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The Early English Attitude Toward Business

The most important activity of Englishmen in the Fourteenth Century, and prior thereto, was fighting. The king was primarily a general and the chief concern of the government was with the development and preservation of the military might of the nation. The greatest honor which could come to a young man was to win his spurs in battle. The peaceful pursuits of production and trade were looked upon with scorn. The farmer, the smith, the armorer and the leech were tolerated, and in a measure encouraged, because of the importance of their products and services to the soldier, but such pursuits were regarded as beneath the dignity of gentlemen. The roads, which were little more than ditches,[1] would have made extensive trade impossible even if the people had desired to engage in it. Much of such trade as existed was in the hands of the Jews, generally regarded by the ruling class as fair game for oppression and plunder. Young men, not of noble birth, had no hope of rising to prominence except by attaching themselves as men-at-arms to the following of some lord, and, through bravery and luck, winning his favor.

While the legal records prior to the Statute of Labourers are meagre, such a society is not conducive to the freedom of the producer and trader from governmental control. It is probable, then, that prior to the Fourteenth Century it never occurred to the rulers of the country, or to the producers and traders themselves, that the producer or trader had any right to freedom from governmental regulation.[2] A man's liberty depended upon the strength of his sword-arm. If he was so effeminate as not to enjoy defending, or so weak as to be unable to defend his right to act as

* Professor of Law, Wake Forest College.

1. See Selden Society, 2 Public Works in Mediaeval Law, xv-xvii.

2. 1 Aubrey, The Rise and Growth of the English Nation (1895) 363: "Parliament, consisting exclusively of that class"—the landed class—"and its immediate adherents, struggled on as doggedly and selfishly for the mastery over the labourers, as at other times for the subjugation of the regal prerogative, when it trenched upon the privileges of their own order."

he pleased then he had to rely upon the strength of his military protector, who, in return, exacted tribute and exerted a regulatory power over his activities. Though some lords were kind to and tolerant of the producers born under their protection, or attaching themselves thereto, governmental protection and toleration of production and trade was a paternalistic or expedient protection and toleration, dependent entirely upon the depth of the overlord's paternal feeling and wisdom. Arbitrary rulings and decrees were regarded as matters of course, for production and trade were not engaged in by gentlemen, and only the gentleman was deserving of freedom. The producer and trader were servants necessary for the supply of the military needs and the comforts of the lords and their ladies. The villain was regarded and treated much as the American farmer regards and treats his plowhorses. The smith and the armorer were regarded as we regard a moderately valuable machine. The leech was a bit more highly prized and, to some extent, feared as the possessor of semi-magic powers. The clergy were feared, partly because they combined their religious activities with considerable skill in the noble art of war, but chiefly because they possessed a weapon against which the English broadsword and battle-axe were an inadequate defense. It was an age of violence and men expected oppression from above and servility below. The human mind tends to accept as reasonable and right that to which it has become accustomed. In such a barren soil it is not strange that ideas of individual freedom, as a matter of right, were slow to take root, and often withered before coming to flower.

The Statute of Labourers

Edward III's claim to the throne of France and the Fourteenth Century love of war, resulted in the Hundred Years War, which devastated France but also drained England of thousands of producers. While it was in progress, there swept out of eastern Europe and across the Channel the plague of the Black Death. No part of England escaped its ravages. When the disease finally burnt itself out, England was a thinly populated country. The military machine was threatened with a breakdown, not only by lack of soldiers, but also by lack of producers. The Black Death took its toll from the castle as well as from the hovel, leaving many localities without powerful directors. The result was a general disorganization and lack of discipline. Producers were scarce and inclined to refuse to work at their accustomed tasks and wages. To meet this crisis the Statute of Labourers was enacted

requiring agricultural workers to work for reasonable wages. Similar acts were passed requiring tradesmen to serve applicants and to charge no more than reasonable prices. Violations were punished by criminal proceedings. Thus a tendency toward freedom of the individual producer and trader was nipped in the bud, and industry and commerce were regulated with a heavy hand.[3]

Businesses Subject to Price Regulation in Mediaeval England

The early English law drew no distinction between businesses of a public nature and those of a private nature. Prior to the Eighteenth Century it appears not to have been doubted that every type of business was subject to governmental regulation of both prices and services. The qualifying adjective "common" did not originally signify an exceptional undertaking, but was used to distinguish the person who made his living at a trade from one who rendered such services occasionally.[4] As a matter of neighborliness one might perform services, transport or supply produce without lowering himself into the category of "tradesman" even though he accepted compensation. If he did so customarily that was a different matter. He then tended to lose social standing and subjected himself to governmental interference with his activities, such as was deemed inappropriate in the case of the "gentlemen." The word "common" has several connotations. In its various uses it connotes something frequently recurring, something

3. "Like many of these early enactments, the first Statute of Labourers presents in realistic form the social condition of the time. Originally issued in June, 1349, as an Ordinance by the King and the great men—Parliament being unable to meet because of the Black Death—it finds a place among the Statutes of the Realm, though, in strictness, it is not an enactment. The preamble states that 'a great part of the people, and especially of workmen and servants, late died of the pestilence, many, seeing the necessity of masters, and the great scarcity of servants, will not serve unless they may receive excessive wages.' Every man and woman, free and bond, under sixty years, not a trader, craftsman, or owning or tilling land, and not already in service, was to render this when required. The wages [were] to be such as were usual in 1347, when they began to increase. Lords were to have the first claim on their tenants and bondmen. Refusal to serve was punishable with close imprisonment until obedience was promised. Any reaper, mower, or other servant, leaving without cause or license, was also to be sent to gaol. None were to pay, or promise to pay, more than the accustomed wages in 1347. Any demanding more were to be fined in double the amount, at the suit of any informer, and any lord promising to pay more was to be fined treble. All saddlers, skinners, cordwainers, tailors, smiths, carpenters, masons, tilers, shipwrights, carters, and other artificers and workmen, were not to ask or accept more than the old rates of wages, under pain of imprisonment. Butchers, fishmongers, hostellers, brewers, and all sellers of victuals were to make reasonable charges, and to be content with moderate gains under penalties of paying double to the buyer or the informer. Mayors and bailiffs neglecting to inquire into such cases were to be amerced in treble the amount." Id. at 361.

4. Adler, Business Jurisprudence (1914) 28 Harv. L. Rev. 135, 149-158.

held or enjoyed by more than one person, and something of a low order and vulgar. Today we do not associate the latter meaning with the common carrier, but it is quite likely that this was at least a portion of the significance of the term in early English law. Certainly it is true that those in control of the government of ancient England looked with scorn upon tradesmen, and scorn of the governor for the governed is not conducive to freedom of the latter in his activities. This attitude toward production and commerce continued in England with slowly diminishing force until a considerable time after the colonization of America began, and furnished part of the incentive for the emigration of the colonists. The economic changes of the Industrial Revolution in the Eighteenth Century and the social and economic conditions of the New World, together with the writings of Adam Smith and John Locke, gave to the producer and the trader a greater dignity. The new social standing of the businessman resulted in greater political rights for him and, conversely, more power in politics enhanced further his social status.

The Common Law Duty to Serve

The Statute of Labourers,[5] imposing a duty to serve all who applied at reasonable rates, was probably an act providing machinery and penalties for the enforcement of a duty already felt to rest upon producers and traders, rather than a right-creating, duty-imposing statute. After its repeal[6] there was still an obligation, imposed by the courts, to serve when one engaged in a trade or business.

The origin of the common law duty to serve all who apply is lost in antiquity. The usual explanation is that one who engaged in a common calling "held himself out" to the public generally as willing to serve, and so, assumed an obligation to serve whoever applied.[7] An early decision[8] defines a common carrier as "any man undertaking for hire to carry the goods of all persons indif-

5. See p. 560, supra.

6. The original Statute of Labourers was followed by others of a similar nature. Final repeal came, after the statute had long been obsolete, in 1863 when the Statute Law Revision Act was enacted.

7. "It was because a person held himself out to serve the public generally, making that his business, and in so doing assumed to serve all . . . who should apply . . . that he was liable in an action on the case for refusal to serve . . . by which refusal . . . he had committed a breach of his assumpsit. . . . The fact that one was a common carrier, common inkeeper, common farrier, or common tailor was of itself a general assumpsit to serve." Burdick, Origin of the Peculiar Duties of Public Service Companies (1911) 11 Col. L. Rev. 514, 515.

8. Gisbourn v. Hurst, 1 Salk. 250 (1710).

ferently." An action on the case lay in early times for a breach of an assumpsit even though there was no consideration.

It is rather difficult to find an undertaking to serve all comers in one's effort to earn a living by rendering services or selling goods. It is not likely that the early artisans "entered" their businesses conscious of making such a promise. They did not "enter" the business. They drifted into it or were born into it, and had no other way in which to earn a living. Forcing them to do business with anyone who might apply on the ground of a "holding out" sounds more like judicial rationalizing of a predetermined policy than the enforcement of an actual undertaking. The language of Chief Justice Holt in *Lane v. Cotton*[9] indicates that the basis of the duty to serve lies in the similarity between the positions of public officers and those engaged in a public calling.[10] The Chief Justice must have been hard put to it to find a plausible explanation, since more dissimilar positions than those of an officer of the Crown and a lowly common carter would be difficult to imagine.

If we contrast the social standing of the carter, innkeeper and artisan with that of their customary patrons, we are probably close to the origin of the rule. The early shippers, travelers, guests at inns and purchasers of armor and other goods were not the common people. Almost without exception they were either the noblemen or those acting in their interest. For a tradesman to refuse such a patron would have been an insult, which would not have been tolerated by lawmakers concerned more with maintaining their own class than with abstract justice.[11] The consequences of refusal were serious, since it was difficult to find the needed service elsewhere. The natural tendency to accept as right that to which one has become accustomed asserted itself. There developed a general acceptance of the idea that businessmen must not refuse to serve. This the judges later explained by reasoning which they felt might satisfy those who questioned the justice of the requirement. Whatever the origin of the require-

9. 12 Mod. 472, 1 Lord Raymond 546, 91 Eng. Reprint 220 (K.B. 1701).

10. See Burdick, supra note 7, at 516.

11. "The gravamen of the complaint of the lords [resulting in the Statute of Labourers] was not that the employers could not afford to accede to the demand for increased wages, but that mere tillers of the soil had the temerity to assert themselves in any way whatever, or to take advantage of the law of demand and supply. Competition was unknown and unrecognized. Anger was aroused at what was deemed the presumptuous insolence of the labourers in asking for higher wages, and refusing to work at old rates for payment. The Statute speaks of the 'malice of the servants in husbandry'." 1 Aubrey, op. cit. supra note 2, at 361.

ment may have been, there seems little reason to doubt that the early common law required one who engaged in any business to serve anyone who applied so far as his facilities enabled him to do so.

The Common Law Requirement of Reasonable Rates

The common law requirement that businessmen charge rates no higher than reasonable appears to have been as extensive as the requirement that all who apply shall be served.[12] It has been suggested that originally it went further and applied to anyone performing a service, even though not regularly in the business,[13] but this is doubtful. Since the power to charge exorbitant rates is a power to refuse to serve those unable to pay such rates, the requirement of rates no higher than reasonable follows as a corollary from the requirement that anyone applying must be served. The two rules apparently sprang up simultaneously, the purpose of the price limitation being to give practical effect to the duty to serve.

The Early Common Law and the Right to Charge Discriminatory Prices

From the common law requirement that businessmen charge no more than reasonable rates some writers and judges have attempted to deduce a contemporaneous requirement that the same price be charged to all who are given the same service under similar circumstances.[14] These writers proceed from the common law rule that common carriers[15] can charge no more

12. Beale and Wyman, Railroad Rate Regulation (2 ed. 1915) 4, § 1.

13. Burdick, supra note 7.

14. Homestead Co. v. Des Moines Electric Co., 226 Fed. 49 (S.D. Iowa 1915); Messenger v. Pennsylvania R.R., 37 N.J. Law 531, 18 Am. Rep. 754 (1874); Shipper v. Pennsylvania R.R., 47 Pa. St. 338 (1864); Coggs v. Bernard, 2 Lord Raymond 909, 92 Eng. Reprint 107, 1 Smith's Leading Cases 175 (K.B. 1703). Landis, D.J., in United States v. Chicago & A. R.R., 148 Fed. 646, 648 (N.D. Ill. 1906): "No rate can possibly be reasonable which is higher than anybody else has to pay." Redfield, Railroads (6 ed.) 101: "But as the rule is clearly established at common law that a carrier is bound by law to carry everything, which is brought to him for a reasonable sum . . . it would seem to follow that he is bound to carry for all at the same price, unless there is some special reason for the distinction. For, unless this were so, the duty to carry for all would not be of much value to the public, since it would be easy for the carrier to select his own customers at will by the arbitrary discrimination in his favor. . . . Carrying for reasonable compensation must imply that the same compensation is accepted always for the same service, else it could not be reasonable either absolutely or relatively." Hutchinson, Carriers (3 ed. 1906) 567, § 521: "A reasonable compensation in each case does not, however, necessarily mean absolute uniformity of rates in all cases. It simply requires that there shall be no unreasonable and hence no unjust discrimination."

