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 DUE PROCESS OF LAW IN STATE LABOR LEGISLATION

BY FOWLER VINCENT HARPER*

I

Introduction

ANY regulation on the part of the state of the relations between the laborer and his employer must necessarily deprive the one or the other of his liberty or property, by interfering with his freedom to contract.¹ The protection of freedom of contract which the Constitution affords is not, however, an absolute right. There is nothing necessarily unconstitutional about such legislation unless it is "without due process of law." In other words, legislation of this kind is usually a valid regulation if it can be justified as coming within the due process of law provision.

Such legislation is often referred to as an exercise of the police power, that broad principle of law-making so often employed to

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¹"Practically every change in the law governing the relation of employer and employe must abridge in some respect, the liberty or property of one of the parties—if liberty and property be measured by the standard of the law theretofore prevailing. If such changes are made by acts of the legislature, we call the modification an exercise of the police power." Mr. Justice Brandeis, dissenting, in *Truax v. Corrigan*, 257 U. S. 312, 355 (1921). Cf. Learned Hand in "Due Process of Law and the Eight Hour Day," 21 *Harv. L. Rev.* 495 (1908): "It is also not of consequence that the 'liberty guaranteed by the Fourteenth Amendment has come to mean the right to pursue one's individual purposes as one likes and to make contracts for that end. There can be little doubt that so to construe the term 'liberty' is entirely to disregard the whole juristic history of the word."

justify regulations calculated to promote the public weal and to protect public interests. That the States are empowered to enact laws conducive to the public health, safety and morality is a proposition indisputably established in our law. If labor legislation can be fairly said to fall within the scope of the police power, it is therefore within the limitations prescribed by due process of law; if the police power is incapable of including such legislation, it is likely to be violative of the Fourteenth Amendment, and therefore void.

It is obvious that a consideration of labor legislation by the states must include a consideration of the two fundamental conceptions involved, the police power and "due process of law" as contained in the Amendment. Within certain limits, the two conceptions are opposed to each other. Both, however, are a living part of our Constitutional law and both bear directly on labor legislation and its validity. To study the basic theories upon which these conceptions are grounded and the habits of thought from which they emanate, together with the decisions which are predicated upon them, is the object of this inquiry; to review the general governing principles as expressed in the particular applications of those principles.

It has often been remarked that the police power is the vaguest and least susceptible to definition of any of our legal principles. It has likewise been frequently observed that due process of law is incapable of exact definition. It has been suggested that the custom of the courts and lawyers of thinking of a statute as being within the police power when it fulfills the requirements of due process of law, and being outside the limits of the police power when it fails to satisfy the demands of due process, is, in truth, to get nowhere, since by the time due process has been explained and delimited, one had just as easily bounded the limits of the police power.² It is indeed true that the courts are profering little help when they refer to the one conception to explain the other.

Since, then, it is impossible to adequately define either the police power or due process of law, which means merely that it is impossible to reduce either to a rule of thumb, the operation of which is

²See Albert Kales, "Due Process, The Inarticulate Major Premise and the Adamson Act," 26 *Yale L. J.* 519, 520 (1917).

a purely mechanical process, the only hope of clarifying the police power—due process problem lies in a critical examination of the conditions under which these two conceptions are brought into operation, and some analytical effort to detect, from the mass of decisions, some of the essentials of due process, as the idea has evolved in our Constitutional law. Through this means, it may not be impossible to formulate some rational and intelligible theory for prophecy, for although definition be next to impossible, there may yet be an understanding of the use of these conceptions.

The difficulty here is the same one which is invariably presented when a legal precept cannot be expressed in that form of law which we designate as a legal rule wherein all that is required is to determine whether or not a given situation coincides with a given series of operative facts. The general conclusion, the legal principle, involves a different mental process for its application. The *form*³ is different. The difficulty is the one incurred in going from the general to the particular. Rules, deduced from principles, when firmly established in the law, are so much more convenient to manipulate that there is a constant and manifest attempt on the part of courts and lawyers to reduce every principle to a rule.⁴ The police power, as a legal principle, has not infrequently been subjected to this process.⁵ It is thus that the law loses its elasticity, and a principle, originally broad and comprehensive, becomes narrow and inflexible. Stability is gained at the sacrifice of flexibility.

Still more difficult than the principle is the application of the legal standard, the universal conclusion. A standard is invariably involved in the operation of a legal principle. The standard provides the means of deriving the particular conclusion from the general conclusion. In other words, in order to determine whether or not a given statute is within the police power, it is necessary to apply

³On forms of law, generally, cf. Pound, "Theory of Judicial Decision," 36 *Harv. L. Rev.* 641, 645 (1923); Harper, "Forms of Law and Moral Content," 22 *Ill. L. Rev.* ——— (1927).

⁴The equitable maxim that Equity aids only the vigilant is handily turned into a legal rule in the statute of limitations. Cf. the Roman law principle that hard bargains were not enforceable giving way to the rule that considerations less than one-half of the market value would not sustain a contract.

⁵For example *Adkins v. Children's Hospital*, 261 U. S. 525, 67 L. Ed. 785, 43 Sup. Ct. 394 (1923); see *post.* 40.

a standard to determine the operation of that principle. Due process of law supplies this standard, for the police power does not extend to statutes which are not due process of law.

To understand the theories upon which both the police power and due process of law are predicated is certainly indispensable in the effort to realize that ideal harmony between the individual and society which Constitutional law seeks to effect. Few can be entirely satisfied with the treatment so often accorded these problems by the courts. Regardless of one's attitude toward the result of the decision, it can scarcely be denied that the method employed in handling the minimum wage question in *Adkins v. Children's Hospital* is unconvincing in principle inasmuch as the obvious attempt is made to reduce the principle to a rule and determine the result accordingly.⁶

The legal profession in America has long been accustomed to regard with skepticism any attempt to theorize over the existing body of law. Jurisprudence, as a philosophy, has made little progress in the United States. Analysis and history, regarded more kindly, have fared better. But with the steady and ever increasing growth of the law in the attempt to keep pace with changing social and economic conditions, it is evident that the legal rules of the past must give way and must be broken down to be replaced by new rules, deduced from broader legal principles, by the increasing application of still broader legal standards. In this process sound theory is the only safe guide, and juristic philosophy must supply the theory. Some thirty years ago Mr. Justice Holmes observed, "We are only at the beginning of a philosophical reaction and of a reconsideration of the worth of doctrines which for the most part still are taken for granted without any deliberate, conscious and systematic questioning of their grounds."⁷

And so the attempt to look beyond the precedents to see what has been the reason therefore, the attempt to get at the bottom of the whole matter, to see why and how the precedents have been established must precede any constructive attempt to mould the law

⁶See James Nesbit, "Due Process of Law and Opinion," 26 *Col. L. Rev.* 23 (1925).

⁷"The Path of the Law," 10 *Harv. L. Rev.* 457, 468 (1897); *Collected Papers*, 185 (1920).

to satisfy the demands of modern life and society. "Back of the precedents" writes Judge Cardozo, "are basic juridical concepts which are the postulates of legal reasoning, and farther back are the habits of life, the institutions of society, in which these conceptions had their origin and which by a process of interaction, they have modified in turn."⁸ The precedents are worth a great deal; indispensable, as our law operates. Perhaps it is better, however, to regard them as what the law *has been*, rather than what the law *is*. At any rate it is necessary to have an eye upon more than the precedents alone and to try to master the conceptions themselves which are the "postulates of juridical reasoning," and to do this in the light of the "habits of life and institutions of society" at the time, for these are the empirical conditions from which the precedents, as the product of the law, have emanated. With this in mind, then, a study of what seems to be the theories upon which the courts have worked, in an effort to understand the principles which unify and rationalize their judgments, should help to clarify the law, for such are the principles which tend to extend themselves in a jurisprudence.⁹

II

The Two Conflicting Conceptions.

Strictly speaking, the term "police power" of course includes all the powers of government.¹⁰ Nothing is gained by calling it the police power.¹¹ It has rightly been called "unclassified legislative power."¹² Thus the Court in *Mutual Loan Co. v. Martell* comments upon the broad nature of the power, saying:

"Police power is but another name for the power of government; it is subject only to constitutional limitations which allow a compre-

⁸*Nature of the Judicial Process*, 19 (1922).

⁹*Ibid.* 31.

¹⁰See *New Orleans Gas Light Co. v. Louisiana Light Co.*, 115 U. S. 650, 661; 29 L. Ed. 516, 6 Sup. Ct. 252, (1885).

¹¹See *Henderson v. Mayor of New York*, 92 U. S. 259, 271, 23 L. Ed. 543 (1875).

¹²*Cf. Thayer, Legal Essays*, 27 n. 1 (1908).

hensive range of judgment, and it is the province of the State to adopt by its legislature such policy as it deems best."¹³

Recognizing the broad scope of the power, lawyers and judges have usually elected to regard it in a more restricted sense, for the sake of convenience in analysis of what would otherwise be an unwieldy problem. Thus we usually understand by the police power that phase of governmental power generally employed in the interest of the public health, safety, morals, convenience and general welfare.¹⁴ No better understanding of this phase of the power of government can be gained than that derived from the language of Mr. Justice Holmes in *Lochner v. New York*.¹⁵

"Both property and liberty are held on such reasonable conditions as may be imposed by the governing power of the State in the exercise of those powers. . . ."

