>106</sup> Compare 1 BRYCE, *MODERN DEMOCRACIES* (1921) preface, x *et seq.*, where he states that any scheme of social readjustment must include the application of a new viewpoint towards democratic principles.

not hope to construct an industrial system which could function without the compulsion of self-interest, and this demands that the fulfillment of individual expectation be insured by insisting on the sacredness of contractual rights. Indeed, economic planning would seem to indicate that the law must go even further in the enforcement of contracts. To that end technical defences such as lack of mutuality must be discarded and the inducement of breach of competitors' contracts more generally penalized. The suggestion is only that the limits set by economic laws may be more elastic than we have ever imagined,<sup>107</sup> that regulation need not confine but may release economic forces and that there are more choices than the simple one of electing either to maintain or to abandon that which we now possess. As generally happens in matters of social policy, the issue becomes one of degree only.

There is no lack of problems to be settled: an acceptable method for determining the cost level in price fixing,<sup>108</sup> means for production control which will eliminate economic waste without reacting unjustly against the consumer,<sup>109</sup> the working out of effective devices to prevent unfair practices, the meaning to be given to "monopolies" as used in the new legislation, the extent to which the exercise of labor's collective power in industrial bargaining is consistent with the public interest.<sup>110</sup> Somehow a safe course must be charted between the errors of accepting whatever is as the consequence of natural law and trying to achieve the impossible. Throughout this process of adjustment we may expect to see contracts become increasingly standardized in order to lessen exploitation of the weak and ignorant because of their weakness and ignorance, and a growing interference by the government in economic relations to prevent ruinous price wars and improper use of credit facilities and to realize for labor and capital a regular employment.

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<sup>107</sup> Thus, for example, one of the inexorable economic "laws" postulated that the fund available for wages could not be increased by action of the laborers. See MILL, *op. cit. supra* note 53, bk. II, c. 11. This wage fund theory has exercised no little influence on the trend of judicial decisions. For an account of the history of this "law," see GIDE AND RIST, *HISTORY OF ECONOMIC DOCTRINE* (1915).

<sup>108</sup> Compare the perplexing problem in determining the level of legal minimum rates in the field of public utilities with respect to whether the minimum rates should be fixed so low as to merely cover the costs with the consequent danger of the utility being run down or whether they should be sufficiently high to give all competitors in the field an adequate return.

<sup>109</sup> See the report of the Darrow committee, summarized in the *New York Times*, May 21, 1934, at 8.

<sup>110</sup> *E. g.*, the case of the "sympathetic" general strike.