15. That this requirement of uniformity, if it existed, was not limited to common carriers, but extended to all businesses, see note 4, supra.

than a reasonable rate as their major premise, and their definition of reasonableness—no rate can be reasonable if it is more than another pays for like services—as the minor, to the conclusion that the common law of early days forbade discrimination in rates by the common carrier. The flaw in this logic is in the minor premise. It is the result of the various connotations of "reasonable." To determine whether different rates to shippers similarly situated can both be reasonable, as that term is used in the early common law requirement that rates of common carriers be reasonable, we must look, not to abstract theories of justice, but to the purposes for which the common law rule was made. It is clear that none of the early cases required uniformity of rates.[16] The source of the requirement of reasonableness was in the duty to serve all. Reasonable rates were required so that the carrier could not by extortionate rates deny the right of the shipper to have his goods carried. So it becomes clear that the term "reasonable" as used in the early common law rule connoted rates reasonable per se, not reasonable relatively.[17] Consequently, it is not correct to couple the early rule of reasonableness with any other meaning of reasonable than that of cheapness. The common law could not proceed from the requirement of reasonable rates to a requirement of no discrimination by sound deductive logic.

The Early Common Law and Discrimination in Facilities

While the early common law did not forbid preferences in rates, it seems never to have been doubted that the requirement to serve all who apply did imply substantial equality of service and facilities.[18] The duty to serve is the duty to serve with reasonable promptness. To delay an applicant until a subsequent applicant could be served was apparently regarded as unjustifiable. To serve one applicant free or at a reduced rate is not an infringe-

16. See Attorney General v. Birmingham & Derby Junction Ry., 2 Ry. & Can. Cas. 124 (1840); Blackburn, J., in Great Western Ry. v. Sutton, L.R. 4 H.L. 226 (1869); Merick, J., in Fitchburg R.R. v. Gage, 78 Mass. 393 (1859); Westcott, J., in Johnson v. Pensacola and P. Ry., 16 Fla. 623 (1878); Cooper, J., in Ragan v. Aiken, 77 Tenn. 609 (1882); Doe, J., in McDuffie v. The Portland & Rochester R.R., 52 N.H. 430, 13 Am. Rep. 72 (1873); Baker, J., in St. Louis, A. & T. H. R.R. v. Hill, 14 Ill. App. 579 (1884). Story, Bailments (8 ed.) § 508 (said not to have been written by Story, but by the editor of the eighth edition. See Note 8 Am. Ry. & Corp. Rep. 700). Beale and Wyman, supra note 12, at 531, § 612; Burdick, supra note 7, at 529; Kline, Origin of the Rule Against Unjust Discrimination (1917) 66 U. of Pa. L. Rev. 123.

17. See Blackburn, J., in Great Western Ry. v. Sutton, L.R. 4 H.L. 226, 237 (1869).

18. See Chicago & N.W. R.R. v. People, 56 Ill. 365 (1870); McDuffie v. The Portland & Rochester R.R., 52 N.H. 430, 13 Am. Rep. 72 (1873). Burdick, supra note 7.

ment of another's right to a cheap rate. The two prices are totally unrelated, except for evidential purposes, in determining the cheapness of the second price. However, to give one applicant all of the available facilities is directly connected with denial or postponement of service to the other. The applicant who first applied acquired, at the time of his application, a right to the use of the facilities then available, which the businessman could not transfer against that applicant's will to another. Thus the rule requiring service implied a duty to serve in order of application.

Subsequent Changes in the English Attitude Toward Business

The disintegration of the feudal system, the emergence of a strong central government from the struggles of the Wars of the Roses, and the resulting decline of the power of the local lords produced a more mobile population. Communication was made easier by considerable improvements in roads. The period of relative peace under the Tudor Dynasty and the rise of England's sea power with the resulting voyages of discovery and exploration, turned men's attention to trade and production. The Protestant Reformation contributed the idea of the individual's freedom and responsibility in spiritual affairs, and awakened a nation-wide interest in morals and ethics. The revival of learning and the discovery of printing developed new thoughts and made their communication easier. Religious refugees from France and other continental countries brought with them a love for freedom and new commercial interests and abilities. Manufacturing expanded, and with its expansion cities and towns grew in size and importance. The exchange of goods became more important in English life, and the standard of living gradually rose.

Before the Industrial Revolution these gradual changes in English life were tending to produce an increasing respect for the individual. With this came the feeling that the individual was both able and entitled to handle his own affairs free from governmental restrictions so long as he committed no violence and did not infringe upon the property rights of others. There was no sudden change in philosophies, but a long-continued gradual eroding away of the acceptance of a semi-paternalistic, semi-domineering government. All through the absolute monarchies of the Tudors and early Stuarts, and through the equally autocratic rule of the Puritans, these forces were at work. The Industrial Revolution was the result, not the cause, of these changes, though the rapid succession of inventions speeded the growth of the impor-

tance of production and commerce. Locke's philosophy of little governmental interference was seed sown on fertile ground. It, the economic theories of Adam Smith, and the invention of machines making mass production possible, all worked together to produce changes in the English government's attitude toward business. Not the least important of the factors contributing to the change was the need for capital in industry and trade, which resulted in the formation of companies. Into these the upper classes of England's society poured their wealth, and dividends upon their investments increased their respect for businessmen. As their money flowed into businesses, it carried with it some of their prestige and freedom. Thus production and trade came to be regarded as matters possessed of some dignity. At least the aristocracy could engage in such activities by proxy, and in so doing they came to believe in laissez faire.

Business cannot flourish without some measure of governmental interference with individual activity. Businesses upon which production and selling depend for their very life have always been, and probably always will be, regulated by government when the forces of competition and ethics fail. In the period of the late Eighteenth and Nineteenth Centuries competition, if not ethics, sufficiently safeguarded the consumer against prices so exorbitant as to amount to a denial of service. Laws requiring service and regulating prices fell into disfavor so far as the vast majority of businesses were concerned; but in exceptional types of businesses, of which transportation is the most notable example, they were never abandoned.

Imposition Upon English Railroads of the Duty to Charge Non-Discriminatory Rates

From the date of their first appearance upon the scene, railroads were required to serve all who applied, and at reasonable rates. The idea of rate regulation to prevent discrimination appears in some of the early special acts chartering canal companies.[19] However, little litigation arose under the early canal charters. The close similarity of canals to public highways was probably the reason for the insertion of equality clauses in their charters. It was not until the coming of the railroad that the English law undertook seriously to protect the shipper or consumer against cheaper rates to another, his own being reasonable per se.

19. The charter of the Swansea Canal Company, 34 Geo. III, c. 119, provided that the rates charged should be equal throughout the length of the said intended canal.

Thus it may fairly be said that the railroad brought into the English law the idea that rates must be equal to all applicants for similar services under similar conditions. The development of the idea has proceeded almost entirely upon the analogy, real or alleged, to railroads of the other businesses subjected to the requirement.

The economic changes produced by the invention of the railroad will be discussed later.[20] They were the chief factors in the imposition of the requirement of equality of rates. The railroad had other characteristics, which no doubt contributed to the passage of anti-discrimination laws. The physical dangers associated with railroad operation have no direct connection with the regulation of rates, but the fear with which the English people viewed the trains tended to produce a feeling that this was an "unnatural" business, and one which should be kept under close governmental supervision. Furthermore, although the early railroads did some carrying, they were also highways upon which the shipper could place his own vehicle for a toll. The similarity of the railroad to the public road no doubt played a part in the development of the idea that the same rate should be charged everyone for the same service.[21] Again, most of the railroads were operated by corporations, which, being impersonal, have always been regarded as subject to governmental regulation to a greater degree than individual businessmen. While the earliest general statute regulating railroads provided, "Whenever the term . . . railway company . . . is used in this Act, the same shall extend to and be construed to include the proprietors for the time being of any railway, whether a body corporate or individual,"[22] and similar provisions are found in the statutes dealing specifically with rate discrimination,[23] it is, nevertheless, significant that these were all acts passed to regulate railway companies, and the unincorporated operators were included as an incident.

Same—Lord Shaftesbury Clauses

Prior to 1845 the English railroad companies were incorporated by special acts. In these acts were inserted clauses requiring equality of rates. These came to be known as Lord Shaftesbury

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20. See p. 584 et seq., infra.

21. See Brewer, J., dissenting in Budd v. New York, 143 U.S. 517, 549, 12 S.Ct. 468, 478, 36 L.Ed. 247, 257 (1892).

22. Railway Regulation Act, 1 & 2 Vict. (1838) c. 98.

23. Railway Regulation Act, 8 & 9 Vict. (1845) c. 20; Railway and Canal Traffic Act, 17 & 18 Vict. (1854) c. 31.

Clauses.[24] Such a clause appeared in the act incorporating the Great Western Railroad. It provided:

> "... the aforesaid rates and tolls to be taken by virtue of this act shall at all times be charged equally and after the same rate per ton per mile, throughout the whole of the said railroad, in respect of the same description of articles, matters or things, and that no reduction or advance in the said rates and tolls shall, either directly or indirectly, be made partially or in favor of or against any particular person or company, or be confined to any particular part of the said railway, but that every such reduction or advance of the rates and tolls upon any particular kind or description of articles, matters or things shall extend to and take place throughout the whole and every part of the said railway, upon and in respect of the same description of articles, matters and things thereon; anything to the contrary thereof in anywise notwithstanding."

This clause was interpreted by Chief Justice Tindal in *Parker v. Great Western Railway Company*.[25] Parker was what is known in America as a forwarding agent. He collected from various shippers their small parcels, combined them into one, carried it to the station of origin and consigned it to himself at the station of destination, where his representative received it and distributed the several parcels to the persons for whom intended. Parker's profit in the venture lay in the difference in the railroad rates for large and small parcels. To avoid loss of the profitable small parcel business, the railroad refused to charge Parker according to the aggregate weight but demanded the usual rate on each package. The Chief Justice in holding this was a violation of the clause said:

> "And it is to be observed that the language of these acts of Parliament is to be treated as the language of the promoters of them: they ask the legislature to confer great privileges upon them, and profess to give the public certain advantages in return. Acts passed under such circumstances should be construed strictly against the parties obtaining them, but liberally in favor of the public."

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24. "At first the Legislature in each special act inserted such clauses as seemed to the particular committees reasonable in each case. Very soon these came to be usual clauses which the then Chairman of the Committee of the House of Lords used to require to be inserted in all railway bills with more or less modification. They were known by his name as 'Lord Shaftesbury's Clauses'." Blackburn, J., in Great Western Ry. v. Sutton, L.R. 4 H.L. 226, 237 (1869).

25. 7 Man. & G. 253, 135 Eng. Reprint 107, 3 Ry. & Can. Cas. 563 (1844).

