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The Meaning and Malleableness of Liberty from 1897-1945

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The term liberty throughout the history of the United States has undergone many different interpretations, especially in the Supreme Court. Many of us would define liberty today as the right to live safe and healthy lives, to pursue our own self-interests, and to earn an education so we can further our progress in society. Liberty during the founding period meant freedom from a tyrannical government that all men are created equal and have unalienable rights. Only a dozen years later, liberty was used and needed to form a more perfect union to save the new nation from destruction. However, to preserve what we call "liberty", there are amendments in our constitution that are used to safeguard this right, and the two most important ones in this sense are the 5th and 14th Amendments.

The Bill of Rights was ratified to the Constitution in 1791. The Federalists had been wanting to add the Bill of Rights to ensure that the citizens of the newly formed nation would be protected from tyranny. Despite the pushback the Bill of Rights received from the Anti-Federalists, the Bill of Rights are now what we know as the fundamental rights and liberties of all citizens, as stated in the most famous footnote of all, footnote number 4, in the court case *U.S. v. Carolene Products Company (*1938*).* In the said footnote, Justice Stone stated that, "When legislation appears on its face to be within a specific prohibition of the Constitution, such as those first ten amendments… held to be embraced within the 14th Amendments… to be subjected to more exacting judicial scrutiny…" (Hall et al., 2017, p. 505).

Incorporation of the first 10 Amendments had begun in the case *Gitlow v. New York* (1925). While Gitlow did not win the case, in which he was claiming that his 1st Amendment rights had been violated after he flouted New York's Anarchy law for passing out a "Left Wing Manifesto", it did establish the fact that the 14th Amendment did indeed prevent the states from abridging 1st Amendment Rights. After all, the 14th Amendment proclaims, "No state shall…"

The 14th Amendment, one of the three so called "Reconstruction Amendments", was ratified in 1868, after the South had substantially not given the newly freed people the rights that they had been granted in the constitution. The 14th Amendment has three major clauses: The Due Process Clause, the Equal Protection Clause, and the Privileges and Immunities Clause (largely gutted after the Slaughterhouse Cases). The Due Process clause of the 14th Amendment are some of the most important words in our entire constitution. It reads as, "...nor shall any State deprive any person of life, liberty, or property, without due process of the law…" (Kermit et al., 2017, p.722).

In fact, it is the same language used in the 5th Amendment, "nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of the law…" (Kermit et al., 2017, p. 720). One who would read the constitution would reasonably notice that while the two amendments have similar language, it is intended for two different types of Due Process. We consider the 5th Amendment Due Process clause to be in terms of "procedural" Due Process, which are the actual mechanics of the legal system. We consider the 14th Amendment Due Process clause to be in terms of "substantive" Due Process, which are the fundamentals of liberty, or the first 10 Amendments. Roscoe Pound, one of the most influential American Legal scholars, stated that (1960), "… the paramount social interest in the general security…which should restrain magisterial as well as individual willfulness and assure a firm and stable social order." This is a form of legal realism that would develop over the 20th Century and into the modern day. Pound also wanted to make it known that Justices must consider the social outcomes of court decisions, rather than just the plain text of the constitution.

In the late 19th Century, the term liberty was used to protect the economic liberty of citizens, as protected by the Due Process clause of the 14th Amendment. The case *Allgeyer v. Louisiana* (1897) established the liberty of contract doctrine. During the decision of this case, the United States was in the full swing of the "Laissez Faire" economy. This was also during a period known as the "Gilded Age", which was a period of innovation, but it was also a time of worker exploitation and large trusts that dominated the nation in all aspects of life. Liberty, in the sense of the Laissez Faire Capitalists, was private property.

There was very little regulation until the late 19th Century, the first being the Interstate Commerce Commission in 1887 which regulated the Railroads, and then in 1890 the Sherman Antitrust Act was passed, created to dissolve monopolies, and prevent collusion among firms that would result in a restraint of trade. Regulation to the Laissez Faire Capitalists was seen as a deprivation of their liberty, and was breaking the invisible hand of the economy, which naturally regulated itself and there was no need for any government intervention.