It is the power to impose such conditions that is commonly referred to as the "police power." Thus Mr. Chief Justice Shaw, in *Commonwealth v. Alger*,¹⁶ expresses it:

"Rights of property, like other social and conventional rights, are subject to such reasonable limitations in their enjoyment, as shall prevent them from being injurious, and to such reasonable restraints and regulations established by law, as the legislature, under the governing and controlling power, vested in them by the Constitution, may think necessary and expedient."

The police power is said to have originated in the functions performed by the King in Council, which activities became of such great importance after the reign of Edward IV.¹⁷ Especially significant was the control exercised by the privy council over vaccinations and the prevention of disease.¹⁸ Consequently, it is contended, after the Revolution in America, when the people of the States inherited or acquired the powers of both the crown and Parliament, the police power descended to the sovereign people, subsequently to

¹³222 U. S. 225, 56 L. Ed. 175, 32 Sup. Ct. 74 (1911).

¹⁴*Bacon v. Walker*, 204 U. S. 311, 51 L. Ed. 499, 27 Sup. Ct. 289 (1907).

¹⁵198 U. S. 45, 53, 49 L. Ed. 937, 25 Sup. Ct. 539 (1905).

¹⁶7 Cush. (Mass.) 53, 85 (1851).

¹⁷See *Taylor, Due Process of Law*, 395 (1917).

¹⁸*Ibid.*, 396. See also *Taylor, Origin and Growth of the English Constitution*, I, 252, and 546 (1889).

become vested in their legislatures.¹⁹ Such theories have been propounded by our courts.²⁰ Tempting as this account for such a power may be, it is more ingenious than significant. The police power, as, in its restricted sense, a single phase of government power, is so intimately and essentially connected with the normal functions of a sovereign state, that its origin must be said to inhere in sovereignty rather than in any corresponding function of the English government.²¹ This is usually regarded as a satisfactory explanation of the power, and it is uniformly conceded to be subjected only to constitutional limitations.

As a source of power, the exercise of which is regarded as sufficient to authorize legislative interference with private right in the interest of the public welfare, the police power is of comparatively recent origin and growth in America. In England where no written constitutional checks restrict its play, it has long been employed to such ends, and to no small extent for the passage of labor legislation.²² In the earlier cases which came before our courts there was great reluctance to contribute to the growth of the conception.²³ Thus in *Vanhorne's Lessee v. Dorrance*,²⁴ it was said that,

“ . . . no one can be called upon to surrender or sacrifice his

¹⁹*Ibid.*, 397.

²⁰See *Martin v. Waddell*, 16 Pet. 367, 410, 10 L. Ed. 997 (1842).

²¹*Cf.* *Crow, J. in State v. Somerville*, 67 Wash. 638, 122 Pac. 324, 326 (1912): “The ‘police power’ * * * is an inherent attribute of sovereignty, the exercise of which is necessary to secure good government and promote the public welfare.” See also *Freund, Police Power*, 2, 3 (1904).

²²The first Statute of Laborers was enacted in 1349 involving a “maximum wage law.” See 23 Edw. III, c. 3. See also *Henderson, Historical Documents of the Middle Ages*, 165 (1922). See also *Reeves, History of English Law*, III, 365 (1880). A long series of labor enactments followed: 34 Edw. III, c. 9 (1360); 2 Hen. VI, c. 18 (1423); 3 Hen. VI, c. 1 (1425); 8 Hen. VI, c. 8 (1429); 23 Hen. VI, c. 12 (1444); 11 Hen. VII, c. 22 (1495); 12 Hen. VII, c. 3 (1496); 4 Hen. VIII, c. 5 (1512); 6 Hen. VIII, c. 3 (1514); 7 Hen. VIII, c. 5 (1515). See Learned Hand in 21 *Harv. L. Rev.* 495 (1908). See in general for early labor acts *J. W. Bryan, The Development of the English Law of Conspiracy*, 27 (1909). See also *Sayre, Cases on Labor Law*, Chap. I (1922).

²³For the early growth of the police power, see Denny, “The Growth and Development of the Police Power of the State,” 20 *Mich. L. Rev.* 173 (1921).

²⁴2 Dal. 304, 1 L. Ed. 391 (1795).

whole property, real and personal, for the good of the community without recovering compensation in value . . . The legislature, therefore, had no authority to make an act divesting one citizen of his freehold, and vesting it in another, without just compensation The next question is whether the legislature had authority to make an act divesting one citizen of his freehold and vesting it in another, even with compensation."²⁵

The courts and jurists of early America were thoroughly imbued with natural law philosophy, and natural law, at that time, meant the inviolability of individual rights, and especially property rights.²⁶ Federal supremacy, but with strong state governments, was to come later. There was little room in the thoughts of either lawyers or publicists for the growth of the police power. Professor Corwin has traced the tardy evolution from the older insistence upon the rigid protection of private interests to the point of recognition of the state's right and power to impose reasonable restrictions upon the enjoyment thereof, by reasonably legislating in behalf of the public weal.²⁷ The liquor traffic was one of the first of private interests to succumb to governmental control, in the interest of the public good,²⁸ and it was but a short time until state courts began to extend the principle of police regulation in this²⁹ and other directions.³⁰

The principle was conceded to be a valid one and received recognition in our constitutional jurisprudence as a part thereof under the influence of Chief Justice Taney.³¹ After 1837 the doctrine had the recognition of the highest court in the land.³² That as early as

²⁵*Ibid.* 310. Cf. also *Osborne v. Huger*, 1 Bay's Rep. (S. C.) 179 (1791).

²⁶"The preservation of property, then, is a primary object of the social compact * * *." *Vanhorne v. Dorrance*, *supra*. See Corwin, "Due Process of Law before the Civil War," 24 *Harv. L. Rev.* 366, 375 (1911).

²⁷*National Supremacy*, chap. V (1913).

²⁸*Byers v. Olney*, 16 Ill. 35 (1854); *King v. Jacksonville*, 2 Scam. 305 (1840).

²⁹See *Goddard v. Jacksonville*, 15 Ill. 589 (1854).

³⁰*Woodward v. Turnball*, 3 Scam. 1 (1841); see *State v. Bosworth* 13 Vt. 402 (1841); *Presbyterian Churchyard v. New York*, 5 Cowen 538 (1826); *Commonwealth v. Tewesbury*, 11 Met. (Mass.) 55 (1846); *Commonwealth v. Alger*, 7 Cush. (Mass.) 53 (1851).

³¹See Corwin, *supra* 116.

³²*Miln v. New York*, 11 Pet. 102, 9 L. Ed. 648 (1837).

1876, the police power was axiomatic in Constitutional law is suggested by the language of Chief Justice Waite in *Munn v. Illinois*:³³

“‘A body politic,’ as aptly defined in the preamble of the Constitution of Massachusetts ‘is a social compact by which the whole people covenants with each citizen and each citizen with the whole people, that all shall be governed by certain laws for the common good.’ This does not confer power upon the whole people to control rights which are purely and exclusively private, *Thorpe v. R. & V. Ry. Co.*, 27 Vt. 143 (62 Am. Dec. 625); but it does authorize the establishment of laws requiring each citizen to so conduct himself and so use his property, as not unnecessarily to injure another. This is the very essence of government, and has found expression in the maxim ‘*Sic utere tuo ut alienum non laedas.*’ From this source come the police powers, which, as was said by Mr. Chief Justice Taney in the *License Cases*, 5 How. 583 (12 L. Ed. 256), ‘are nothing more or less than the powers of government inherent in every sovereignty . . . that is to say . . . the power to govern men and things.’”³⁴

Here, while the police power is recognized, there is still undeniable suggestion of the strict limits within which the courts were to confine it for a quarter of a century. The old order was deeply rooted, and was to yield only after a great struggle. In fifty years the police power was to embrace the power to sterilize mental defectives³⁵ and establish zoning ordinances,³⁶ invasions of private rights which were then unthought of under a free government. It was about this time that legislatures began their work in the interests of labor, and while the end is not yet reached, the path traveled has been hard and long in the half century since. Every step of the way has met with stubborn opposition. The Constitution, and especially the Fourteenth Amendment, has been invoked to impede

³³94 U. S. 113, 24 L. Ed. 77 (1876).

³⁴*Ibid.* 124, 125.

³⁵See for example, *Buck v. Bell*, 143 Va. 310, 130 S. E. 516 (1925). See also Shartel, “Sterilization of Mental Defectives,” 24 *Mich. L. Rev.* 1 (1925).

³⁶See, for example, *Aurora v. Burns*, 319 Ill. 84, 149 N. E. 784 (1925). See also Baker, “Constitutionality of Zoning Ordinances,” 20 *Ill. L. Rev.* 213 (1925).

every advance. Just how this conception of due process has been modified to permit the expansion of the police power in respect to labor legislation is our particular problem. Let us, then, examine briefly the nature of the conception due process of law in the effort to understand the point of balance where the Constitutional scale has, under changing conditions, come to rest.