It can be seen that this clause forbade preferences to favored individuals, and required rates to be uniform per ton mile throughout the length of the railroad, thus prohibiting differences per mile based upon length of haul or the localities between which the shipment moved. Differences in rates had to be justified by differences in the kind of freight, or not at all. When one remembers that the railroads of the 1830's were not many miles in length, the requirement that all portions of the track be served at the same rate does not seem quite so arbitrary as would a similar requirement imposed upon our modern railroads.[26]

Same—General Statutes Dealing with Railroad Discrimination

In 1844 Parliament provided that any electrical telegraph line established by any person upon the right of way of any railroad, unless it be for the exclusive use of the government or of the railroad, must be open for the sending of messages by all persons without favor or preference either in service or in rates.[27]

The Railway Clauses Consolidation Act of 1845[28] was the first general act providing for railroad incorporation. In it Parliament announced its intention to "comprise in one general act sundry provisions usually introduced into acts of Parliament authorizing the construction of railways." It forbade different rates to different persons for passengers, carriages or goods of the same description passing over the same portion of the railroad under the same circumstances.[29] The act did not require that rates be uniform for all portions of the railroad, thus permitting discrimination between localities, nor was equality required where the circum-

26. The important Manchester and Liverpool Railroad, completed in 1830, was approximately forty miles in length.

27. Railway Regulation Act, 7 & 8 Vict. (1844) c. 85.

28. 8 & 9 Vict. (1844) c. 20.

29. Section 90 reads: "And whereas it is expedient that the company should be entitled to vary the tolls upon the railway so as to accommodate them to the circumstances of the traffic, but that such power of varying should not be used for the purpose of prejudicing or favoring particular parties, or for the purpose of collusively and unfairly creating a monopoly, either in the hands of the company or of particular parties: it shall be lawful for the company, subject to the provisions and limitations herein and in the special act contained, from time to time to alter or vary the tolls by the special act authorized to be taken, either upon the whole or upon any particular portions of the railway, as they shall think fit: *Provided:* that all such tolls be at all times charged equally to all persons, and after the same rate, whether per ton per mile or otherwise, in respect of all passengers, and of all goods or carriages of the same description, and conveyed or propelled by a like carriage or engine, passing only over the same portion of the line of railway under the same circumstances, and no reduction or advance in any such tolls shall be made either directly or indirectly in favour of or against any particular company or person traveling upon or using the railway."

The Canal Acts, 8 & 9 Vict. (1845) c. 28, 42, contained similar provisions.

stances were dissimilar. The section is practically identical with the provisions of the special charter of the Birmingham and Derby Junction Railway granted in the previous decade, and no doubt was, as the preamble indicates, no variation from the provisions found in most charters, though it appears that a more stringent requirement of equality was imposed upon the Great Western Railroad.[30] The Lord Chancellor had refused to enjoin the Birmingham and Derby Junction Railway's charging different passenger rates from Hampton to Derby, dependent upon whether the passenger went on to London over the defendant's affiliate or changed at Derby to the shorter line of the Midland Railway Company.[31] However, it was held that the fact of one shipper's being the owner of all the parcels in a large shipment and another's being a forwarding agent did not render the circumstances dissimilar, and so the railroad must charge the forwarder the usual rate on the aggregate weight of the parcels.[32]

As railway construction continued, lines lengthened, and factories sprang up along them, it became increasingly necessary for industry to have speedy transportation at rates which were reasonable relatively as well as absolutely. The simple regulations imposed by the special charters and the Act of 1845 soon became inadequate to prevent the railroad from using its rate making power to dominate English industry. In 1854 the Railway and Canal Traffic Act[33] was passed. It was an elaborate plan for the

30. Supra p. 566.

31. Attorney General v. Birmingham & Derby Junction Ry., 2 Ry. & Can. Cas. 124 (1840). After doubting the standing of the Attorney General to raise the question, the Lord Chancellor proceeded: "Now I do not know who will suffer by that arrangement, whatever may be the cause of it. But it is not necessary to say anything about the jurisdiction of the court, or how far I should interfere if I had the power, because I am quite clear that the 63rd section has not the slightest reference to this case. That was for the purpose of preventing those who should get the monopoly of the carriage of the public from exercising that monopoly to the prejudice of individuals, that is to say, that they shall not be at liberty to carry the goods of one manufacturer and refuse the goods of another. It was to give an equal right to the public to the conveyance, and if there was any doubt about the earlier part of the clause, the latter part of the clause is in terms so: 'and no reduction or advance on any charge for conveyance by the company, or for the use of any locomotive power to be supplied by them, shall be made either directly or indirectly in favor of or against any particular company or person traveling upon or using the same portion of the said road only and under the same circumstances as aforesaid.' That was the object of the clause, not to prevent the company from making such arrangements within the powers of their act as they might find most convenient to themselves."

32. Crouch v. Great Northern Ry., 9 Exch. 556, 156 Eng. Reprint 238, 7 Ry. & Can. Cas. 787 (1854).

33. 17 & 18 Vict. (1854) c. 31.

regulation of railroad service and rates in the interests of the public. Section Two[34] dealt with discrimination.

Under the Act of 1854 it was held that the railroad might not prefer one shipper of coal over another shipper to the same market from another point of origin, so as to overcome the second shipper's geographical advantage and allow the favored shipper to compete.[35] Cresswell, J., reserved, however, the question of the right to charge different rates where one shipper has the advantage of railroad competition and the other has not. In another case between the same parties involving the same problem[36] Williams, J., said:

> "The effect of such a scale of charges is to diminish the natural advantages which the position of the dealers at Ipswich, by reason of its greater proximity, gives them over the dealers at Peterborough in respect of the traffic at Thurston, etc., by annihilating, in point of expense of carriage, a certain portion of the distance between Peterborough and those places; and just in proportion by which that natural advantage is diminished, and undue preference is given to the Peterborough dealers, and an undue disadvantage is brought upon the complainants and other Ipswich dealers."

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34. Section Two provided: "Every railway company, canal company, and railway and canal company shall, according to their respective powers afford all reasonable facilities for the receiving and forwarding and delivering of traffic upon and from the several railways and canals belonging to or worked by such company respectively, and for the return of carriages, trucks, boats and other vehicles, and no such company shall make or give any undue or unreasonable preference or advantage to or in favour of any particular person or company or any particular description of traffic, in any respect whatever, nor shall any such company subject any particular person or company or any particular description of traffic to any undue or unreasonable prejudice or disadvantage in any respect whatsoever; and every railway company and canal company having or working railways or canals which form a part of a continuous line of railway or canal or railway and canal communication, or which have the terminus, station or wharf of the one near the terminus station or wharf of the other, shall afford all due and reasonable facilities for receiving and forwarding all the traffic arriving by one of such railways or canals by the other without any unreasonable delay, and without any such preference or advantage, or prejudice or disadvantage, as aforesaid, and so that no obstruction may be offered to the public desirous of using such railways or canals or railways and canals as a continuous line of communication, and so that all reasonable accommodation may, by means of the railways and canals of the several companies, be at all times afforded to the public in that behalf."

In 1863 the provisions of this act, so far as applicable, were extended to steamship lines.

35. Ransome v. Eastern Counties Ry., 1 C.B. (N.S.) 437, 140 Eng. Reprint 179, 1 Ry. & Can. Tr. Cas. 63 (1857).

36. Ransome v. Eastern Counties Ry., 4 C.B. (N.S.) 135, 140 Eng. Reprint 1034, 1 Ry. & Can. Tr. Cas. 109 (1858).

Crowder, J.,[37] in interpreting the phrase "undue or unreasonable preference or advantage," said:

> "Now according to the construction we put upon the statute—it is not contravened by a railway company carrying at a lower rate in consideration of a guarantie of large quantities and full train loads at regular periods, provided the real object of the railway company be to obtain thereby a greater remunerative profit by the diminished cost of carriage, although the effect may be to exclude from the lower rate those persons who cannot give such a guarantie."

In another case Justices Williams and Willes held that the allowance of a lower rate to a passenger making a longer trip than to one making a shorter trip to the same destination (the shorter being included within the longer) was not an undue preference where made in order to compete with another railroad, there being no competition at the intermediate point.[38] However, that the favored shipper agreed to ship all his goods, no amount or regularity of shipment being promised, over the railroad was held not to be a sufficient difference in circumstances to prevent the preference from being undue.[39]

In a case holding that a preference is unjustifiable when given for an advantage to the proprietors of the railroad disconnected from the operation of the line over which the carriage occurred,[40] Cockburn, C. J., seems to have fairly expressed the early attitude of the English judges to the statute. He said:

> "Such [the requirement of equal terms] being plainly the intention of the legislature, and this court having been constituted the tribunal by which any injustice or inequality in the working of the railway system as between the companies and the public is to be redressed, we must endeavor to prevent any injustice, either in the rate of charge or the degree of accommodation afforded, at the same time we carefully avoid interfering, except where absolutely necessary for the above purpose, with the ordinary rights which, subject to the before-named qualification, a railway company, in common with every other company or individual, possesses of regu-

37. Nicholson v. Great Western Ry., 5 C.B. (N.S.) 366, 441, 141 Eng. Reprint 146, 180, 1 Ry. & Can. Tr. Cas. 121 (1858).

38. Jones v. Eastern Counties Ry., 3 C.B. (N.S.) 718, 140 Eng. Reprint 923 (1858).

39. Baxendale v. Great Western Ry., 5 C.B. (N.S.) 309, 141 Eng. Reprint 123, 1 Ry. & Can. Tr. Cas. 191 (1858).

40. 5 C.B. (N.S.) 336, 351, 141 Eng. Reprint 134, 140, 1 Ry. & Can. Tr. Cas. 202 (1858).

lating and managing its own affairs, either with regard to charges or accommodation, or to the agreements and bargains it may make in its particular business."

In 1878 the House of Lords held that the desire to compete with a rival railroad did not justify free cartage to a shipper whose warehouse was located on the rival's siding, no such privilege being granted to a competing shipper in the same town but not on either railroad's siding.[41] Lord Blackburn said:

"It may be that it would have been provident and proper on the part of the Legislature to say that there should be an exception in such cases, in order to induce traffic to go by a route different from that by which it would otherwise have gone. However, it is not what the Legislature has said. What the Legislature has clearly said is that the tolls must be charged equally to all persons under the same circumstances. I think that means under similar circumstances as to the goods, not as to the person."

This decision greatly limited the right of the railroad to grant special inducements in order to compete for traffic, and indicates a trend away from Chief Justice Cockburn's theory of as little interference with the railroad as might be consistent with the purpose of the statute. The United States Supreme Court later reached the same result in a case practically identical both as to facts and statutory requirements.[42] While the statutes were undoubtedly susceptible of the constructions so placed upon them by the highest courts of England and America, it is submitted that these decisions are unjust and go beyond the purpose of the legislation of either country. The purpose of the legislation was to prevent the railroad from disturbing the normal competitive conditions in the market by favorable rates to one shipper. These decisions were of no value to the complaining shipper, for when the free cartage was discontinued the rival shipper could return to the railroad on which his warehouse was located and continue to have the same competitive advantage over the complainant. The decisions unduly limit the railroad's efforts to obtain traffic without affecting competitive conditions in the goods carried.

In 1888 Parliament acted in a measure upon Lord Blackburn's suggestion. Section 27 of the Railway and Canal Traffic Act of that year[43] provided:

41. London & N.W.Ry. v. Evershed, 3 A.C. 1029, 39 L.T. 306 (1878).
42. Wight v. United States, 167 U.S. 512, 17 S.Ct. 822, 42 L.Ed. 258 (1897).
43. 51 & 52 Vict. (1888) c. 25.

> "In deciding whether a lower charge or difference in treatment does or does not amount to an undue preference, the court . . . or the commissioners . . . may, so far as they think reasonable, in addition to any other considerations affecting the case, take into consideration whether such lower charge or difference in treatment is necessary for the purpose of securing in the interest of the public the traffic in respect of which it is made, and whether the inequality cannot be removed without unduly reducing the rates charged to the complainant."

While the act goes no further than to authorize the consideration of the public's interest in the railroad's getting the favored traffic, it is a recognition of the competition with another railroad as a dissimilarity in the circumstances of the shippers.

The Influence of the English Philosophy Upon American Constitutional Law

The Railway and Canal Act of 1854, with the amendments and judicial interpretations thereof, was followed substantially by Congress in drafting the Interstate Commerce Act of 1887. Consequently, the English decisions prior to 1887 have had extraordinarily persuasive force in administrative and judicial interpretations of that act. The fact that England had for several years forbidden discrimination in transportation rates, resulting in benefits to the public without serious hardship upon the railroads, contributed to the feeling in America that such a requirement imposed upon "businesses affected with a public interest" was not an undue governmental interference with such businesses. Since the English anti-discrimination laws were a development subsequent to the adoption of the Constitution, they are not as important for an understanding of the Constitution, however, as the English philosophy of government and the state of the English law at the time the Constitution was adopted.