The liberty of contract doctrine would be influential for the next several years. The liberty of contract doctrine was used to protect against economic restraint, and economic liberty, not political liberty, was recognized by the court. As written by Justice Rufus Peckham, "liberty mentioned in that [14th] amendment means not only the right of the citizen to be free from the mere physical restraint…the term is deemed to embrace the citizen to be free in the enjoyment of all his faculties…" (Hall et al., 2017, p.411). The unanimous *Allgeyer* decision was a huge win for the Laissez Faire Capitalists but would be a loss for the workers and the Progressives as workplace regulations would be hindered for the next 40 years.

As is true with most court decisions, nothing is established in stone In *Holden v. Hardy* (1898), just one year after the liberty of contract doctrine was established in *Allgeyer*, the court

was tapped to decide whether a Utah statute that limited the hours a miner could work in a day to 8. States would often try to lessen the harsh working conditions of some professions, which were deemed to be dangerous. The miners claimed that the 8 hours was theft and against their Due Process granted by the 14th Amendment. Justice Henry Billings Brown, however, thought otherwise.

Writing for the majority, Justice Henry Billings Brown accepted the idea that employers and employees do not stand on an equal footing and upheld the Utah statute. He writes, "This right of contract, however, is itself subject to certain limitations which the State may lawfully impose…owing to an enormous increase in the number of occupations which are dangerous, or so far detrimental to the health of the employees…" (Hall et al., 2017, p.413). States may use their police powers to protect the health, safety, and morals and thus may pass statutes that limit the hours people may work in dangerous occupations. The constitution may adjust as society progresses and this is a form of Sociological Jurisprudence, which began to get its rise as well in the 20th Century.

The New York Bakeshop Act, which was passed in 1895, forbade laborers to work no more than 60 hours a week or 10 hours per day. Once again, we see a state using their police powers to regulate the health, safety, and morals of their citizens. Lochner, a bakeshop owner, was accused of permitting one employee to work more than 60 hours in the week. Lochner challenged this all the way to the Supreme Court, which was decided in 1905. *Lochner v. New York* should have followed the *Hardy* decision, but this was not the case. The court, in a close decision, ruled 5-4 to overturn the New York Statute limiting the working hours of bakers. The rest of the statute, which cleaned up the bakeries, was fine and constitutional.

Justice Rufus Peckham, who wrote the *Allgeyer* decision, acknowledged that police powers are essential for states, but claimed that "there is a limit to the valid exercise of the police power by the State". He continues, "There is no reasonable ground for interfering with the liberty of person or the right of free contract, by determining the hours of labor, in the occupation of a baker…no contention that bakers as a class are not equal in intelligence and capacity to me in other trades or manual occupations…" (Hall et al., p.414,415). Baking was not a dangerous occupation as compared to mining, and so the bakers did not need to be protected by the state.

Justice Oliver Wendell Holmes dissented, proclaiming that "...This case is decided upon an economic theory which a large part of the country does not entertain…" and that, "a constitution is not intended to embody a particular economic theory…" (Hall et al., p. 416). Any right in our constitution can be regulated at some point for the public good, such as work hours in a dangerous occupation, or oleomargarine, as in the *McCray* decision in 1904. The majority seemingly forgot how tight the spaces were that the bakers were laboring in and just how many safety hazards there were in the bakeries. Unfortunately, it would take until the Triangle Shirtwaist Factory fire in 1912 for workplace safety and regulation laws to be enumerated.

Another minimum working hours case was brought to the court in 1908 in *Muller v. Oregon*. In 1903, Oregon passed a statute that limited women's working hours to 10 per day. A laundry owner, Curt Muller, was fined $10 when he violated the Oregon law. Muller believed that the Oregon law violated the 14th Amendment's Due Process (and equal protection) clause as it deprived the economic liberty of the workers. One would think again that the court would use the *Lochner* decision to strike down the statute. However, this again was not the exposition.

The court used statistical findings from Louis Brandeis, who would be appointed to the Supreme Court in 1916. Brandeis found that long hours affect the health and safety of women,

and that it would cause ill health, early death, and high infant mortality. The court agreed with this idea, and Justice David Brewer, writing the unanimous opinion, found that "...woman's physical structure and the performance of maternal functions place her at a disadvantage in the struggle for subsistence is obvious… especially true when the burdens of motherhood are upon her." (Hall et al., p. 418).