The Fourteenth Amendment is uniformly regarded as insuring the quality of reasonableness to exercises of the police power by the States.³⁷ But it is not easy to determine just what the test of reasonableness may be for the entire history of the litigation involving the two conceptions indicates the futility of attempting to lay down a rule to cover every type of difficulty. In each situation the problem arises afresh.³⁸ The cases differ in circumstances, and the results vary. It is only by observing the trend of the line which the law slowly marks out and by following closely the path which it makes that the unifying principles can be gradually made manifest.

The origin of "due process" is usually thought of as being the celebrated *lex terrae* clause of *Magna Carta*,³⁹ and there can be little doubt that this chapter sought to insure that particular phase of due process, the want of which had been so largely responsible for the ills of John's subjects. Surely, however, it did not mean any particular form of trial, nor did it necessarily involve a judgment by the barons' peers in all cases.⁴⁰ It has been pointed out that even a great baron did not always regard a judgment by his peers as the most obvious or natural way of making a charge.⁴¹

³⁷Chicago, B. & Q. R. R. v. Drainage Commissioners, 200 U. S. 561, 50 L. Ed. 596, 26 Sup. Ct. 341 (1906).

³⁸See Noble State Bank v. Haskell, 219 U. S. 104, 112, 55 L. Ed. 112, 31 Sup. Ct. 186 (1911).

³⁹John. 1215, c. 39. See McGhee, *Due Process of Law*, 3, n. 1 (1911) for brief textual discussion of *Magna Carta*.

⁴⁰McGhee, *supra*, 5, 6. Cf. Pollock & Maitland, *History of English Law*, 173, n. 3 (2nd. ed. 1899).

⁴¹Powicke, "Per Iudicium parium vel per legem Terrae," *Magna Carta Commemoration Essays*, 96, 103. Some courts of high repute have thought that the *lex terrae* included trial by jury. See Jones v. Robbins, 8 Gray (Mass.) 329, 341-343 (1857). Prosecution by information, however, has been held to be within the *lex terrae* in England. King v. Berchet, 1 Show. 106 (1690). With this compare Hurtado v. California, 110 U. S. 516, 534-535, 28 L. Ed. 232, 4 Sup. Ct. 111 (1884). Cf. the paraphrase of *per legale*

While it cannot longer be denied that *lex terrae* did not, as Coke insisted, warrant every legal principle and every rule of procedure that the common law might subsequently develop, and was thus not synonymous with "due process of law," meaning "due process of the common law,"⁴² still it is difficult to conceive of the barons' notion, namely that their liberty and property should not be taken except by the established measures sanctioned by the law of the land, being fundamentally or formally different from that which we entertain when we speak of "due process of law."⁴³ The Courts have declared that the Amendment provides for precisely such measures.⁴⁴ No doubt the barons' notion of what was included in the *lex terrae* differs from that of today, but so also does the content of due process vary from time to time. The conception, however, remains forever the same.

The immediate abuse which it was the design of the barons to remedy was unquestionably the so-called "Jeddart Justice."⁴⁵ This was not the law of the land, and chapter 39 forbade it.⁴⁶ Thus it was that the *lex terrae* clause was an attempt to insure the safety of the person and his property from infringement, except, according to Bigelow, by "judicial proceedings according to the nature of the case,"⁴⁷ and there was no question in Coke's mind but that *per legem terrae* included the "Common Law, Statute Law, or Customs of England."⁴⁸

Historical investigations have convinced us that the *lex terrae* clause was designed, as McKecknie says, to protect the barons and

judicium parium suorum vel per legem terrae, Reeves, *History of English Law*, II, 43 (1880). Cf. Mott, *Due Process of Law*, 34 (1926).

⁴²See Corwin, "Due Process of Law before the Civil War," 24 *Harv. L. Rev.* 366, 368 (1911). See also McKecknie, *Magna Carta*, 446 ff. (1905) McGhee, *supra* 5.

⁴³"It was in fact a declaration in favour of legality all around." Vinogradoff, "Magna Carta Chapter 39," *Commemoration Essays*, 85. For differing interpretations by different scholars, see references in Mott, *Due Process of Law*, 32, n. 9.

⁴⁴Cf. *Myers v. Nebraska*, 262 U. S. 390, 67 L. Ed. 1042, 43 Sup. Ct. 577 (1923).

⁴⁵"Hanging first and judging after."

⁴⁶McKecknie, *Magna Carta*, 381 (1905).

⁴⁷*History of Procedure*, 155 n. (1880).

⁴⁸*Institutes*, II, 46, 50.

their friends against the King.⁴⁹ Their sense of fairness and decency had been outraged, because the familiar legal practices had been neglected. It was to eliminate the arbitrary element in government that they insisted upon compliance with the *lex terrae*. The prevailing sense of justice demanded adherence to established modes of procedure. At the basis of the conception, too, was the conviction that popular justice was true justice. This was characteristic of the common law, and must be taken into account in explaining the rise of trial by jury,⁵⁰ for although trial by jury was not unknown to our Germanic ancestors,⁵¹ its decay on the Continent⁵² and its growth in England can be satisfactorily accounted for in this way. In considering the habits of thought and life of Englishmen and Americans, then, there is nothing inconsistent in insisting that the law of the land meant in 1213 fundamentally and formally what due process of law means today,⁵³ although to limit the scope of the standard to this extent is to ignore the entire evolution of juridical ideas.

John had relied largely upon the theory that the will of the Prince was the law of the land.⁵⁴ The barons thought otherwise. But the *lex terrae* clause of the Charter was not a new idea. The conception is too broad and too fundamental to have been ingeniously

⁴⁹*Supra* 382.

⁵⁰See Thayer, *Preliminary Treatise on Evidence*, 8 (1898). See also Moschzisker, *Trial by Jury*, sec. 27 (1922).

⁵¹See Forsyth, *Trial by Jury*, 16 ff. (Morgan's ed., 1875).

⁵²See Pomeroy, *Municipal Law*, sec. 113 ff.

⁵³In Murray's Lessee v. Hoboken Land & Improvement Co., 18 How. 272, 276, 15 L. Ed. 372, the Court, per Mr. Justice Curtis, said: "The words 'due process of law' were undoubtedly intended to convey the same meaning as the words 'by the law of the land,' in *Magna Carta*. Lord Coke, in his commentary on those words (2 Inst. 50) says they mean 'due process of law' * * * We must examine the Constitution itself to see whether this process be in conflict with any of its provisions. If not found to be so, we must look to those settled usages and modes of proceeding existing in the common and statute law of England, before the emigration of our ancestors, and which are shown not to have been unsuited to their civil and political condition by having been acted on by them after the settlement of this country." Thus the prevailing sense of what is fair and just, in accordance with custom and tradition, must be satisfied before either the law of the land is observed or due process of law complied with.

⁵⁴Taylor, *Due Process of Law*, 2.

devised, on the moment, to meet the present evil. It was and had been deeply rooted in English law.⁵⁵ In fact it cannot be said to be confined, in its fundamental sense, to English law. The Roman law, says Sir Henry Maine, begins, as it ends, with a Code.⁵⁶ The Twelve Tables were brought into existence in much the same way as *Magna Carta*, for when the Plebes "struck," and assembled on Rome's hills, there was a classic precedent for the assemblage of the barons at Runnymede, many centuries later. On each occasion, the complaint was that there had been a government of men and not of laws, for when government, either through executive, legislative or judicial action, offends the sense of fairness and justice,⁵⁷ as developed by the customs and practices of the day, it has not acted with due process of law nor has it been consistent with the law of the land. Whenever this occurs, the notion of due process finds expression in a Code,⁵⁸ a *Magna Carta*, or a Fourteenth Amendment.

⁵⁵See *Pollock & Maitland, History of English Law*, 150 (2nd. ed. 1899), the system of original writs. It seems that before the reign of Edward I, the King of England could be sued as a common person. See *Allen, Royal Prerogative*, 95, 96. Cf. Bracton I, 268 (Twiss' ed.) declaring that "the king has a superior, for instance God. Likewise the Law through which he has been made king. Likewise the Court * * *." After the Conquest, Stephen was compelled, in the Oxford charter to promise to observe "the good laws and ancient and just customs." See *McKecknie, Magna Carta*, Appendix, 483, 484. For charters antecedent to Magna Carta, see *Stubbs, Select Charters* (1921). With this, compare as to "due process of law," C. H. McIlwain, in 14 *Col. L. Rev.* 27, 51 (1914); Professor Beale's comment on Union Refrigerator Transit Co. v. Kentucky (199 U. S. 194, 50 L. Ed. 150, 26 Sup. Ct. 36, 1905) in 32 *Harv. L. Rev.* 587, 592 (1919). Cf. also constructions of "due process of law" in *Otis Co. v. Ludlow Manufacturing Co.* (201 U. S. 140, 50 L. Ed. 696, 26 Sup. Ct. 353, 1906); *Grant Timber Co. v. Gray* (236 U. S. 133, 59 L. Ed. 501, 35 Sup. Ct. 279, 1915); *Paterson v. Bark Eudora* (190 U. S. 169, 47 L. Ed. 1002, 23 Sup. Ct. 821, 1903); *St. Louis & S. F. R. R. Co. v. Mathews* (105 U. S. 1, 41 L. Ed. 611, 17 Sup. Ct. 243, 1897).

⁵⁶*Ancient Law*, I (3 ed. Am. ed.; 5th. London ed.).