It is psychologically impossible for men to form a government totally free from the influence of the past. The assumptions, traditions, and beliefs of our forebears inevitably color our own thinking. The society organized by Fletcher Christian and his companions on Pitcairn's Island was a different society from that which would have been established there by a band of Chinese, not because of qualities inherent in the bloodstream, nor because of greater or less wisdom, but because of the English background of its founders. Similarly, the society of post-Revolutionary

America was an English society, and its lawmakers could not escape the influence of the current English philosophy of government, however much they may have disliked its particular manifestations. Nevertheless, each locality and generation has its own social and economic conditions and problems, requiring adjustments of received theories of government and of individual rights. The American constitutions are the product of an English culture and philosophy brought into contact with the problems of the wilderness. To interpret their clauses one must have a knowledge of both factors.

The Purpose of the American Constitutions

The framers of our constitutions did not intend to establish governments incapable of meeting new conditions, but to keep in balance the rights of the individual and the welfare of the majority. As these factors are variables, the point of balance must constantly shift, so specific applications of constitutional clauses must vary with the times. Experiences under past adjustments of the point of balance are valuable aids in locating the point for the present. Therefore, the task for the interpreters of the constitutions is "to study the day before yesterday in order that yesterday may not paralyze to-day, and to-day may not paralyze tomorrow."[44]

In a pure democracy the will of the majority is supreme. The maxim *vox populi, vox dei* is the only principle to be followed in law making. Ethics, sportsmanship and self-interest may prevent the voice of the majority from commanding certain interferences with the individual, but there is no greater assurance of future freedom of the individual from governmental interference in the pure democracy than under an absolute monarchy or dictatorship. Always slow to act, inconvenient and untrustworthy, the pure democracy was unthinkable in even a single state in post-Revolutionary America. Men could not leave their families in the wilderness and spend days traveling to the capital and weeks deliberating legislative problems. Autocracies and oligarchies being odious to them, the only alternative was a representative government.

One purpose of the framers of the constitutions was to provide a durable machinery through which a representative government could work—to provide for the selection of representatives and to clothe them with the power of the majority to con-

44. 3 Maitland, Collected Papers, 438.

trol individual activity. To some, this seems to be the only present function of the American constitutions, but to even the casual student of post-Revolutionary times it is obvious that their framers had another, and, to them, equally important object in view. They knew that the voice of the people speaks in the intolerance of hatred and fear or the emotion of enthusiasm as often as in cool reason, if not more often. They also knew that England had had a representative government of a sort for centuries, and that it was partly to escape the oppressive laws of these spokesmen for the English people that they or their fathers had crossed the ocean. Therefore, in writing the constitutions they undertook to forbid their representatives to encroach upon certain areas of individual activity. Thus they sought to provide for the freedom of activity of individuals a permanency lacking in both the autocracy and the pure democracy. Taxation without representation was the source of a revolutionary motto for the firing of enthusiasm, not the cause of the Revolution. Had the colonies been given representation in the English Parliament, the Revolution would have merely awaited the finding of some other pretext. The cause of the Revolution was the widespread dislike in America of any government's interference with the individual save so far as necessary to restrain him from injuring the person or property of another.

The early American wanted to be let alone. To make sure that he would be, and at the same time be secure in person and property from violence, he wrote a state constitution. In matters of bargaining he felt competent to take care of himself, and doubtless he was amply capable of preserving his own interests in the society of that time. To provide for the common defense and physical security, and to free trade from local barriers, the Federal Constitution was written. Like the state constitutions it set up a machinery of government, representative of both the states and the people, and, like the state constitutions, it sought to give permanence to the freedom of both state and individual from interference by the national government. It is sometimes said to be incredible that there should be areas into which no government in America can enter. To the framers of the constitutions it was incredible that any government should enter certain areas, but, recognizing their inability to foresee the needs of a later day, they wisely provided for amendments permitting governmental entrance into those areas if such should later prove to be desirable. Governments of all political parties have ever

since resented the restraints put upon them by the constitutions and have sought to evade them to extend their powers. Natural vanity and the equally natural love of casting the mote out of one's brother's eye are not removed by election to public office, especially when the electoral majority is large. The process of amending the constitution, especially the Federal Constitution, is a slow one. It was meant to be.

The Federal Constitution as originally drafted provided little protection to the individual against federal laws. To make it acceptable the first ten amendments, known as the Bill of Rights, were added. Several states ratified the Constitution with recommendations that such protections be added. North Carolina and Rhode Island being less trustful and less powerful, refused to ratify until after they were added. Thus the people of the post-Revolutionary era sought to write constitutions in terms broad enough to cover their current need for protection, and elastic enough to permit, through interpretation and amendment, the extension of governmental power over the individual, but also sufficiently elastic to develop more restraint upon the government the further it encroached upon individual activity.

Early Laws Affecting Prices in America

England was always more inclined to give her colonies a free hand in the management of their internal affairs than was any other European country. The laws enacted by Parliament affecting American trade dealt almost entirely with exports and imports in an effort to bring to England the raw materials produced in the colonies and to create in them a market for her manufactured goods. The original enactments were in general mutually beneficial, and even these were not rigorously enforced. It was not until the accession of George III to the throne that Parliament's regulation of American trade became oppressive, and even then there was little disposition on the part of England to interfere with the domestic trade of the colonies.

The first years in Virginia and Massachusetts were largely devoted to the building of homes and the production of enough food to keep the people from starving until the next supply ship could arrive from England. Trade was practically non-existent, and so laws interfered with individual activity little more than to restrain violence, encourage morality, provide for the common defense, and in some cases, as in Virginia, require a certain amount of labor in the clearing of land and production of food

crops. After a few years the danger of starvation lessened and some trade sprang up. The first colonial price fixing law appears to have been enacted in Massachusetts when shopkeepers and merchants were forbidden to charge excessive prices.[45] Thereafter, price fixing laws were not uncommon in the colonies. This was particularly true in New England where the people were inclined toward trade and manufacturing; the soil was unsuited to extensive agriculture, and the settlers tended to live in towns and to be dependent upon each other. It was less true in the southern colonies, where an abundance of land suitable for agriculture was available on easy terms, if not for the mere taking. There was little if any attempt in the southern colonies to regulate prices save in the exceptional businesses such as transportation and innkeeping.

The interferences by Parliament with American trade after the accession of George III to the throne were especially burdensome to New England, which by that time had come to depend a great deal upon foreign commerce. The resentment aroused by these laws tended to produce even in New England a dislike for governmental interference with trade. One result of the Revolution was to give to the several states all the powers of the English Parliament. Another result was to arouse a widespread objection to government in general. The state constitutions were framed so as to prevent the state legislatures from exercising all powers to which the state had fallen heir.

The chief constitutional protection against governmental interference with prices is the Due Process Clause. This limitation upon the power of government to interfere with the individual did not, of course, originate in the adoption of the Fifth Amendment[46] but may be traced back at least as far as Magna Charta, and was found, in substance, in the state constitutions adopted before the formation of the Union.[47] Casual reading of the Due

45. See Hamilton, Price Fixing by State Legislatures (1928) 3 Temp. L. Q. 28, 30.

46. The Fifth Amendment provides: "No person shall . . . be deprived of life, liberty or property, without due process of law. . . ." U.S. Const. Amend. V.

47. "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 Charta. Lord Coke, in his commentary on those words (2 Inst. 50) says they mean due process of law. The constitutions which had been adopted by the several states before the formation of the federal constitution, following the language of the great charter more closely, generally contained the words, 'but by the judgment of his peers, or the law of the land'." Curtis, J., in Murray's Lessee v. Hoboken Land and Improvement Co., 59 U.S. 272, 276, 15 L.Ed. 372, 374 (1856).

Process Clause conveys the impression that it is a limitation as easily applied and as certain in result as the multiplication table. A moment's reflection even by one totally ignorant of Supreme Court decisions, shows that it is not, for it contains two variable terms, "liberty"[48] and "due process of law."

The doctrine of substantive due process now read into the Due Process Clauses by the courts was not developed until after the adoption of the Fourteenth Amendment. There is little reason to doubt that the people of the late Eighteenth Century regarded such provisions as procedural limitations only. However, Locke's philosophy of as little government as possible was especially attractive to Americans at the time of the Revolution and for several decades thereafter, and from the time of the Revolution until the latter part of the Nineteenth Century the states made little effort to control prices except in businesses regarded as exceptional. Certainly, since the Revolution, whatever may have been the case before, "religious freedom, political freedom and economic freedom have been the watchwords of our national history."[49]

When a belief in economic freedom as a policy is practically universally accepted for a long period of time it is an easy step to a belief that arbitrary interference with that freedom is beyond the power of a constitutional government. During the early life of the nation the majority of the people favored tariff restrictions on foreign trade, but they agreed that governmental interference with domestic trade was justified only when exceptional circumstances existed. The Supreme Court's reading into the Due Process Clause of the Fourteenth Amendment a prohibition against interference by state laws with prices in ordinary businesses was possibly influenced by Mr. Conkling's argument that such was the intent of the committee that drafted the amendment.[50] It was,

48. "The world has never had a good definition of the word liberty, and the American people, just now, are much in want of one. We all declare for liberty; but in using the same word we do not all mean the same thing. With some the word liberty may mean for each man to do as he pleases with himself, and the product of his labor; while with others the same word may mean for some men to do as they please with other men, and the product of other men's labor. Here are two, not only different, but incompatible things, called by the same name, liberty. And it follows that each of the things is, by the respective parties, called by two different and incompatible names—liberty and tyranny." Lincoln, Address at the Sanitary Fair in Baltimore (1864).

49. Van Metre, Economic History of the United States (1921) 16.

50. See Graham, The "Conspiracy Theory" of the Fourteenth Amendment (1937) 47 Yale L. J. 371.

however, probably due more to the hardening of the gradually developed American belief in free domestic trade, as a policy, into a belief that the constitutions were intended to put an end to price regulations such as were common in England and the colonies.

The Effect of the Railroad on American Philosophy of Government

Prior to the coming of the railroad, transportation for hire to the interior was of little importance. Industries and mercantile establishments clustered around the good harbor. Large scale trade was port-to-port trade and goods were carried principally in ships owned by either the buyer or the seller. So long as transportation was supplied directly by the buyer or seller society was not concerned greatly with its price. Differences in the cost of transportation were regarded as something to be expected in the same way and to the same degree as differences in cost of production. Apart from the elements of efficiency of the captain and crew and of the hazards of the sea, there was little to make transportation more costly to one than to another. It followed that people left the businessman to his own devices and skill in getting his goods from production point to consumption point as cheaply as he could.

Inland transportation before the advent of the railroad was transportation of farm and forest products to port, with a slow trickle back from port to farm of manufactured goods which could not be produced on the spot. The itinerant peddler's wagon wound through the backcountry loaded with goods from the outside world. The rural communities were largely self-contained units. The farm and farmhouse produced most of the articles consumed by the farmer's family and his slaves or employees. Local trade was served by the buyer's or seller's own teams. Only the surplus products of the farm were "exported." Here again, transportation was by the producer's wagons making an annual trek to the city, or by his flatboat or raft floating down the rivers with the spring freshet. Cattle were driven to the buyer. Passenger transportation was insignificant. The traveler's horse, coach or canoe carried him to such places as he wished to visit.

Early American life was a hard life, but an independent one. No carrier for hire dictated transportation rates or speeded one man's products to market while another's were held back. The producer's vehicle was as speedy as the carrier's. The employ-

ment of a carrier for hire was a matter of convenience, not a necessity of competition. The business of carriage for hire was open to all, and the carrier was concerned with eking out his own livelihood, not with empire building. The shipper was in the stronger position of the two, and rates were the result of haggling and bargaining. Some discrimination resulted, of course, but it was not systematic, nor could it have been of substantial consequence as it was too easy for the shipper to serve himself. Production had not yet caught up with consumption, and while there was competition between producers, there was a market for all. The demand for farm products and manufactured products was such that the difference of a few cents per ton mile in transportation costs between different shippers did not spell prosperity for one and financial ruin for the other. The chief concern of the shipper or the passenger with respect to transportation via a carrier for hire was not a concern with the amount of the hire but with the safe arrival at the destination. In the matter of rate making the shipper felt competent to protect himself. His need for the help of the State was confined to a machinery for enforcing the carrier's contract to carry to the destination and for protection against the carrier's dishonesty and carelessness once the goods passed beyond the shipper's sight.