Not every woman was equal in terms of the law. Segregation was at its height and immigrant women were not treated the same as their caucassian counterparts. Labor reformers and women's right activists claimed that the law only singled out women for protection and didn't involve all other workers (i.e., the bakery workers in *Lochner*), there was a presumption of inferiority between women and men, and that there was a limited opportunity to create their own means of economic liberty. Nonetheless, the court found that Oregon's statute was a valid use of police powers and could limit women's working hours for the safety and morals of the state and nation.

The jump from economic liberty to civil liberty first came in the West Coast Hotel v. Parrish (1937) decision. The case involved at hand was like that of *Muller*, but this time the court had a change of mind. The decision came after FDR had attempted to pass his court-packing plan, and it showed that the Justices were now formally accepting the fact that New Deal was indeed progressing the economy (although 1937 would be a year of recession) and the fact that the United States was behind FDR in full force. The court in a close majority, 5-4, overturned the Lochner decision and upheld the minimum wage law in Washington state. Chief Justice Charles Hughes delivered the opinion, "The Constitution does not speak of freedom of contract. It speaks of liberty and prohibits deprivation of liberty without due process of law… does not recognize an absolute and uncontrollable liberty." (Hall et al., 2017, p.500).

10 years before the *Parish* decision was handed down, there was a significant case that dealt with civil liberties. In it, we enter one of the most infamous cases in the history of the Supreme Court, *Buck v. Bell* (1927). This was the accumulation of the progression of Eugenics that gained traction in the late 19th Century. Eugenics is the science of human breeding, and Gregor Mendel's pea plants were a big part of why the movement boomed. Negative Eugenics would breed out the unfitness, weakness, disability, imbecility, drunkenness, and addiction. Positive Eugenics would breed in the pragmatics of good mental/physical traits and would bend human evolution towards progress and the longevity of humans.

In 1907, Indiana became the first state to pass a law that allowed statewide sterilization. However, it would be declared unconstitutional in 1921 by the Indiana Supreme Court, citing denial of Due Process under 14th Amendment. Despite this law being deemed unconstitutional, Virginia passed a sterilization law in 1924. It was justified as a means of police powers to protect the health, safety, and morals of the state, and overall, for the nation.

Carrie Buck was judged as "feebleminded" and was eventually ordered for involuntary sterilization. It was claimed that if she had any more children (she had one out of wedlock at age 17) it would be a danger to society. Her child, Vivian, would be declared feebleminded at 7 months old, although it was done in an erroneous way. This was a test case for Eugenics supporters as the Virginia act had yet to be analyzed in the courts. Buck challenged the law, stating that her 14th Amendment Due Process was violated, and it violated her liberty to have a child. This was a case of privacy and personal liberty, something that had not been evaluated much or had been gutted in the 59 years of the 14th Amendment.

Both lower courts agreed that the Virginia statute was constitutional, and the last resort for Buck was to appeal to the Supreme Court, who heard arguments in April 1927. The court

affirmed the decision of the lower courts, upholding the Virginia statute 8-1. Compared to the Indiana law, the Virginia law had a Due Process component. Since Buck was given a hearing in the lower courts, and they agreed that the involuntary sterilization was good to go, her Due Process had been satisfied. Justice Oliver Wendell Holmes wrote the majority opinion, spewing these revolting words, "The principle that sustains compulsory vaccination is broad enough to cover cutting the fallopian tubes. Three generations of imbeciles are enough." (Oyez, 2022). After this, other states took suit and passed their own sterilization laws, including Indiana. The Indiana statute would not be repealed until 1974. At this time, it would be far too late, as thousands of women and me would be sterilized, and some people did not know about it until years later. This is one of the darkest periods in recent United States history.

The final case I want to discuss is *Korematsu v. United States* (1944), which deals with the 5th Amendment Due Process Clause. Pearl Harbor was bombed on the morning of December 7th, 1941. As FDR noted in his speech asking congress to declare war against Japan, "a day which will live in infamy". In the following year, the West Coast was divided into "military zones", as used by FDR's power as commander-in-chief.