⁵⁷A state penal statute which prescribes no standard of conduct that it is possible to know violates fundamental principles of justice embodied in the conception of due process of law. *Collins v. Kentucky*, 234 U. S. 634, 638, 58 L. Ed. 1510, 34 Sup. Ct. 924 (1914). Cf. *O'Neill v. Leamer*, 239 U. S. 244, 60 L. Ed. 249, 36 Sup. Ct. 54 (1915).

⁵⁸"Among the chief advantages which the Twelve Tables and similar codes conferred on the societies which obtained them was the protection which they afforded against the frauds of the privileged oligarchy and also against the spontaneous deprivation and debasement of the national institutions. The

Nothing is truer in law than the proposition that mathematical formulae are unsafe guides to the satisfactory solution of legal problems.⁵⁹ Scholastic logic offers little assistance to a problem involving two such theorems as "due process of law" and the "police power." Under our theory of government sovereignty rests in the people politically; not in the people as a collection of individuals.⁶⁰ We distinguish between the State and the government.⁶¹ The latter is the agency of the former, to carry out and execute its will. Constitutional limitations, then, restrict the government but not the State.⁶² The Fourteenth Amendment, it follows, secures to the people, individually, certain protections against the government.⁶³

We regard the state as protecting its subjects by preserving, through law, to certain extents, their interests; the law protects interests by creating certain legal rights.⁶⁴ These rights are granted by the law partly by statutes, partly by usage and custom as recog-

Roman Code was merely an enunciation in words of the existing customs of the Roman people." *Maine, Ancient Law*, 17.

⁵⁹*Cf.* *Adams Express Co. v. Ohio State Auditor*, 166 U. S. 185, 41 L. Ed. 965, 17 Sup. Ct. 604 (1897) where it appears that the whole of the corporation's property was equal to more than the sum of its parts, at least so far as taxation is concerned.

⁶⁰The early Roman law proceeded from the proposition that a rule of law was such by virtue of the authority of the people to the conclusion that statute law could be abrogated by desuetude, because that which the people could do collectively, they could do by popular tacit agreement, though as individuals. Constantine later denied this, logically enough, since, at the time, law was such, not because it was the will of the people, but because it was the will of the emperor. Our theory of the State, as a distinct legal personality, disposes of the argument that what is done by the people, in their political capacity can be abrogated by any, or all as individuals. *Cf. Dernburg, Pandekten*, I, 22, 2, translated in *Pound's Readings in Roman Law*, 10 (1914).

⁶¹See *Texas v. White*, 7 Wall 700, 19 L. Ed. 227 (1868); *Virginia Coupon Cases*, 114 U. S. 270, 290, 29 L. Ed. 185, 5 Sup. Ct. 903 (1884); *Lehigh Valley R. R. v. Russian Government*, 293 Fed. 133 and 135 (1919).

⁶²*Cf. Willoughby, Fundamental Conceptions of Public Law*, 82-83 (1924).

⁶³"The Constitution * * * is a restraint upon government, purposely provided and declared * * * making the restraints upon government the rights of the governed." Mr. Justice McKenna in *Block v. Hirsh*, 256 U. S. 135, 160, 65 L. Ed. 865, 41 Sup. Ct. 458 (1921). *Cf. Stimpson, The American Constitution as it Protects Private Rights*, 6 and 210.

⁶⁴Jhering said that rights were legally protected interests. *Geist des roemischen Rechts*, III, 1, 351 (1906). *Cf. Salmond, Jurisprudence*, 237 (7th ed., 1924).

nized in the common law. But the Constitution, and the Fourteenth Amendment do not create rights; they merely add guarantees that rights already acquired shall not be violated by the government.⁶⁵ In other words, the Fourteenth Amendment was intended to recognize and protect fundamental rights long recognized under the common law system.⁶⁶ It was a means of securing the rights of the minority against the rights of the majority.⁶⁷ The phrase itself is misleading. It certainly does not mean any definite method of procedure, the compliance with which will justify a taking of property or a denial of liberty, which would otherwise be unlawful.⁶⁸ On the other hand, the Amendment is recognition that sometimes the interests of the individual conflicts with the interest of the public or of society.⁶⁹ Two things are provided by the Amendment: (1) a guarantee of protection for the minority against the majority in the expression "nor shall any State deprive any person of life, liberty or property," and (2) a protection to the majority, or to

⁶⁵Minor v. Happersett, 21 Wall. 162, 22 L. Ed. 627 (1874).

⁶⁶Cf. Kelly v. Pittsburg, 104 U. S. 78, 80, 26 L. Ed. 658 (1881).

⁶⁷Cf. J. S. Mill in "Utilitarian Basis of Individualism," *Rational Bases of Legal Institutions*, 14, 15 (1923): "The 'people' who exercise the power are not always the same people with those over whom it is exercised; and the 'self government' spoken of is not the government of each by himself, but of each by all the rest. The will of the people moreover, practically means the will of the most numerous or most active *part* of the people; the majority, or those who succeed in making themselves accepted as the majority; the people, consequently, *may* desire to oppress a part of their number, and precautions are as much needed against this as against any other abuse of power." Cf. *Hall, Popular Government*, 176, 177. Cf. also *Jacobson v. Massachusetts*, 197 U. S. 11, 38, 49 L. Ed. 643, 25 Sup. Ct. 358 (1905).

⁶⁸*Rogers v. Peck*, 199 U. S. 425, 50 L. Ed. 256, 26 Sup. Ct. 87 (1905); *Garland v. Washington*, 232 U. S. 642, 58 L. Ed. 772, 34 Sup. Ct. 456 (1914). The early cases showed a decided tendency to treat the due process of law clause as a restriction only upon procedural methods, but gradually the provision was extended, and application made as a restriction upon legislative power in general. See Charles Warren, "The New Liberty under the Fourteenth Amendment," 39 *Harv. L. Rev.* 431, 441 (1926). See also E. S. Corwin, "Due process of Law before the Civil War," 24 *Harv. L. Rev.* 366, 372 ff. (1911).

⁶⁹Some writers deny that there exists such a thing as "social interests," all interests being, it is urged, but some form of individual interest. See, for example, A. L. Corbin, "Jural Relations and Their Classification," 30 *Yale L. J.* 226, 227, n. 2 (1921).

society, against the minority in the expression "without due process of law." From this pledge by the State of protection to two kinds of conflicting interests, comes the balancing process in each case, the weighing of the one interest or interests against the other. It is the saving clause "without due process of law," that permits the operation of the police power in cases where the otherwise absolute protection of life, liberty and property would preclude its application.

It follows that the due process of law clause is equivalent to a declaration that individual interests shall not be compromised unless the enjoyment of such interests materially infringes upon the interests of society. In the latter case, it shall be with due process of law to deprive the individual to the extent of the conflict. It is not an infringement of his rights, for he has no rights in the legal sense under such circumstances. It is merely a recognition that, when social interests materially suffer, the law affords no protection to the conflicting private interests. To the extent that society sustains injury, there are no legally protected private interests; likewise to the extent that individual interests are materially invaded, society has no legally protected interests.⁷⁰ If we substitute the word "all" for "another," Constitutional law seeks for the "sum of the circumstances according to which the will of the one may be reconciled to the will of 'another' according to a common rule of freedom."⁷¹ This was Kant's definition of right (Recht), and with this revision it represents indeed the "fixed point in the sense of an unattainable and yet sure guiding star"⁷² of the law, for it contemplates justice, or right, to the individual and right to society. So by superimposing upon Kant's conception a doctrine of "social interests," we socialize it into a workable twentieth century philosophy.

Thus the two conceptions, each a check upon the other, strive neither to produce exclusively public justice in the sense of exploiting the minority through the individual, nor yet absolute individual justice by exploiting the majority through society, by means of

⁷⁰Cf. Mill's formula for liberty: "To individuality should belong the part of life in which it is chiefly the individual that is interested; to society the part which chiefly interests society." *On Liberty*, 104 (Atlantic Monthly Press ed., 1921).

⁷¹See Kant, *Metaphysische Anfangsgruende der Rechtslehre, Einleitung*, B.

⁷²Stammler, *Theory of Justice*, 107 (1925).

exploded theories of natural law and inalienable rights of man.⁷³ On the other hand, the net result of the balancing process must be a gradual and reasonable invasion of each type of interests until the people, both as individuals and as members of a growing and constantly changing society, secure the greatest possible liberty according to the "common rule of freedom."

In the weighing of public interests against private interests it has been contended that the courts are, in fact, merely considering individual interests, or groups of individual interests, all interests being merely some form of private or individual interests.⁷⁴ On the other hand it is maintained that what we speak of as public or social interests represent the only concern of the law.⁷⁵ This premise necessitates the conclusion that the law protects individuals only for the sake of society, while the former proposition leads to the conclusion that the law protects society only for the sake of individuals. Whether regarded from one point of view or the other, it remains that the balancing process must take place, and interests, some of which more widely affect the public, must be weighed against interests which, on the other hand, affect but a small proportion of society. Law, as the exclusive guardian of the former, must assume communistic tendencies; as the exclusive guardian of the latter, it tends to support economic privilege. Most certainly the nineteenth century stressed individual freedom at the expense of the masses, to society's detriment. Law, with its object the protection only of private interests and the satisfaction of private wants,⁷⁶ ignored the demands of progressing society. Adjustment was bound to come,

⁷³"The right of acquiring and possessing property, and having it protected, is one of the natural, inherent and inalienable rights of man." *Vanhorn v. Dorrance*, 2 Dal. 304, 310, 12 L. Ed. 391 (1795). Cf. *Richardson, Constitutional Doctrines of Justice Oliver Wendell Holmes*, Introduction, 13 (1924): "He (Holmes) cannot believe in natural rights of man. In all society, he says, duties and rights arise from practical necessity of forbearance, if men are to live together and exist. But he finds no inherent right which permits one man to live beside another. The fact that they do bear and forbear is based upon utilitarian consideration." With this, compare Holmes in 32 *Harv. L. Rev.* 40, 42 (1918).