The railroad changed all this. Running from the ports of the seaboard to the interior, the railroad made possible the growth of towns and cities where once had been the wilderness. Manufacturing, no longer tied to navigable water, moved westward to the source of raw materials. Specialization in manufacturing developed as the interchange of goods became easier and speedier. The farm ceased to be an economically independent principality. The farmer could concentrate upon the particular crop that he and his soil were best fitted to produce and exchange his product for the other things he needed. He too could now move farther from navigable water since he would not have to make the long haul to the city in his own wagon or boat. The drift to the fertile plains of the western territories became a rushing torrent as men left the "overcrowded" eastern states to seize the opportunities in the West made available to them by quick overland transportation.

Had the railroads been impartial in their treatment of these new manufacturers and farmers, many of the modern problems of public utility regulation would not have arisen. The railroad magnates were not interested in transportation alone. Realiz-

ing that the life-line of the new Empire of the West was their two parallel lines of steel, they saw their opportunities for power and fabulous wealth. These men were not like the old common carter. They were investors, and the railroad was for many of them a side-line. Their railroad was to them what his ships were to the merchant prince of former years—a means for transporting their own goods. The common carter had no other business interests. The railroad magnate was building an empire for himself, and his trains were used to make it as extensive as possible. He conceived of the territory through which his road ran as his, and the people therein as his vassals, who were to be used, not served.

The Civil War, which preceded the era of western railroad building, like all wars, disturbed prevailing views of ethics and produced an era of ruthlessness and disregard for the rights of others. American business adopted the maxim, "Let him take who has the power; let him keep who can." The result was that the independent miner, forester, farmer and manufacturer found himself in direct and ruthless competition with rivals who controlled the transportation service which was his life-line to the East. No longer was the shipper equal in bargaining power to the carrier. No longer was it possible for him to do his own hauling when he could not reach an agreement with the carrier as to rates. Distances had become too great for wagon hauls. The carrier was the master and his rule was an autocratic one. Transporting his own goods over his own railroad with no effective limitation imposed by law upon his rate-making powers, and no competition, the railroad magnate charged the small independent producer high rates and undersold him in the market until the independent producer was obliged to sell to the railroad operator at the latter's price.

Uncontrolled by outside forces, it is natural for one man to aid his own friends, and this natural impulse is encouraged when that friend has something that his benefactor needs and hopes to get from him. The railroad magnate gave his friends preferential freight rates, enabling them to undersell their rivals and monopolize the market. Naturally he tended to grant such favors to businessmen who could reciprocate. At points where producers had other means of getting their products to market, he gave producers lower rates than he would otherwise have charged in order to persuade them to ship over his railroad. The large shipper was favored over the small shipper because his traffic was

worth more to the railroad. Thus, within a few decades after its invention, the railroad had become, paradoxically, the developer and destroyer of the country. It had made the wilderness to blossom as the rose, but was making the rose garden a baronial estate.

State Enactments Forbidding Discrimination by Railroads

The first serious rumblings of discontent came from the new states of the West and from the deep South.[51] Though in 1880 most Americans still agreed in general with Locke's philosophy of little governmental interference and with the economic theories of Adam Smith so far as domestic commerce was concerned, this was due to their horror of government-created monopolies and their confidence in their own ability to bargain. With the rise in power of the railroads they were faced with a monopoly in fact, which, theoretically, could be broken,[52] but which the shippers themselves could not break, as their fathers would have been able to break any monopoly in fact of the common carter. Already harassed and continually threatened by the forces of Nature in their pioneer communities, they now perceived that no matter how hard they worked to develop the country or how much nature might smile upon them, they were threatened with being crushed into practical vassalage by the railroad magnates and their friends. Politically they opposed grants of special privileges. Now they turned to the State to put an end to special privileges in transportation. Their concern was not with the reasonableness of rates per se so much as with their relative reasonableness. They were not concerned with a common carter giving harmless favors to his friend, but with an impersonal corporation, whose stock was owned by rich Easterners, and which had deliberately conspired with these and other outlanders to discriminate in rates to the end that they, who had stayed comfortably at home

51. As a result of the Granger movement many states prior to the enactment of the Interstate Commerce Act, inserted in their constitutions provisions authorizing the passage of laws prohibiting discrimination in railroad rates. See Ill. Const. (1870) Art. XI, § 15; Pa. Const. (1873) Art. XVII, § 3; Ark. Const. (1874) Art. XVII, § 3; Ala. Const. (1875) Art. XIII, § 22; Mo. Const. (1875) Art. XI, § 6; Tex. Const. (1876) Art. X, § 2; Ga. Const. (1877) Art. IV, § 2; Fla. Const. (1885) Art. XVI, § 30.

Some of the eastern states had held that the common law forbade the common carrier to discriminate in rates as well as in facilities. (See p. 564, supra.) Other states enacted statutes forbidding discrimination in rates by common carriers, and these were sustained, when attacked, under the general police power of the state, but the frequent insertion of express provisions in the state constitutions indicates that there was, as late as 1880, considerable doubt that such statutes would have been valid under the original state constitutions.

52. See the dissenting opinion of Brewer, J., in Budd v. New York, 143 U.S. 517, 550, 12 S.Ct. 468, 478, 36 L.Ed. 247, 258 (1892).

through the pioneer days, might now move west and take over the forests, farms, mines, and factories from those who had built or developed them. The pioneers left it to the courts to rationalize their position, and to show how it was the product of Right Reason and the Social Compact. They were not concerned with logic but with a threat to their homes and livelihoods. Under such circumstances political theories give ground. The decline of laissez faire and the shifting of the popular conception of "liberty" and "due process of law" had their beginnings in the invention of the railroad, and progressed as the tracks went westward. In such times men do not think coolly and rationally. The evil was underselling in the market. Governmental interference with the price charged in the market was too great a departure from early American governmental theory to suggest itself to the people or their legislators. They, instead, set out to destroy the condition which made possible the bulk of the underselling. With characteristic American enthusiasm they denounced all railroads, making no distinction between those which had conspired to enslave them and those which had not, and often denounced all discrimination in rates without distinguishing between discrimination designed to enslave and discrimination designed to enable the railroad, itself, to live. Nevertheless, it must be borne in mind that the origin of statutes forbidding preferential prices to favored individuals was the use by railroads of preferential rates to undersell in the market and thus stifle the independent, unfavored producer.

Constitutional Limitations Upon the Growth of the Common Law

We have seen[53] that the early common law did not forbid preferences in prices in any business but stopped with the imposition of a duty to serve all and a duty to charge reasonable prices, i. e., cheap prices. It does not follow that the common law of today is helpless to deal with discrimination. " 'The common law is not a code of inflexible and logically consistent principles, but a body of broad principles based on justice and practical considerations, and even if at one time there was no rule forbidding a common carrier to discriminate, the common law has the capacity to adapt itself to changed conditions and the social needs of the community.' "[54]

That common law courts make law has long been known, but

53. See supra p. 564.

54. Brown, J., in Sullivan v. Minneapolis & R.R. Ry., 121 Minn. 488, 494 142 N.W. 3, 5 (1913).

generally apologized for, and, until recently, generally denied by American judges. A reversal of a former decision obviously changes the law of the state. This sort of judicial law-making is explained on the theory that the true law of the state was always what is now declared. This theory regards the former decision as the result of a failure to use Right Reason, causing the court not to reach the common law brooding in the sky but to bring down something else, which the present court now throws back and replaces with the applicable portion of the brooding omnipresence. Nevertheless, the reversal changes individual rights and duties to the same degree as a legislative overriding of the former decision would do. When the courts push the common law into new areas the invasion is justified on the ground that it is not an invasion at all but a mere occupancy, via inductive and deductive logic, of territory already within the domain of the common law, the common law's ownership of it being implicit in rules already established. The River of Doubt has usually been bridged with analogies, which, though often straining under the load, have carried the government across, and have concealed the fact that government is now entering territories where formerly the individual was free. The courts are now less hesitant to admit their exercise of law-making powers, and assert that modern judges possess the same creative power and right as their early English predecessors.[55]

The judicial power to make law is not, however, unlimited. The doctrine of separation of powers is an integral part of the federal and state governments. The oft-repeated denial by courts that they create law, and the popular conception of the common law as a brooding omnipresence reached by the ladder of Right Reason, have made the separation appear sharper than it ever has been. However, it is recognized that the American constitutional machinery is so arranged as to contain an inherent prohibition of judicial changes in the law which cannot by logical processes be tied in with rules previously established. This implicit limitation in the constitutions is as truly a protection of individual freedom against the encroachments of government as is any

55. "A rule which in its origin was the creation of the courts themselves, and was supposed in the making to express the mores of the day, may be abrogated by the courts when the mores have so changed that perpetuation of the rule would do violence to the social conscience. . . . If abrogation is permissible in cases of extremity, still more plainly permissible at all times is continuing adaptation to varying conditions. This is not usurpation. It is not even innovation. It is the reservation for ourselves of the same power of creation that built up the common law through its exercise by the judges of the past." Cardozo, The Growth of the Law (1924) 136-137.

other constitutional limitation. It is frequently, though usually unintentionally, violated. The growth of the common law occurs in the appellate court, and it is not easy for one to detect flaws in his own logic. However, the limitation is usually applied without its application being stated in the written opinion.

The judicial power invested in the courts by the state constitutions was not intended to be radically different from the English judiciary's power. The framers of the constitutions knew that the English judges overruled former precedents and established new ones; so, notwithstanding the doctrine of separation of powers, the constitutions cannot be regarded as taking all law-making power from the American courts. They are a restriction upon that power. It was intended that after the creation of the constitutions the common law should grow only by sound application of inductive and deductive logic. However, an unwarranted extension of the common law is usually regarded as a misstatement of the law rather than an unconstitutional invasion of individual freedom.

The doctrine of separation of powers is not the only constitutional limitation upon the growth of the common law in America. The Due Process Clauses and the Equal Protection Clause of the Federal Constitution, and similar provisions in the state constitutions, are limitations upon government, not upon particular branches of government. So long as courts insist that they do not make law, but only apply it, these constitutional provisions will not be applied to precedent-creating decisions. Furthermore, since due process of law and equal protection of the laws both involve the question of reasonableness of governmental action, it is not to be expected that anything short of the most obvious defect in the logic of a lower court would be held to violate these limitations. Ordinarily a reversal of a precedent is not a violation of the Due Process Clause.[56]

The Development of the American Common Law Prohibition of Discriminatory Rates

The first intimation that the common law forbids discrimination in railroad rates is apparently a dictum by Justice Strong in a Pennsylvania decision in 1864.[57] The decision was that the railroad had not discriminated, but had made a proper classification.

56. "State courts, like this Court, may ordinarily overrule their own decisions without offending constitutional guaranties, even though parties may have acted to their prejudice on the faith of the earlier decisions." Footnote by Brandeis, J., to Brinkerhoff-Faris Trust & Savings Co. v. Hill, 281 U.S. 673, 682, note 8, 50 S.Ct. 451, 454, 74 L.Ed. 1107, 1114 (1930).

57. Shipper v. Pennsylvania R.R., 47 Pa. St. 338 (1864).

Discussing the insertion of Lord Shaftesbury Clauses into the charters of the English railroad companies,[58] Justice Strong said they were but declaratory of the common law, and implied in the requirement of reasonable rates. No other reason was given for the dictum. It was obviously the result of an erroneous conception of the English law.[59] In 1869 there was a dictum by Chief Justice Appleton of the Maine court that the common law required that rates be equal for equal services, but there were no supporting reasons or authorities.[60]

The first American decision forbidding discrimination in rates was rendered in New Jersey in 1873.[61] The railroad had contracted to give the plaintiff rebates sufficient to make the rate to him on shipments of hogs twenty per cent lower than the rate to the next most favored shipper. The plaintiff sued to recover rebates due under the contract. The court held the contract void as against public policy. Chief Justice Beasley, recognizing that the English law on the subject was statutory, put his decision upon two grounds: (1) that the contract, if enforced, would enable the favored shipper to acquire a monopoly of the hog market, which would be adverse to the public welfare; and (2) that the franchise to build and use a railroad is a prerogative of the sovereign, who, by "natural principle," could not prefer one citizen over another, so a private corporation operating under a state-granted franchise could not discriminate.