As stated by Hall et al. (2017), "Lieutenant General John DeWitt argued for the military control of the 112,000 Japanese Americans that were living in the area." (p.447). Congressman Leland Ford urged that any Japanese person, whether they were a citizen or not, should prove they were patriotic by permitting themselves in an internment camp. FDR's Attorney General, Francis Biddle, argued that the internment camps would be an infringement upon the constitutional rights of the Japanese American citizens. Despite this, FDR signed into law Executive Order 9066, under his authority from the Espionage Act of 1917. In all, 122,000 people of Japanese descent would be relocated into the internment camps. 66 percent of the

internment camps prisoners were U.S. citizens, while the other 33 percent of the prisoners were Japanese born.

Fred Korematsu, the plaintiff in this case, was a native of California who was of Japanese ancestry. After Pearl Harbor, Korematsu signed up to volunteer for the army, but he would be turned down due to medical reasons. He would go on to study welding and started working in the defense industry, and he did so long after his family was forced to leave for the internment camps. A few months after Executive Order 9066 was passed, Korematsu was ordered to relocate into the internment camps. He refused to leave his home while the rest of his family left. Korematsu was then arrested and convicted of violating the Executive Order. He argued that the Executive Order violated his 5th Amendment rights of the Due Process Clause.

The lower courts both affirmed the conviction and the Executive Order, and as such Korematsu appealed to the Supreme Court and arguments were heard in October 1944. By the end of the year, the Supreme Court made its decision. In a 6-3 decision, the court affirmed the lower courts' decision and upheld Korematsu's conviction and Executive Order 9066. The need to protect the country from espionage was far more important than the civil liberties given in the constitution. This decision is like the *Schenck* decision in 1919, which limited constitutional speech and liberties during a time of crisis, such as war. Oliver Wendell Holmes wrote the decision, and If there was a "clear and present danger" that the speech will cause the destruction of the nation, it was unconstitutional.

Justice Hugo Black wrote the majority opinion. He stated, "There was evidence of disloyalty on the part of some, the military authorities considered that the need for action was great, and the time was short." (Hall et al., 2017, p.450). The flaw to this was the fact that there

was, shockingly, no evidence of disloyalty among the Japanese Americans. In fact, most of the "findings" were erroneous and used to rile up the people in the West Coast.

Justice Frank Murphy wrote a dissenting opinion. He stated that the majority approved of the legalization of racism, even with the known evidence of no espionage following the attack on Pearl Harbor. Justice Owen Roberts wrote another dissenting opinion, "Such exclusion goes over the 'very brink of constitutional power' and falls into the ugly abyss of racism." He continues, "Individuals must not be left impoverished of their constitutional rights on a plea of military necessity that has neither substance nor support." The finishing touch to Justice Murphy's dissent is, "Racial discrimination in any form and in any degree has no justifiable part whatever in our democratic way of life." (Hall et al., 2017, p.451-454).

The *Korematsu* decision established the Strict Scrutiny test, an add on to the Rational Basis test that was established in the *Carolene* decision. Strict Scrutiny is the highest, with Intermediate in the middle, and Rational Basis is the lowest. This is the only case to date that the court used the "rigid scrutiny" test and still upheld the law in question.

The Executive Order was terminated by FDR in the early days of 1945, and all the prisoners of the camps were sent back home, with discovery that some of their property had been stolen or destroyed. There is a happy ending to this story, as in 1983 Fred Korematsu's conviction was overturned. In 1988 congress passed the Civil Liberties Act and formally apologized to the Japanese people who were in the internment camps and each survivor was granted $20,000 and in 1998 he was awarded the Presidential Medal of Freedom by President Bill Clinton.

We can see that the meaning of liberty is malleable and can change throughout time. The meaning of Substantive Due Process changed from economic liberty in the late 19th Century to

the privacy and personal liberty that has continued into the modern day. Not every Supreme Court decision is sticky, as we can see in the *Hardy*, *Lochner*, and *Muller* decisions. Following the *Parrish* decision (1937), economic liberty was given a lower standard of scrutiny and formally overturned *Lochner*. As observed by the *Buck* and *Korematsu* decisions, the idea of personal and private liberty would be damaged for several years, although the highest level of scrutiny would be established in *Korematsu*, despite the plaintiff still losing.

Eugenics and racism were seemingly justified by the court for the greater good of the nation, and dismissed the civil liberties protected by both the 14th and 5th Amendment. We now look back at these cases with curiosity and disgust with how our nation interpreted laws that we today would consider vile and against everything we stand for as a nation. There are still battles today for the right of civil liberties, one that we must all fight together for the growth of our country in the 21st Century.

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