⁷⁴See Corbin, *ante*, note 69.

⁷⁵"The interests of mankind cannot, like man's will, be opposed to those of society." *Korkunov, Theory of Law*, 112 (1909). Cf. Pound, "Interests of Personality," 28 *Harv. L. Rev.* 343, 349 (1915).

⁷⁶Cf. *Constitution of Washington*, I, 1.

and, so far as labor legislation was concerned, the readjustment was started a half century ago. Law must work out a solution involving a reasonable protection for both types of interests. It can not be seriously doubted that under ever changing conditions, as more complex social and economic problems arise, resulting from the progress of civilized society, more interdependence of the different elements of which society is composed is inevitable, and increasing public wants are apt to become, for the nonce, paramount to private needs. Such is the price of civilization.

More and more the wide range of social interests makes new demands upon the law, and the view that law is a social institution calculated to satisfy social wants⁷⁷ may at times cause us to lose sight of the interest that society must have in the protection of private interests, for it is to the advantage of the majority to deal fairly with minorities.⁷⁸ But we must not ignore the fact that by translating private interests into social interests or by regarding the latter in terms of the former, we are not changing the essential nature of the problem.

Perhaps it is not too much to attribute largely the rise of the social view of law to Jhering. His remarkable definition of a legal right has been said to be indicative of the complete change of attitude toward law.⁸⁰ German jurists have not been slow to expand this philosophy,⁸¹ nor have the French been tardy to recognize its

⁷⁷See Pound, *Introduction to the Philosophy of Law*, 99 (1922): I am content to think of law as a social institution to satisfy social wants * * * the claims and demands involved in the existence of civilized society * * * by giving effect to as much as we may with the least sacrifice, so far as such wants may be satisfied or such claims given effect by an ordering of human conduct through politically organized society."

⁷⁸This has long been recognized. Cf. Bracton, *De Legibus Angliae*, I, 21. (Twiss, 1878): "Private right is that which pertains primarily to the interests of individuals, and which pertains in a secondary manner to the State. Whence it is said to be expedient for the State that no one should misuse his substance, and so reciprocally, that it interests the State primarily, that it should in a secondary manner regard the interest of individuals."

⁷⁹See *ante*. n. 64.

⁸⁰Cf. Korkunov, *supra*, 112.

⁸¹Dernburg argues that a right is not conferred by law for the protection of the individual alone, but to secure human needs. The interest involved determines the legal use of a right. *Pandekten*, I, 34.

significance.⁸² In America, Constitutional law has conceded the value of scientific data in estimating social interests in the triumph of the sociological brief,⁸³ although subsequent events have indicated that only the beginning of the immediate problem here involved has as yet been met.⁸⁴ In private law as well, premises have been subjected to a critical eye with a view to protecting the public in view of the facts and conditions of society as they exist, not only in the problem of handling actions for damages⁸⁵ to person, but to property as well.⁸⁶

The courts have latterly recognized, in a general way, the nature of the balancing process between public and private interests, although not always the exact process of balancing. Mr. Justice Harlan, in *Adair v. United States*,⁸⁷ speaking of liberty of contract, said that it was "subject to the fundamental condition that no contract whatever its subject matter can be sustained which the law upon reasonable grounds forbids as inconsistent with the public interests or hurtful to the public order, or as detrimental to the common good." Again, it was declared that the Fourteenth Amendment debar States from striking down personal liberty or property rights or materially restricting their normal exercise excepting so far as may be incidentally necessary for the accomplishment of some other paramount object and one that concerns the public welfare.⁸⁸

⁸²See Planiol's discussion of an abusive or anti-social exercise of a right. *Traite Elementaire De Droit Civil*, II, 871 (4th ed.), translated in *Pound's Readings in Roman Law*, 76 ff (1914).

⁸³For example Brandeis' brief in *Muller v. Oregon*, 208 U. S. 412, 52 L. Ed. 551, 28 Sup. Ct. 324 (1908).

⁸⁴See *post*, 60.

⁸⁵"Precedents drawn from the days of travel by stage coach do not fit the conditions of travel today. The principle that the danger must be imminent does not change, but the things subject to the principle do change. They are whatever the needs of life in a developing civilization require them to be." Cardozo, J. in *MacPherson v. Buick Motor Co.*, 217 N. Y. 382, 111 N.E. 1050, 1053 (1916).

⁸⁶For example, the principle of "reasonable user" or "natural user" of property. See *Giles v. Walker*, L. R. 24 Q. B. D. 656 (1890). See note in *Ames and Smith, Cases on Torts*, 928 (Pound's ed., 1919). See E. W. Huffcut, "Percolating Waters: The Rule of Reasonable User," 13 *Yale L. J.* 222 (1904).

⁸⁷208 U. S. 161, 52 L. Ed. 436, 28 Sup. Ct. 277 (1908).

⁸⁸*Coppage v. Kansas*, 236 U. S. 1, 18-19, 59 L. Ed. 441, 35 Sup. Ct. 240 (1915).

But it is not always easy to determine which way the balance swings. Mr. Justice Holmes, voicing this difficulty, remarked in *Hudson County Water Co. v. McCarter*:⁸⁹

“The boundary at which conflicting interests balance cannot be determined by any general formulae in advance, but points in the line of helping to establish it are fixed by decisions that this or that concrete case falls on the nearer or farther side.”

The public interests change so frequently and the line that fixes the balance is so variable that only a few years intervening may be sufficient to make that which was subordinate to private interest before, thereafter paramount to individual interest, and consequently justly demand the further sacrifice of the latter to promote the public welfare.

Again not all interests are protected by the law and different interests are given varying degrees of protection. The circumstances of each case must govern. The courts have taken different attitudes toward the same interests at different times. Thus before 1898, as is suggested later, it seemed that the social interest in morality was sufficient to justify an infringement of private rights in many instances where the social interest in the public health would not so do. After *Holden v. Hardy*,⁹⁰ and later, *Muller v. Oregon*,⁹¹ when the courts began to secure more information as to the effect upon health of certain conditions to which workmen were subjected, the scales turned in a manner detrimental to private interests, because of the greater recognized interest of the public in the health of workmen. Today, with the decadence of Puritanism in addition, the social interest in health and sanitation would probably be conceded vastly greater, so far as the invasion of private interests is concerned, than the social interest in public morals. Whatever turn the balance takes from time to time, the principle still remains that private interests must be subjected in an ever increasing degree, to the process of weighing against social interests, and, when outweighed, in the minds of reasonable men, must be proportionally sacrificed; for the law, in order to live, must serve society.

⁸⁹209 U. S. 349, 355-356, 52 L. Ed. 436, 28 Sup. Ct. 277 (1908).

⁹⁰169 U. S. 366, 42 L. Ed. 780, 18 Sup. Ct. 383 (1898).

⁹¹208 U. S. 412, 52 L. Ed. 551, 28 Sup. Ct. 324 (1908).

III.

a. Statutes Relating to Hours of Labor

The history of the judicial review of hours of labor statutes, in general, begins approximately in 1876 when the Massachusetts court sustained an act limiting the employment of women and children under eighteen engaged in manufacturing establishments to sixty hours a week.⁹² The court goes about its business cautiously and does not face the issue squarely. The real conflict was evaded and the act upheld on the theory that it did not, in terms, limit a woman's right to labor as many hours per day or per week as she liked but "merely prevented her employment continuously in the same service more than a certain number of hours."

The period from 1876 to 1898 was a barren one as to progress in upholding hours of labor statutes, enacted for the preservation of the health and welfare of the employes.⁹³ Laws had been adjudged constitutional, however, which restricted the hours of labor of employes of laundries in large cities by prohibiting them from working between the hours of ten P.M. and six A.M. and prohibiting work on Sunday altogether. This result was reached in the California court⁹⁴ and in the Supreme Court of the United States⁹⁵ and was predicated upon the power of the State and of cities to guard against fires.⁹⁶ The interest considered was the public safety. The protection of the lives and health of laborers was not involved. There was no indication, as yet, that the welfare of a particular class of workers might be sufficient public interest to justify interference by the State in the relations between them and their employers.

⁹²Commonwealth v. Hamilton Manufacturing Co., 120 Mass. 383 (1876).

⁹³In 1881 an ordinance of San Francisco prohibiting women from being employed in places where intoxicating liquors were sold was declared unconstitutional, as being in excess of the police power. *In re Maguire*, 57 Cal. 604. A different result, however, was obtained sixteen years later. *In re Considine*, 83 Fed. 157 (1897).