In *Chicago and Alton Railroad Company v. People*,[62] the state brought quo warranto proceedings to declare the company's charter forfeited because of a violation of the Illinois statute forbidding discrimination in rates. Though holding the proceedings must be dismissed because the statute was defective, Chief Justice Lawrence stated that the common law forbade unjust and injurious discrimination in rates by any common carrier, individual or corporate. The case involved discrimination between localities. The Chief Justice stated that competition with another railroad for the favored locality's business was no justification for a difference in rates, but rather that the rate established under the influences of competition was presumably the reasonable rate and a higher rate to a nearer point was unreasonably

58. See p. 568, supra.
59. See Great Western Ry. v. Sutton, L.R. 4 H.L. 226 (1869).
60. New England Express Co. v. Maine Central R.R., 57 Me. 188 (1869).
61. Messenger v. Pennsylvania R.R., 36 N.J. Law 407 (Sup. Ct. 1873), affirmed 37 N.J.Law 531 (Ct. Errors and App. 1874).
62. 67 Ill. 11 (1873).

high. Thus the dictum that the common law forbids unjust discrimination in rates between localities is further weakened by the supporting reasoning, which shows the court regarded the rate as unreasonable per se and so a violation of a well-established but different common law requirement.

Two years later the Illinois court appears to have rejected this dictum, for it held that a contract to give a rebate was a matter of private agreement between the parties and was not even a violation of the statute forbidding discrimination.[63] A later dictum by Justice Baker of the Illinois Court of Appeals[64] splits the difference, saying that the English authorities are to the effect that the common law did not forbid rate discrimination, but "the decided weight of American authority holds that the common law requires that the charges must be equal to all for the same service of transportation under like circumstances." The supporting reasons were those of Justice Doe of New Hampshire set forth below. As there were then one American decision and four dicta[65] to the effect that the common law imposed such a requirement, and two decisions[66] and two dicta[67] to the contrary, Justice Baker's decided weight of authority could hardly have been numerical.

A dictum by Justice Doe of New Hampshire[68] declares that a service or price otherwise reasonable may be made unreasonable by an unreasonable discrimination, and thus a violation of the common law. The case involved discrimination in facilities by a common carrier, which was always forbidden by the common law.[69] Furthermore, by statute, New Hampshire had forbidden discrimination in rates as well as facilities. The reasoning upon which the dictum is based appears to be that the term "common carrier" shows that the public has a "common" right, which means an equal right. Justice Doe admitted that the English courts held a different view of the common law, but he says this was a misconception arising from the fact that the matter was

63. Toledo, Wabash & W. Ry. v. Elliott, 76 Ill. (1875).

64. St. Louis, A. & T. H. R.R. v. Hill, 14 Ill. App. 579 (1884).

65. The other two dicta are in Ragan & Buffet v. Aiken, 77 Tenn. 499 (1882), and Twells v. Pennsylvania R.R., 2 Walk. 450 (Pa. 1864).

66. Fitchburg R.R. v. Gage, 78 Mass. 393 (1859); and Johnson v. Pensacola and Perdido R.R., 16 Fla. 623 (1878).

67. See Spofford v. Boston & Main R.R., 128 Mass. 326 (1880); and H. & T.C. Ry. v. R.C. Stewart & Co., 1 White & W. 718, § 1248 (Tex. Com. App. 1881).

68. McDuffie v. Portland & R. R.R., 52 N.H. 430, 451, 13 Am. Rep. 72, 76 (1873).

69. See p. 565, supra.

very early regulated in England by statute and the English courts had lost sight of the common law origin of the duties of the common carrier. The misconception of the early common law seems to have rested with Justice Doe rather than with the English courts.[70]

In 1885 the Ohio court held that discrimination in rates by a railroad is a violation of the common law when the effect would be to destroy the legitimate business of the shipper discriminated against and create a monopoly.[71] The railroad was distinguished from manufacturing and mining corporations in that it had been given the power of eminent domain. Two years later Federal District Judge Bruce similarly held that the common law forbids a railroad operating under a franchise from the state to discriminate in rates so as to give the favored customer a monopoly.[72] Soon after this the California court held that the prohibition of discrimination in rates was not a rule of the early common law, but had been brought into the law because of the economic power of railroads, and for this reason a shipowner might discriminate.[73]

By the turn of the century statutes forbidding discrimination in railroad rates had become common. The natural tendency of people to accept, as inherently right, the laws to which they have become accustomed asserted itself, and there were other dicta to the effect that such statutes were merely declaratory of the common law.[74] While Anglo-American jurists generally subscribe to the principle that a creative statute does not furnish a starting point for the extension of the law by analogical reasoning, the provisions of the Interstate Commerce Act and the many similar state statutes have undoubtedly contributed to the development of the common law to the point of forbidding discrimination in rates. Courts are not unaffected by popular conceptions of justice and of the function of law. Modern judges have lived most of their lives under anti-discrimination statutes and among people regarding these statutes, not as invasions of individual liberty, but as requirements inherently right. A judge who has been

70. See pp. 562-565, supra.

71. Scofield v. Lake Shore & M.S. Ry., 43 Ohio St. 571, 3 N.E. 907 (1885).

72. Samuels v. Louisville & Nashville Ry., 31 Fed. 57 (N.D. Ala. 1887).

73. Cowden v. Pacific Coast S. S. Co., 94 Cal. 470, 29 Pac. 873 (1892).

74. See Roberts v. St. Louis, I. M. & S. Ry., 95 Ark. 249, 130 S.W. 531 (1910); Adams Express Co. v. State, 161 Ind. 328, 67 N.E. 1033 (1903); Sullivan v. Minneapolis & R.R. Ry., 121 Minn. 488, 142 N.W. 3 (1913); State v. Central Vermont Ry., 81 Vt. 463, 71 Atl. 194 (1908). For later decisions to the contrary, see Bibber-White Co. v. White River Valley Electric R.R., 175 Fed. 470 (D.C. Vt. 1909); McNees v. Missouri Pac. Ry., 22 Mo. App. 224 (1886); Baird v. Erie R.R., 148 App. Div. 452, 132 N.Y. Supp. 971 (1914).

reared in a society so ordered brings to the consideration of the case a mind pre-disposed toward equality in rates in exceptional businesses. It is but natural for him to frown upon practices which he regards as plainly contrary to fairness and justice, and to refer to the statutes as declaratory of the common law. If all our anti-discrimination statutes were repealed tomorrow (assuming this were not due to changes in social needs and popular sentiment) it can hardly be supposed that the American courts would return to the common law theory of pre-railroad days.

The courts have been slow to extend the rule against discrimination in rates to other businesses. It has been held that a gas company is forbidden, in absence of statute, to make unjust rate classifications because engaged in a business "public in nature."[75] The United States Supreme Court in holding that a Nebraska judgment against the Western Union Telegraph Company for discrimination in rates for interstate messages did not violate the Commerce Clause of the Constitution, said that the common law forbade discrimination by a common carrier given the power of eminent domain by the state.[76] Electric power companies have been held forbidden to discriminate even in the absence of statutory prohibition, on the ground that they have been granted a franchise to use the streets.[77] No doubt such decisions would have been more numerous had not discrimination in these businesses been regulated by statute as soon as the businesses became of great importance.

It is worthy of note that the development of the American common law rule forbidding price discrimination has not extended beyond railroads and other "exceptional" businesses. Whenever the courts have given reasons therefor, other than a mistaken view of history, they have rested the rule upon one, or both, of two factors—the public interest in a competitive market for produce, and the possession by the business of peculiar privileges which are generally regarded as powers inherent in

75. Richmond Natural Gas Co. v. Clawson, 155 Ind. 659, 58 N.E. 1049 (1900). Contra: Commonwealth v. Wilkes Barre Gas Co., 2 Kulp 499 (Pa. 1883).

76. Western Union Telegraph Co. v. Call Publishing Co., 181 U.S. 92, 21 S.Ct. 561, 45 L.Ed. 765 (1901). See also the opinion of Lurton, J., in Cumberland Telephone & Telegraph Co. v. Kelly, 160 Fed. 316 (C.C.A. 6th, 1908); and that of Smith, J., in Postal Telegraph-Cable Co. v. Associated Press, 175 App. Div. 538, 163 N.Y. Supp. 4 (1916).

77. Homestead Co. v. Des Moines Electric Co., 226 Fed. 49 (S.D. Iowa 1915). And see Seaberg v. Raton Public Service Co., 43 N.M. 161, 87 P.(2d) 676 (1939); El Paso Electric Co. v. Raynolds Holding Co., 100 S.W.(2d) 97, 101, (Tex. Com. App. W.D. 1937). Contra: Lewisville Light and Water Co. v. Lester, 109 Ark. 545, 160 S.W. 861 (1913).

the sovereign. Placed upon the first ground, the rule is a proper application of the ancient common law rule against conspiracy to injure the sovereign. Since the people are the American sovereign, any conspiracy to injure the public is contrary to the common law rule. In America in the Nineteenth Century, and for most businesses today, there was and is a definite policy to favor competition. A conspiracy to destroy competition and create in the conspirators a monopoly is, therefore, a conspiracy to obstruct and injure the sovereign. Thus extension of the law by the courts to the specific instance of systematic discrimination by railroads is not an invasion of the individual's liberty protected by the constitutions. There never was a recognized liberty to conspire against the sovereign.

While at the time of the development of the American common law rule, railroad rate discrimination was the only type of price discrimination sufficiently serious to be regarded as a conspiracy against the sovereign, and so the cases establishing it were correct in limiting its application to railroads, there is nothing inherent in the rule requiring it to be so limited. "It has never been supposed, since the adoption of the Constitution, that the business of the butcher, or the baker, the tailor, the wood-chopper, the mining operator or the miner was clothed with such a public interest that the price of his product or his wages could be fixed by state regulation."[78] But, if bakers or wood-choppers conspire to injure the sovereign, and their economic position is such that it is possible for them to accomplish their purpose if let alone, it has never been supposed, because of the nature of their trades, that the sovereign would be powerless to protect itself, nor that the common law did not supply a means of protection. Systematic discrimination for the purpose of creating a monopoly dangerous to the public of a state—and the intent to accomplish the necessary consequence of an act is presumed—is within the scope of this American common law rule regardless of the nature of the business, except insofar as the nature of the business affects the seriousness of the monopoly and the plan's probability of success. On the other hand, the justification for the rule is the possible serious consequence to the public of the discrimination in question. Therefore, it is a misapplication of the rule to extend it to all discrimination even by a common carrier, and even though the discrimination is arbitrary. The common law test of

78. Taft, C.J., in Wolff Packing Co. v. Court of Industrial Relations, 262 U.S. 522, 537, 43 S.Ct. 630, 633, 67 L.Ed. 1103, 1109 (1923).

the propriety of price discrimination, under this theory, is not the nature of the business, but the nature and effect of the discrimination. If customers discriminated against are injured only in their pride or in their desire to prevent others from having what they do not have, extending the common law rule to forbid the discrimination is unjust and illogical.

Placing the common law prohibition of discrimination upon the ground that the business possesses peculiar privileges granted by the state requires a different development of the rule. A rule so based cannot be extended to ordinary businesses such as the butcher, the baker, the mine-owner and the wood-chopper, for they possess no peculiar franchises. A rule so based is, on the other hand, not limited to discriminations positively injurious, but extends to all differences in treatment of those similarly situated.