⁹⁴Ex parte Moyner, 65 Cal. 33, 2 Pac. 728 (1884).

⁹⁵*Son Hing v. Crowley*, 113 U. S. 703, 28 L. Ed. 1145, 5 Sup. Ct. 730 (1885); *Barbier v. Connolly*, 113 U. S. 27, 28 L. Ed. 923, 5 Sup. Ct. 357 (1885).

⁹⁶*Barbier v. Connolly*, *ibid.* 30.

On the other hand, throughout these years, the courts were almost unanimous in delivering themselves of the opinion that such interest did not exist, in this respect, as to warrant so great an interference with freedom of contract.⁹⁷ In *Lowe v. Reese Printing Co.*, probably due, in part, to the fact that the statute might almost be construed as a wage regulating act,⁹⁸ the result was made to rest upon a flat denial of the right on the part of the State to prohibit more than eight hours of work. "The legislation attempted," said the court, "cannot be defended as a police regulation, as was attempted in argument, for, under pretense of the exercise of that power, the legislature cannot prohibit harmless acts which do not concern the health, safety, and welfare of society."⁹⁹ By relying largely on the Nebraska decision, the Illinois court reached a similar result, the following year.¹⁰⁰ The extreme individualistic philosophy of the courts of these years was best indicated by the argument based upon freedom of contract as an absolute right. Liberty included the right to acquire property; labor was property; to acquire property of this kind, contracts must be made and performed; therefore the privilege of contracting was both a liberty and a property right. "If one man," argues the court, "is denied the right to contract as he has hitherto done under the law, and as others are still allowed to do so by the law, he is deprived of both liberty and property to the extent to which he is thus deprived."¹⁰¹

The courts regarded liberty of contract as inviolable. No interference therewith could be "with due process of law." In addition, the welfare of laborers was not a legitimate object of legislative concern. The public could have no interest in them. The Supreme Court, however, in 1898, threw the weight of its authority in the other direction, and the first important step in upholding social legis-

⁹⁷*Wheeling Bridge and Terminal Co. v. Gilmore*, 8 Ohio C. C. 658 (1894); *Low v. Reese Printing Co.*, 41 Neb. 127, 59 N.W. 362 (1894); *Re Eight Hour Law*, 21 Colo. 29, 39 Pac. 328 (1895); *Ritchie v. People*, 155 Ill. 98, 40 N.E. 454 (1895).

⁹⁸The act did not, in terms, prohibit labor for more than eight hours, but provided that eight hours should be considered a day and further provided for over-time pay for longer periods.

⁹⁹59 N.W. 362, 368.

¹⁰⁰*Ritchie v. People*, *supra*.

¹⁰¹*Ibid.* 105.

lation was made.¹⁰² The Utah act in question was an eight hour law for workers in underground mines. It was sustained as a valid exercise of the police power. Health was the basis of the social interest, and the health of laborers in mines was regarded as sufficient justification for the exercise of the power, applying both to employers and employes alike.¹⁰³ "These employments," declared the Court, "when too long pursued, the legislature has judged to be detrimental to the health of the employes and so long as there are reasonable grounds for believing this to be so, its decision upon this subject cannot be reviewed by the Federal Courts."¹⁰⁴

In spite of the Federal decision on this subject, the Colorado court, following its own precedent,¹⁰⁵ invalidated a statute similar to the Utah act, insisting that the decision of the Supreme Court was not binding on the States to establish the validity of such a law under the State constitution.¹⁰⁶ "It would be absurd," reasoned the court, "to argue that, while the process itself is continuous, limiting the hours of those laboring in a smelter in any wise conduces to preserve the health of any portion of the public. That is to say, three shifts of laborers, working eight hours each, would affect the public health to the same extent, if at all, as would two shifts at twelve hours each . . . Indeed, the only object that can rationally be claimed for it, is the preservation of the health of those working in smelters . . . How can an alleged law that purports to be the result of the exercise of the police power, be such in reality, when it has for its only object not the preservation of the health of others or of the public health, safety or morals or general welfare, but the welfare of him whose act is prohibited when if committed, it will injure him who commits it, and him only?"¹⁰⁷ Subsequently, after a constitutional amendment authorizing such laws, this same court invalidated a similar act, upon a technicality of construction.¹⁰⁸

¹⁰²Holden v. Hardy, 169 U. S. 366, 42 L. Ed. 780, 18 Sup. Ct. 383 (1898).

¹⁰³See Short v. Mining Co., 20 Utah 20, 57 Pac. 720 (1899), holding that the act applied alike to employer and employe, and that consequently an employe who had worked overtime could not recover on a *quantum meruit*.

¹⁰⁴Holden v. Hardy, *supra*.

¹⁰⁵Re Eight Hour Law, *supra*.

¹⁰⁶In re Morgan, 26 Colo. 415, 58 Pac. 1071 (1899).

¹⁰⁷58 Pac. 1075.

¹⁰⁸Burcher v. People, 41 Colo. 495, 93 Pac. 14 (1907).

With this exception, however, *Holden v. Hardy* bore fruits. Hours of labor statutes were generally approved by the courts¹⁰⁹ until the reactionary decision of the Supreme Court in 1905 called a temporary halt. The acts therefore had applied either exclusively to women and children or to men engaged in patently dangerous occupations. *Lochner v. New York*¹¹⁰ raised the constitutionality of an act as applied to bakers. The Court was unable to see a reasonable foundation for holding the law necessary or appropriate as a health law to safeguard the health of bakers.¹¹¹ The State courts, however, had been invalidating these acts on the grounds that to safeguard the health of a certain class of laborers was beyond the scope of the police power and thus was not the legitimate object of legislative solicitude. There were vigorous dissents to the *Lochner* decision,¹¹² the difference being in the application of the standard of reason. Mr. Justice Peckham could see no reasonable relation between hours of labor for bakers and either the public health or that of the bakers, while the dissenting judges were unable to say that there was no such reasonable relationship.

Some faltering was evidenced on the part of the State courts after the *Lochner* decision¹¹³ until *Muller v. Oregon* was decided in the Supreme Court three years later.¹¹⁴ Technically, the Court maintained its position in the *Lochner* case. General liberty to contract "in regard to one's business and the sale of one's labor is (still) protected by the Fourteenth Amendment." But the act in the *Muller* case was applicable to women only, and the Court found the difference in sexes the margin of reasonableness by which the case was distinguishable from the *Lochner* case. The physical well-

¹⁰⁹*Commonwealth v. Beattie*, 15 Pa. Super. 5 (1900); *State v. Buchanan*, 29 Wash. 602, 70 Pac. 52 (1902); *Wenham v. State*, 65 Neb. 394, 91 N.W. 421 (1902); *Re Ten Hour Law for St. Ry. Corporations*, 24 R. I. 603, 54 Atl. 602 (1902); *State v. Cantwell*, 179 Mo. 245, 78 S.W. 569 (1903); *Ex parte Kair*, 28 Nev. 127, 80 Pac. 463 (1904); *Re Boyce*, 27 Nev. 299, 75 Pac. 1 (1904).

¹¹⁰198 U. S. 45, 49 L. Ed. 937, 25 Sup. Ct. 539 (1905).

¹¹¹See the opinion of Mr. Justice Peckham, *ibid.* 61.

¹¹²Particularly that of Mr. Justice Holmes, *ibid.* 74.

¹¹³In *People v. Williams*, 189 N. Y. 131, 81 N.E. 778 (1907); *Burcher v. People*, *supra*.

¹¹⁴208 U. S. 412, 52 L. Ed. 551, 28 Sup. Ct. 324 (1908).

being of mothers was of sufficient public interest to make the law sound. The New York statute had applied to fathers, and was, therefore, unreasonable.

Progress was now made steadily and year after year witnessed decisions in the State courts favorable to labor.¹¹⁵ Illinois enjoyed a reversal by its court of the position taken in the earlier *Ritchie* case,¹¹⁶ and California went so far as to enact a law limiting the hours for the labor of women and children to eight hours per day and forty-eight hours per week prohibiting their employment in some work altogether, the same being upheld by the United States Supreme Court.¹¹⁷ This was perhaps the most restrictive legislation yet to come before the courts. But the old shibboleth of individual freedom, without regard for social interests was being relegated to obscurity. In some cases it was subjected to ridicule. The Mississippi court, in a droll moment, paused to remark "the notable fact that it is rare for the seller of labor to appeal to the courts for the preservation of his inalienable rights to labor." "This inestimable privilege," continued the court, per Cook, J., "is generally the object

¹¹⁵Ex parte Martin, 157 Cal. 51, 106 Pac. 235 (1909): An eight hour law for women allowing time out for lunch. Whitney v. Bloom, 163 Mich. 419, 128 N.W. 913 (1910); a ten hour day, fifty-four hour week for women in stores, warehouses, etc. Ritchie v. Wayman, 244 Ill. 509, 91 N.E. 695 (1910); a ten hour law for women in mechanical institutions, factories or laundries. People v. Erie R. R. 198 N. Y. 369, 91 N.E. 849 (1910): An eight hour day for trainmen and telegraph operators; reversed in Erie R. R. v. New York, 233 U. S. 671, 58 L. Ed. 1149, 34 Sup. Ct. 756 (1914), in so far as the act attempted to regulate inter-state commerce, Congress having entirely covered the field in the Hours of Service Act of 1907. State v. Somerville, 67 Wash. 638, 122 Pac. 324 (1912): an eight hour law for women in mechanical and mercantile establishments. State v. Newman Lumber Co., 103 Miss. 263, 60 So. 215 (1912); State v. Lumber Co., 102 Miss. 802, 59 So. 923 (1912); People v. Elerding, 254 Ill. 579, 98 N.E. 982 (1912); an eight hour law for women in hotels. Riley v. Massachusetts, 232 U. S. 671, 58 L. Ed. 788, 34 Sup. Ct. 469 (1913); regulation of hours for women and a requirement for the posting of schedules in advance. People v. Kane, 79 Misc. 140, 139 N. Y. S. 350 (1913); a nine hour day, fifty-four hour week for women and children in factories. But see State v. Barba, 132 La. 768, 61 So. 784 (1913).

¹¹⁶Ritchie v. Wayman, *supra*.

¹¹⁷Bosley v. McLoughlin, 236 U. S. 385, 59 L. Ed. 632, 35 Sup. Ct. 345 (1914); Miller v. Wilson, *ibid*, 373.

of the buyer's disinterested solicitude."¹¹⁸ Hours of labor laws were, in general, constitutional, and courts refused to hold them otherwise even though it appeared that in the particular instance, labor for excessive hours did not produce injurious results, for the statute must be considered, the courts declared, in "its general application."¹¹⁹

As yet, however, measures to come before the courts and to receive their approbation were confined to restrictions upon the hours of labor for women and children or for men engaged in "dangerous occupations." In 1914 a general act, restricting hours for employes in factories to ten hours per day came before the Oregon court and was upheld.¹²⁰ Two years later this decision was affirmed by the Supreme Court¹²¹ in spite of the argument that the act was, in effect, a wage statute.¹²² Although the Massachusetts court arrived at a different result as to baggagemen,¹²³ the Oregon case has substantially ended the controversy over hours of labor laws. The Supreme Court has followed its own precedents,¹²⁴ with the New York Court of Appeals, apparently convinced of the constitutionality of such statutes,¹²⁵ expressly overruling its former decision in *People v. Williams*.¹²⁶ Other States have indicated no reluctance to follow these decisions¹²⁷ with the result that it is safe to say that

¹¹⁸State v. Newman Lumber Co., *supra* 267-268.

¹¹⁹See State v. Somerville, 122 Pac. 324, 325-326 (1912).

¹²⁰State v. Bunting, 71 Or. 259, 139 Pac. 731 (1914).

¹²¹Bunting v. Oregon, 243 U. S. 426, 61 L. Ed. 830, 37 Sup. Ct. 435 (1916).

¹²²The act provided for a ten hour day, but allowed three hours overtime each day at one and one half pay.

¹²³Commonwealth v. Boston & M. R. R., 222 Mass. 206, 110 N.E. 264 (1915).

¹²⁴Dominion Hotel v. Arizona, 249 U. S. 265, 63 L. Ed. 597, 39 Sup. Ct. 273 (1919); Radice v. New York, 264 U. S. 292, 68 L. Ed. 690, 44 Sup. Ct. 325 (1923).

¹²⁵People v. Schweinler Press, 214 N. Y. 395, 108 N.E. 639 (1915), followed in People v. Warden of the City Prison, 215 N. Y. 701, 109 N.E. 1088 (1915).

¹²⁶189 N. Y. 131, 81 N.E. 778.

¹²⁷Dominion Hotel v. Arizona, 17 Arizona 267, 151 Pac. 958 (1915); Spokane Hotel Co. v. Younger, 113 Wash. 359, 194 Pac. 595 (1919), prohibiting the employment of females for more than five hours consecutively without allowing a half hour rest period; State v. Collins, 47 S. Dak. 325, 198 N.W. 557 (1923).

the validity of such legislation is now removed from the slightest doubt.

b. Hours of Labor on Public Works

In 1890 the California court declared unconstitutional an ordinance of the city of Los Angeles which prohibited a contractor, performing work for the city, to employ laborers for more than eight hours in one day, or to employ Chinese labor.¹²⁸ It was, the court said, a direct infringement of the right of such persons to make and enforce their contracts, and was not within the police power of the State. The movement to restrict hours of labor in private employments, it will be remembered, was at this time receiving severe checks at the hand of the courts in spite of the decision in *Holden v. Hardy*. The California case was followed in Louisiana,¹²⁹ though on different grounds, in Washington,¹³⁰ and in Illinois.¹³¹ Ohio produced a similar decision¹³² but the Kansas court in two decisions,¹³³ upheld the State's power to thus restrict hours of labor on public works on the grounds that the legislature could legitimately direct the agents of the State to employ workers on its behalf for no longer than the number of hours stipulated. The later Kansas case was subsequently affirmed by the Federal Supreme Court.¹³⁴

The New York Court, however, which had in 1901 invalidated a minimum wage act for employes on public works on the curious grounds that it invaded the constitutional rights of the contractor and the constitutional rights of municipalities,¹³⁵ declared void an act

¹²⁸Ex parte Kuback, 85 Cal. 274, 24 Pac. 737 (1899).

¹²⁹State v. McNally, 48 La. Ann. 1450, 21 So. 27 (1896); a municipal ordinance invalidated because a violation of the ordinance was made an indictable offense which only the legislature had power to make.

¹³⁰Seattle v. Smythe, 22 Wash. 327, 60 Pac. 1120 (1900); an ordinance of Seattle declared invalid because it was an undue interference with liberty of contract.

¹³¹Fiske v. People, 188 Ill. 206, 58 N.E. 985 (1900).

¹³²Cleveland v. Clements Bros. etc., 67 Ohio St. 197, 65 N.E. 885 (1902).

¹³³Re Dalton, 61 Kan. 257, 59 Pac. 336 (1900); State v. Atkin, 64 Kan. 174, 67 Pac. 519 (1902).

¹³⁴Atkin v. Kansas, 191 U. S. 207, 48 L. Ed. 148, 24 Sup. Ct. 124 (1903).

¹³⁵People v. Coler, 166 N. Y. 1, 59 N.E. 716 (1901). Cf. Treat v. Coler, 166 N. Y. 144, 59 N.E. 776 (1901).

limiting hours of labor on public works.¹³⁶ That such an act could not be upheld as an exercise of the police power, the court considered a "proposition too plain for debate."¹³⁷ The police power was sufficient to include regulation of hours for women and children, as in *Commonwealth v. Hamilton*, and for male adults in dangerous occupations, as in *Holden v. Hardy*, but the class of laborers in the present act was selected by a classification which had no reasonable relation to public health. The act was equally invalid on the ground that the legislature might impose such restrictions as it saw fit upon the manner in which work should be done for the public, because the laborers affected by the act were not working for the State, nor for the public, but for the contractor who was directly responsible for their conduct, although the Supreme Court of the United States in upholding the Kansas act, had expressly rested the decision on the grounds that the employes were working for the State.¹³⁸ In 1904 the New York court successfully distinguished the Atkins case, and again invalidated an hours of labor on public works statute, in its solicitude to protect the constitutional rights of cities.¹³⁹ It was not until a constitutional amendment in 1908 that the effect of these decisions was avoided.¹⁴⁰ The court, however, was stubborn, and continued to deny that such power was vested in the legislature by virtue of its police power,¹⁴¹ but only because the people of the State had commanded that the Freedom of contract formerly enjoyed must yield to this extent.¹⁴²

For the most part, since the Atkins case, such statutes are generally regarded as valid, and have been so held in Washington,¹⁴³

¹³⁶*People v. Orange Co. Road Construction Co.*, 175 N. Y. 84, 67 N.E. 129 (1903).

¹³⁷67 N.E. 129.

¹³⁸191 U. S. 207, 224.

¹³⁹*People v. Grout*, 179 N. Y. 417, 72 N.E. 464 (1904).

¹⁴⁰Art. 12, sec. 1.

¹⁴¹See *People v. Metz*, 193 N. Y. 148, 85 N.E. 1070 (1908).

¹⁴²*Ibid.*, 158. And an act which limited hours of labor to eight hours in printing shops doing work for the State was declared unconstitutional when it appeared that work was also done for others. *People v. Zimmerman*, 58 Misc. 264, 109 N. Y. S. 396 (1908).

¹⁴³*Re Broad*, 36 Wash. 449, 78 Pac. 1004 (1904).

Montana,¹⁴⁴ Oklahoma,¹⁴⁵ and Massachusetts,¹⁴⁶ and it makes little difference whether the acts provide a forfeiture of the contract price by the contractor violating the act, or whether they provide for imprisonment and fine in case of failure to comply. If the statutes are vague in determining when the penalty should attach, they may be unconstitutional,¹⁴⁷ but aside from general requirements of due process in this respect, there seems to be little doubt of the legislatures' power to so regulate the length of time which men shall toil on public works.

c. Hours of Labor for Children

The validity of State legislation restricting the hours which children might labor, and prohibiting them altogether from engaging in some occupations, has never been seriously questioned by the courts. The principle is so consonant with the general attitude of the common law toward infants that little opposition has appeared to challenge the guardianship of the State in this respect. The New York court, in 1894, upheld, as within the police power, an act prohibiting the exhibition of any female child under fourteen, in theatrical performances, dances, or any exhibitions dangerous to life, limb, health or morals of children.¹⁴⁸ The court laid down as the basis for the decision that "it is not, and cannot be disputed that the interest that the State has in the physical, moral and intellectual well being of its members, warrants the implication and the exercise of every just power, which will result in preparing the child, in future life, to support itself, to serve the State and in all the relations and duties

¹⁴⁴State v. Livingston Concrete Building etc. Co., 34 Mont. 570, 87 Pac. 980 (1906).