Unless the franchise is fairly coupled with a prohibition against discrimination, it is difficult to understand why the grant of such special privilege can serve as an adequate basis for the rule. The grant of special privileges to businesses has always been viewed as a contract between the sovereign and the businessman. The presumption is against such grant, and so from earliest times franchises have been strictly construed against the businessman and in favor of the sovereign.[79] However, construction is not reformation, and under the guise of construing a franchise it is not legitimate to read into it a requirement not originally in the minds of the parties. A franchise to use the sovereign's property, such as streets or roads, or to exercise the sovereign power of eminent domain, may fairly be construed as imposing the duty to serve the public as it applies. To read into such a franchise a manifestation of mutual assent that there shall be no difference in prices except such as are due to differences in the circumstances of the service, appears to be a distortion of the contract. This is especially true when the franchise was granted at a time when preferences in prices were regarded as a matter of course, and neither statute nor precedent indicated that they were injurious to the public. Since the states and the nation have now forbidden discrimination in certain businesses, it is more reasonable to read into a presently-granted franchise, even though for a different business, an understanding that prices are to be nondiscriminatory. It may be argued with some plausibility that the

79. See Tindal, C. J., in Parker v. Great Western Ry., 7 Man. & G. 253, 135 Eng. Reprint 107, 121, 3 Ry. & Can. Cas. 563 (1844).

franchise holder of former days tacitly agreed not to exercise his right so as to obstruct the policies of the sovereign, and since discrimination has become contrary to the sovereign's policy, the franchise contract forbids it. However, even contracts with the sovereign should be interpreted so as to give expression to the intent of the parties at the time of contracting. It is difficult to infer any intention with reference to discriminatory rates from the granting of the franchise or its receipt.

Strong support for the franchise basis for the rule is in the suggestion of Chief Justice Beasley that if the sovereign were exercising the franchise itself, "natural principles" would require the equality of treatment of citizens similarly situated. That such was not the original conception of sovereignty under the common law is obvious. A more apt argument in America would be that the franchise to the corporation was not granted by the sovereign, but by the sovereign's representative, who was not authorized to grant such privileges except upon the insertion of a requirement that all be treated alike when similarly served, and so such a requirement can be read into the franchise. The difficulty with the franchise argument is that whichever way we turn we must imply a contractural obligation which probably had no real existence in the mind of the franchise holder, the representative or the sovereign.

The Common Law and Discriminations in Interstate Commerce

That a state cannot by statute forbid discrimination in rates for interstate transportation was established in the case of *Wabash, St. Louis and Pacific Railway Company v. Illinois.*[80] Whether the common law could apply to interstate shipments was an extremely difficult problem. That the federal courts, as such, had no creative common law powers was early established. Even under *Swift v. Tyson,*[81] the federal courts, in applying the common law to cases coming before them under the Diversity of Citizenship Clause,[82] recognized that their sole power was to ascertain and apply the common law of the state. Thus, if the state common law could not reach interstate shipments, the federal courts were equally powerless. To apply the common law of a state to interstate rate discriminations would result in utter confusion. With New Jersey holding that the common law forbade discrimi-

80. 118 U.S. 557, 7 S.Ct. 4, 30 L.Ed. 244 (1886).
81. 41 U.S. 1, 10 L.Ed. 865 (1842).
82. U.S. Const. Art. III, § 2.

nation,[83] while Florida held it did not,[84] which ruling would control a shipment from Florida to New Jersey? Similar common law conflicts existed between Illinois and Missouri, New York and Pennsylvania, New Hampshire and Massachusetts.[85] The problem requires uniform treatment throughout the nation; and it is beyond the power of the states to regulate interstate rates either as to reasonableness or as to discrimination. The Commerce Clause is a restraint upon state regulation by judicial precedent as well as by legislative action.[86]

The legal and practical limitations upon state regulation of interstate railroad rates was the reason for the passage of the Interstate Commerce Act in 1887. Fourteen years later the United States Supreme Court in the case of *Western Union Telegraph Company v. Call Publishing Company*[87] rendered a decision, which, if it had come earlier, might have changed the course of American governmental development. The case involved the right of a telegraph company to discriminate systematically in rates for interstate messages, there being no applicable act of Congress. The Court sustained a Nebraska judgment against the company on common law grounds. Justice Brewer, speaking for the Court, said that common carriers, whether engaged in interstate commerce or not, are performing a public service, and, since they have the power of eminent domain, they must not unjustly discriminate in rates or services. The common law rule applied by the Court was the common law of Nebraska, but uniformity of rule in cases coming into the federal courts, whether through diversity of citizenship or the presence of a federal question under the Commerce Clause, was possible then under the doctrine of *Swift v. Tyson*.[88] This decision came too late to have much bearing on the development of the American law against discrimination in public utility rates, the problem having already been taken over by the legislative branch. With the overruling of *Swift v. Tyson*,[89] common law restrictions upon discrimination in interstate rates became impossible.

83. Messenger v. Pennsylvania R.R., 36 N.J. Law 407 (Sup. Ct. 1873), affirmed 37 N.J. Law 531 (Ct. Errors and App. 1874).
84. Johnson v. Pensacola & P. Ry., 16 Fla. 623 (1878).
85. See p. 587 et seq., supra.
86. Gatton v. Chicago, R.I., & Pac. Ry., 95 Iowa 112, 63 N.W. 589 (1895).
87. Western Union Telegraph Co. v. Call Publishing Co., 181 U.S. 92, 21 S.Ct. 561, 45 L.Ed. 765 (1901).
88. 41 U.S. 1, 10 L.Ed. 865 (1842).
89. Erie R.R. v. Tompkins, 304 U.S. 64, 58 S.Ct. 817, 82 L.Ed. 1188 (1938).

The Change in the American Philosophy of Government Following the Civil War

Prior to the Civil War the only protection of the individual against state interference with his activities was supplied by the state constitutions, except as to his rights under contracts and the right to travel and trade interstate. The early Americans were fearful of encroachments by the national government. The prohibitions in the Bill of Rights were directed against it alone. The war-produced loyalties and bitternesses caused the people of the northern states to have more confidence in the national government's wisdom and its desire to improve the individual's condition, and to distrust the state's attitude toward his freedom. Consequently, the Fourteenth Amendment was adopted. The important provisions are the Due Process Clause and the Equal Protection Clause.[90]

Until the adoption of the Fourteenth Amendment it was never declared that the Due Process Clause related to substantive law. It may be safely assumed that the limitation thus imposed on the federal government was originally a procedural requirement only. The individual's protection against infringements of his freedom by the substantive laws of Congress was then thought sufficiently guaranteed by the more specific portions of the Bill of Rights and by the fact that the federal government was one of enumerated powers, which, it was then thought, would not and could not be extended by indirection. Therefore, there seems to be no basis for reading into the Fifth Amendment a requirement of substantive due process. However, the amendment is now so interpreted.[91] The purpose of the Fourteenth Amendment was to prevent the state from imposing governmental barriers to the negroes' rise from a state of degradation to the level of their former owners socially, politically and economically. The Equal Protection clause would be sufficient to accomplish this purpose, so there seems to be no reason for reading into the Due Process Clause of the Fourteenth Amendment a limitation as to the substance of a state law. While the first decision of the Supreme Court in a case involving state price fixing laws upheld the law, the language of the opinion and the laborious reasoning employed in upholding the state power indicate that the Court regarded the

90. "Nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." U.S. Const. Amend. XIV, § 1.

91. See Louisville Joint Stock Land Bank v. Radford, 295 U.S. 555, 55 S.Ct. 854, 79 L.Ed. 1593 (1935).

Due Process Clause as having substantive application.[92] The substantive due process doctrine was officially proclaimed in *Allgeyer v. Louisiana*,[93] and although the doctrine has been frequently criticized there seems to be little disposition on the part of the courts to depart from it.

The purpose of the Due Process Clause, so interpreted, is to keep individual activity and the welfare of the group in balance. The *Slaughterhouse* cases[94] established that the Fourteenth Amendment does not deprive the states of all power to restrict individual activity in order to promote the welfare of the group. When the Fifth Amendment was adopted the group welfare required comparatively little restriction of individual activity, and little interference with business was attempted except in connection with foreign trade. At first this absence of state laws interfering with domestic business was probably the result of policy rather than of a belief that the states' own due process clauses forbade it. As these policies continued through the years it is quite likely that there gradually developed a widespread opinion that arbitrary interferences with property rights were beyond the power of a constitutional government, and that when the Fourteenth Amendment was drafted there was considerable feeling that the term "due process of law" carried some substantive content.[95] To those who took such a view the purpose of the clause was to keep individual activity and the welfare of the group in balance. The knife-edge on which they were to teeter was "due process of law." Thus what is a deprivation with due process of law would depend upon conditions at the time of the deprivation, for since the group welfare is a variable it would be necessary to shift the knife-edge back and forth in order to maintain the balance between group welfare and individual freedom. Prior to the Civil War those adhering to this view of due process would have placed the knife-edge far over against interference with individual activity, the slaves not being generally counted as part of the group whose welfare was to be weighed. Those not adhering to this view of due process nevertheless generally believed excessive interference was bad policy, so there was little occasion for judicial determination of the meaning of the phrase. While the issue of the Civil War was the right of a state to withdraw from the Union, the cause of the war was the power which

92. See Munn v. Illinois, 94 U.S. 113, 24 L.Ed. 77 (1877).
93. 165 U.S. 578, 17 S.Ct. 427, 41 L.Ed. 832 (1897).
94. 834 U.S. 36, 21 L.Ed. 394 (1873).
95. See Graham, supra note 50.

the institution of slavery gave to one individual over another. The sympathy of the northern people for the slaves developed into a philosophy that it was the proper function of government to prevent an individual in a dominant position from oppressing weaker individuals. With the defeat of the South the North's philosophy of government became the orthodox American philosophy.

The principal purpose of the Fourteenth Amendment was to enable the negroes, freed from legal slavery by the Thirteenth Amendment, to acquire economic, social, and political freedom. It was designed to protect the negro against legislation by the southern states which might leave them free in name, but dependent in fact upon the will of their former masters. As the negro could still be denied the right to vote, the North feared that the southern legislatures would nullify a large part of the North's victory by laws permitting oppression of the negroes. Whatever may have been the purpose of the committee which drafted the amendment, it was not the purpose of the people of the northern states, and probably was not the purpose of the members of the state legislatures which adopted the amendment, to prevent state legislation restraining the dominant individual from oppressing or endangering the weak portion of the group. That would be directly contrary to the northern philosophy of government which emphasized the power of the government to regulate the single individual in the interest of the weak portion of the group. This philosophy gained acceptance in the North because of the evils, actual and exaggerated, of negro slavery in the South, but with slavery abolished the philosophy of government remained. Thus the net result of the Civil War was the abolition of slavery to an individual master, but the reduction of the citizen's freedom from governmental control of his activities. With the passing of the acute stages of the negro problem, the Fourteenth Amendment, to the surprise of most people, became, in the hands of the courts, the chief barrier against carrying the North's philosophy of government into effect. Nevertheless, even with the doctrine of substantive due process officially proclaimed, "liberty" no longer meant what it had meant in 1788.

After the Civil War economic changes incident to the period of railroad building and the movement to the West[96] plus widespread destitution in the South, produced an economic slavery under masters less benevolent than the average southern planter

96. See pp. 584-587, supra.

had been. The instinct of self-preservation joined with the humanitarian instinct to urge the abolition of this new slavery. The remedy was sought in the legislature, for the knife-edge of due process was thought to have moved far over against individual freedom to use property to control the weaker portion of the group. The same philosophy, which asserted the right of government to interfere to abolish legal slavery, now asserted the right of government to abolish economic slavery. The Due Process Clauses, interpreted by the Court to require substantive due process, restrict the power of government to interfere with the dominant individual for this purpose, but do not forbid all interference. They permit government to restrain the individual's use of his economic power to the extent, but only to the extent, that restraint can reasonably be thought necessary to protect the economic freedom of the group.