¹⁴⁵Byars v. State, 2 Okla. Cr. 481, 102 Pac. 804 (1909).

¹⁴⁶Opinion of the Justices, 208 Mass. 619, 94 N.E. 1044 (1911). So also in Texas, Bradford v. State, 78 Tex. Cr. 285, 108 S.W. 702 (1915); in Oregon Ex parte Steiner, 68 Or. 218, 137 Pac. 204 (1913); and in Maryland, Sweeten v. State, 122 Md. 634, 90 Atl. 180 (1915).

¹⁴⁷State v. Read Co., 33 Wyo. 387, 240 Pac. 208 (1925). It is constitutional for a State to provide that only citizens can be employed on public works, and that local citizens be given preference. Heim v. McCall, 239 U. S. 175, 60 L. Ed. 206, 36 Sup. Ct. 78 (1915); Lee v. Lynn, 223 Mass. 109, 111 N.E. 700 (1916). But see the earlier case, Chicago v. Hulbert, 215 Ill. 346, 68 N.E. 786 (1901).

¹⁴⁸People v. Ewer, 141 N. Y. 129, 36 N.E. 4 (1894).

of adult life to perform well and capably its part."¹⁴⁹ In Oregon, some few years later, it was declared that the State might exercise unlimited control.¹⁵⁰ Speaking of children, the court said, "They are wards of the State and subject to its control. As to them the State stands in the position of *parens patriae*, and may exercise unlimited supervision and control over their contracts, occupations and conduct and the liberty and right of those who assume to deal with them. This is a power which inheres in government for its own preservation and for the protection of the life, person and health and morals of its future citizens."¹⁵¹

Courts in other States have taken similar positions,¹⁵² the United States Supreme Court upholding an Illinois act with a provision that employers were required, at their peril, to ascertain that those employed by them were in fact above the age specified.¹⁵³ The court quickly disposed of the latter clause by declaring that "as it was competent for the State in securing the safety of the young to prohibit such employment altogether, it could select the means appropriate to make its prohibition effective. . ."¹⁵⁴ In view of the inability of Congress to regulate in behalf of children, as to employment and hours of labor, either under the commerce clause¹⁵⁵ or under the taxing power,¹⁵⁶ both State and Federal courts of last

¹⁴⁹*Ibid.* 133.

¹⁵⁰See *State v. Shorey*, 48 Or. 396, 86 Pac. 881 (1906).

¹⁵¹86 Pac. 881, 882.

¹⁵²*Collett v. Scott*, 30 Pa. Super. 430 (1906); *Re Weber*, 149 Cal. 392, 87 Pac. 280 (1906); *Re Spencer*, 149 Cal. 396, 86 Pac. 896 (1906); *Lenahan v. Pittston Coal Co.*, 218 Pa. 311, 67 Atl. 642 (1907); *Bryant v. Skellman Hardware Co.*, 76 N. J. L. 45, 69 Atl. 23 (1908); *Starnes v. Albion Manufacturing Co.*, 147 N. C. 356, 61 S.E. 525 (1908); *Inland Steel Co. v. Yedinak*, 172 Ind. 423, 87 N.E. 229 (1907); *Terry Davy Co. v. Nally*, 146 Ark. 448, 225 S.W. 887 (1920); *Kendall v. State*, 113 Ohio St. 111, 148 N.E. 367 (1925).

¹⁵³*Sturgess v. Beauchamp*, 231 U. S. 320, 58 L. Ed. 245, 34 Sup. Ct. 60 (1913).

¹⁵⁴*Ibid.*, 325.

¹⁵⁵*Hammer v. Dagenhart*, 247 U. S. 251, 62 L. Ed. 1101, 38 Sup. Ct. 529 (1918).

¹⁵⁶*Bailey v. Drexel Furniture Co.*, 259 U. S. 20, 66 L. Ed. 817, 42 Sup. Ct. 449 (1922). A more liberal attitude toward acts of Congress might have produced a different result. *Cf.* *United States v. McCray*, 195 U. S. 27, 49 L. Ed. 78, 24 Sup. Ct. 769 (1904). One other possibility for Federal control, aside from constitutional amendment, may remain, namely the treaty making

resort are apparently not disposed to question the power of State legislatures to so regulate. The infringement of liberty of contract is, in theory, little endangered, inasmuch as minors do not have unlimited capacity to contract, and consequently such further restrictions as the State may impose, in its solicitude as *parens patriae* in safe-guarding the public interest in the welfare of children, are seldom brought in issue.

d. Labor on Sunday

Before the passage of the Fourteenth Amendment, the courts had occasion to pass upon the validity of labor legislation. In 1858 the California court invalidated an act "for the better observance of the Sabbath," declaring that the legislature had no more right to forbid or enjoin the lawful pursuit of a lawful occupation on one day of the week, any more than it could forbid it altogether.¹⁵⁷ Three years later, however, the court sustained an act of this nature "purely as a civil regulation," on the grounds that it spent its whole force upon "matters of civil economy, and was not designated to subserve any religious purpose."¹⁵⁸ To provide for one day of compulsory rest "for the welfare of the general society," the court thought, was not beyond the scope of the power of the legislature.

The Supreme Court settled the question, in general, in *Soon Hing v. Crowley*,¹⁵⁹ in 1884, by upholding an ordinance of San Francisco prohibiting work in laundries on Sunday because of the right of the government to "protect all persons from the physical

power. That Congress may, in pursuance of treaty provisions, accomplish what it would otherwise have no power to effect is established. See *Missouri v. Holland*, 252 U. S. 416, 64 L. Ed. 641, 40 Sup. Ct. 382 (1920). It is subject for speculation whether, if child labor could fairly be regarded as a matter of international concern, a valid treaty might not enable Congress to control child labor in the States. Cf. the language of Mr. Justice Field in *Gorfy v. Riggs*, 133 U. S. 258, 266, 33 L. Ed. 642, 10 Sup. Ct. 295 (1890), and cases cited. See also *Corwin, National Supremacy*, 291-295, and *Burr, Treaty-Making Power of the United States and the Methods of its Enforcement as Affecting the Police Powers of the States*, 327 (1912).

¹⁵⁷Ex parte Newman, 9 Cal. 502 (1858).

¹⁵⁸Ex parte Andrews, 18 Cal. 679 (1861). See also Ex parte Westfield, 55 Cal. 550 (1880).

¹⁵⁹113 U. S. 703, 28 L. Ed. 1145, 5 Sup. Ct. 730 (1883).

and moral debasement which comes from uninterrupted labor."¹⁶⁰ In general, Sunday statutes have been upheld by State courts, even when they were confined to specific kinds of labor.¹⁶¹ Excepting certain kinds of labor in the statute, has not seemed to bother the courts.¹⁶² There have been, however, some courts who have feared lest freedom of contract and property rights were being infringed.¹⁶³ The police power has usually and latterly been found sufficient to authorize such infringement,¹⁶⁴ for the courts have felt that they were unable to say that one day of rest in seven was so extravagant and unreasonable and so disconnected with the probable promotion of health and welfare that its compulsion in law was beyond the power of the legislature.¹⁶⁵

(TO BE CONTINUED)

¹⁶⁰*Ibid*, 710.

¹⁶¹*People v. Havnor*, 149 N. Y. 195, 43 N.E. 541 (1896); *People v. Power Co.*, 86 Misc. 61, 149 N. Y. S. 45 (1914); *People v. Doyle*, 164 App. Div. 795, 150 N. Y. S. 341 (1914); *Carr v. State*, 175 Ind. 241, 93 N.E. 1071 (1911).

¹⁶²*Carr v. State*, *supra*. In *Petit v. Minnesota*, 177 U. S. 164, 44 L. Ed. 716, 20 Sup. Ct. 666 (1900), a statute was upheld which exempted works of necessity and charity, including whatever was needed for the good order, health, and comfort of the community, but specifically stipulating that barber shops were neither necessary or charitable. The Supreme Court found nothing in the Constitution of the United States to prevent the legislature of Minnesota from declaring, as a matter of law, that barbering was neither necessary nor charitable, but leaving other kinds of labor as matters of fact.

¹⁶³*State v. Miksicek*, 225 Mo. 561, 125 S.W. 507 (1909).

¹⁶⁴*People v. Klinek Packing Co.*, 214 N. Y. 121, 108 N.E. 278 (1915); *Perky Bros. v. Commonwealth*, 134 Va. 713, 114 S.E. 764 (1922).

¹⁶⁵But one day of rest in seven laws will be scrutinized closely as to the classes to which they apply, and if the specified or excluded employments do not appear to rest upon a reasonable basis for classification, the same will be unconstitutional. See *State v. POCOEK*, 161 Minn. 376, 201 N.W. 610 (1925).