Applications to Specific Businesses of the New Conception of the Liberty to Set Prices

After the adoption of the Fourteenth Amendment, the legal philosophy of Locke and the economic theories of Adam Smith were still largely accepted in American thought, and especially by the Court which gave the Fourteenth Amendment its early interpretations. From this background of natural law and laissez faire economics emerged the distinction between the so-called public utilities and other businesses. The early applications of the narrower conception of liberty did not extend to businessmen generally, but only to such as had peculiarly dominant positions in the economic society by virtue of the economic necessity which forced others to patronize them or by virtue of their possessing special privileges granted by the state. The ordinary businessman sold a commodity or supplied a service which was not of great importance to the group, or was prevented from oppressing the group by the existence of competition. In the absence of exceptional circumstances it was felt that the owner of property had a natural right to permit its use only upon terms satisfactory to him, and so there was no right in government to regulate the prices he charged. Thus the courts in passing upon price regulations by state legislatures have, until recently, carefully set on one side "businesses affected with a public interest" and on the other "private businesses," asserting the inherent power of government to regulate the rates of the first type of business and the

inherent right of the other to freedom of contract.[97] Clearly, there was no such distinction made by the early common law.[98]

As changed economic conditions had made general regulation of prices unnecessary and undesirable, so further change in economic and social conditions in the United States stopped the pendulum in its swing toward complete freedom before it had gone far enough to reach the businesses of the common carrier and the innkeeper, and started it on its backward swing toward more and more regulation. The courts were able to allow the first slow movement back, notwithstanding the Fourteenth Amendment, by analogies found between the common carrier and the businesses again sought to be regulated. As the movement back gained momentum and covered more and more businesses the task of analogy-finding has become increasingly difficult. Courts have drawn line after line for the stopping of the movement only to be forced to abandon each until we now seem fairly on the road to a return to the ancient idea that all business is public business and susceptible to rate regulation when competition does not afford adequate protection. The opinion in the *Wolff Packing Company* case[99] indicates that the majority of the Supreme Court as then constituted was inclined toward this view. However, as that case held the state law invalid, one cannot be sure that the majority concurred in all the implications of Chief Justice Taft's celebrated classification of businesses subject to regulation.[100]

97. "It has never been supposed, since the adoption of the Constitution that the business of the butcher, or the baker, the tailor, the woodchopper, the mining operator, or the minor was clothed with such a public interest that the price of his product or his wages could be fixed by state regulation. . . . An ordinary producer, manufacturer, or shopkeeper may sell or not sell as he likes, and while this feature does not necessarily exclude businesses from the class clothed with a public interest, it usually distinguishes private from quasi-public occupations." Taft, C.J., in Wolff Packing Co. v. Court of Industrial Relations, 262 U.S. 522, 537, 43 S.Ct. 630, 633, 67 L.Ed. 1103, 1109 (1923).

"In private businesses, one may sell or not as one pleases, manufacture what qualities one chooses, demand any price that can be gotten, and give any rebates that are advantageous. . . . All this time in public businesses one must serve all that apply without exclusive conditions, provide adequate facilities to meet all the demands of the consumer, exact only reasonable charges for the services that are rendered, and between customers under similar circumstances make no discriminations." Wyman, The Law of Public Callings as a Solution of the Trust Problem (1903) 17 Harv. L. Rev. 156.

98. See p. 561, supra.

99. 262 U.S. 522, 43 S.Ct. 630, 67 L.Ed. 1103 (1923).

100. The Chief Justice divided businesses clothed with a public interest into three classes:

"(1) Those which are carried on under the authority of a public grant of privileges which either expressly or impliedly imposes the affirmative duty of rendering a public service demanded by any member of the public. Such are the railroads, other common carriers and public utilities.

"(2) Certain occupations, regarded as exceptional, the public interest

Justice Stone, dissenting in the case of *Ribnik v. McBride*,[101] rejected the kind of business as the test of the state's power to regulate prices. He said:

> "As I read those decisions, such regulation is within a state's power whenever any combination of circumstances seriously curtails the regulative force of competition, so that buyers or sellers are placed at such a disadvantage in the bargaining struggle that a legislature might reasonably anticipate serious consequences to the community as a whole."[102]

A few years later Justice Brandeis, dissenting in the case of *New State Ice Company v. Liebmann*,[103] said: "In my opinion, the true principle is that the state's power extends to every regulation of any business reasonably required and appropriate for the public protection."[104] The broad ideas expressed in these two dissenting opinions were accepted by the majority of the Court in the case of *Nebbia v. New York*.[105] In that case Justice Roberts, speaking for the majority, made the following statement:

> "So far as the requirement of due process is concerned, and in the absence of other constitutional restriction, a state is free to adopt whatever economic policy may reasonably be deemed to promote public welfare, and to enforce that policy by legislation adapted to its purpose. The courts are without authority either to declare such policy, or, when it is declared by the legislature, to override it. If the laws passed are seen to have a reasonable relation to a proper legislative purpose, and are neither arbitrary nor discriminatory, the requirements of due process are satisfied, and judicial determination to that effect renders a court *functus officio*."[106]

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attaching to which, recognized from earliest times, has survived the period of arbitrary laws by Parliament or Colonial legislatures for regulating all trades and callings. Such are those of the keepers of inns, cabs and grist mills.

"(3) Businesses which though not public at their inception may be fairly said to have risen to be such and have become subject in consequence to some government regulation. They have come to hold such a peculiar relation to the public that this is superimposed upon them. In the language of the cases, the owner by devoting his business to the public use, in effect grants the public an interest in that use and subjects himself to public regulation to the extent of that interest although the property continues to belong to its private owner and to be entitled to protection accordingly." Wolff Packing Co. v. Court of Industrial Relations, 262 U.S. 522, 535, 43 S.Ct. 630, 632, 67 L.Ed. 1103, 1108 (1923).

101. 277 U.S. 350, 48 S.Ct. 545, 72 L.Ed. 913 (1928).
102. 277 U.S. at 360, 48 S.Ct. at 547, 72 L.Ed. at 917.
103. 285 U.S. 262, 52 S.Ct. 371, 76 L.Ed. 747 (1932).
104. 285 U.S. at 302-303, 52 S.Ct. at 383-384, 76 L.Ed. at 767.
105. 291 U.S. 502, 54 S.Ct. 505, 78 L.Ed. 940 (1934).
106. 291 U.S. at 537, 54 S.Ct. at 516, 78 L.Ed. at 957.

Similarly, the Due Process Clause of the Fifth Amendment leaves the national government free to adopt whatever economic policy it desires and to proceed under its constitutionally granted powers to effectuate it. "We now have a psychological acceptance of the idea of the state's 'invasion' of business; the competency of a competing system, based on untrammeled individualism, to do all things necessary for the social good is no economic maxim of this day, nor is individualism one of its juristic fetishes."[107] The *Nebbia* case is not, however, to be regarded as a holding that the freedom of the businessman to fix prices is not protected at all by the Due Process Clauses. Whatever may be said of some of the language there used, the decision goes no further than to abandon the test of the type of business and substitute the test of the circumstances under which the regulated business is carried on.[108]

With a conservative United States Supreme Court so adequately protecting the freedom of the individual businessman against governmental aggression, it has been largely overlooked that there are also limitations upon the power of the state in state constitutions. While the language of the state due process clauses is practically identical with those clauses in the Federal Constitution, and the interpretation by the United States Supreme Court is very persuasive, it is not controlling as to the meaning of the state clause. Since the *Nebbia* decision, state laws regulating prices have been more strenuously attacked as violations of the state constitution than was the case before. Recently the Superior Court of Pennsylvania in holding a milk control statute unconstitutional, expressed its disapproval of the rule announced in the *Nebbia* case.[109] Other courts have manifested a marked tendency to restrict the doctrine of the *Nebbia* decision to the facts involved in that case.[110] These state decisions are a recognition of the fact that the philosophy of government of the people of a single state may differ from the philosophy of the people of the

107. Robinson, The Public Utility Concept (1927) 41 Harv. L. Rev. 277, 282.

108. "It is clear that there is no closed category of businesses affected with a public interest, and the function of the courts in the application of the Fifth and Fourteenth Amendments is to determine in each case whether circumstances vindicate the challenged regulation as a reasonable exertion of governmental authority or condemn it as arbitrary or discriminatory." Roberts, J., in Nebbia v. New York, 291 U.S. 502, 536, 54 S.Ct. 505, 515, 78 L.Ed. 940, 956 (1934).

109. Rohrer v. Milk Control Board, 121 Pa. Super. 281, 184 Atl. 133 (1936).

110. City of Mobile v. Rouse, 27 Ala. App. 344, 173 So. 254 (1937), as affirmed by City of Mobile v. Rouse, 293 Ala. 622, 173 So. 266 (1937); State v. Greerson, 124 S.W.(2d) 253 (Tenn. 1939). See also O'Niell, C.J., dissenting in Board of Barber Examiners of Louisiana v. Parker, 190 La. 214, 298, 182 So. 485, 512, noted in (1938) 1 LOUISIANA LAW REVIEW 218, from the reversal on rehearing of the original decision that the statute was unconstitutional.

United States, and that, as a result, similar phrases may afford different protections under the two constitutions.

Applications of the New Conception of Liberty to Price Discrimination

Nearly thirty years ago Mr. Edward A. Adler advocated a return to the common law conception of business, and contended: "It is beyond dispute that arbitrary discrimination and refusal to deal are wholly repugnant to the profession of common employment."[111] Nevertheless, even the more liberal courts would be slow to enforce a statute forbidding discrimination in the ordinary callings, and the American people would be slow to amend the constitutions to override such court refusal. We still favor liberty of contract except when the circumstances are unusual. The Clayton Act[112] forbids persons engaged in interstate commerce to discriminate in price regardless of the type of business, but applies only to discriminations the effect of which is to tend to create a monopoly.[113] Such an act is not a denial of due process because applicable only where the circumstances of discrimination are peculiarly dangerous to the public welfare.[114]

Probably the reason we favor freedom of contract for ordinary businesses under ordinary circumstances is that we like to drive a bargain and complain only when we are worsted, seeking the aid of government only when we do not have in ourselves powers sufficient to enable us to protect ourselves from oppres-

111. Adler, op. cit. supra note 4, at 160.

112. 38 Stat. 730 (1914), 15 U.S.C.A. §§ 12-27 (1927).

113. As a result of widespread agitation for statutory restraints upon chain stores, Congress in 1936 enacted the Robinson-Patman Act, 49 Stat. 1526 (1936), 15 U.S.C.A. § 13 (Supp. 1940). This act revised and extended the Clayton Act so that it is now declared unlawful "for any person engaged in commerce, in the course of such commerce, either directly or indirectly, to discriminate in price between different purchasers of commodities of like grade and quality . . . where the effect of such discrimination may be substantially to lessen competition or to tend to create a monopoly in any line of commerce, or to injure, destroy, or prevent competition with any person who either grants or knowingly receives the benefit of such discrimination, or with customers of either of them," save as to differentials making only due allowance for differences in cost of manufacture, sale, or delivery and not found unjustly discriminatory by the Federal Trade Commission. The Robinson-Patman Act represents no change in philosophy. Its purpose, like that of the Clayton Act, was to prevent price discrimination having a prejudicial effect on competition and so tending toward the establishment of a monopoly. See Great Atlantic & Pacific Tea Co. v. Federal Trade Commission, 106 F.(2d) 667 (C.C.A. 3rd, 1939), cert. denied, 308 U.S. 625, 60 S.Ct. 380, 84 L.Ed. 521 (1940), rehearing denied 309 U.S. 694, 60 S.Ct. 466, 84 L.Ed. 1035 (1940).

114. Central Lumber Co. v. South Dakota, 226 U.S. 157, 33 S.Ct. 66, 57 L.Ed. 164 (1912); George Van Camp & Sons Co. v. American Can Co., 278 U.S. 245, 49 S.Ct. 112, 73 L.Ed. 311 (1928).

sion. When our butcher charges us less than he charges our neighbor we like it because it is evidence of our greater shrewdness or of our "pull." When he charges us more than he charges our neighbor we resent it not so much because it injures us financially as because it wounds our pride. We do not, however, press for a law to forbid discrimination by butchers; we transfer our patronage elsewhere. Herein can be seen at least four reasons for the absence of laws forbidding discrimination in prices by butchers. The first is that we have an adequate remedy in the existence of the competing butcher. The second is that the butcher knows this and so guards against discrimination. The third is that we are not seriously injured even when there is no competing butcher. The fourth is that the butcher does not discriminate for the purpose of injuring us through favoring another, but to build up his own business, or as a matter of personal friendship for the favored customer.

The explanation, then, of the difference in the American attitude toward discrimination by carriers and its attitude toward discrimination by other businessmen, is not, as the decisions indicate, in the different natures of the businesses, nor in the grant to the public of an interest in the property by devoting it to a use in which the public has an interest, nor in the possession by the public service company of peculiar franchises such as the right to use the streets or the power of eminent domain. The explanation is that discrimination by certain businesses results in a serious injury to a large number of individuals so as to jeopardize their economic freedom, and that there are no adequate means of self-protection available. Where there is near-equality of bargaining power our legal philosophy is to leave the parties to their bargaining. It is when the liberty of contract becomes a theory instead of a fact that we feel it is the function of government to step in and restore the balance of power destroyed by the lack of equilibrium in the parties' bargaining abilities.