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## CONSTITUTIONAL LIMITATIONS AND LABOR LEGISLATION.<sup>1</sup>

BY ERNST FREUND.<sup>2</sup>

In the development of legal principles twenty-five years is not a very long period. In 1884 the body of constitutional doctrine by which labor legislation has since been judged was practically non-existent and it is consequently a growth of a span of time within the legal memory of most of us. There had been previously a solitary decision of the Supreme Court of Massachusetts<sup>3</sup> in which the court was obviously a good deal puzzled how to deal with the objections raised, disposing of them in a rather off-hand and not altogether satisfactory fashion. This dated back as far as 1876. In 1877 the decision of the federal Supreme Court in the Granger cases<sup>4</sup> established the principle of public control of economic interests, although without a proper appreciation of the limits that have since been recognized. The control was also asserted only with reference to businesses affected with a public interest, and a significant observation fell from Chief Justice Waite, that the constitution does not confer power upon the whole people to control rights which are purely and exclusively private.

The decision of the New York Court of Appeals in the Tenement Labor Case in 1885<sup>5</sup> was the first to take a decided

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<sup>1</sup>This paper was read at a joint meeting of the American Association for Labor Legislation and the American Political Science Association, held in New York on December 30, 1909. Copies may be obtained by addressing the American Association for Labor Legislation, Metropolitan Bldg., New York City, N. Y.

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<sup>3</sup>*Com. v. Hamilton Mfg. Co.*, 120 Mass. 383.

<sup>4</sup>*Munn v. Illinois*, 94 U. S. 113, and subsequent cases.

<sup>5</sup>*In re Jacobs*, 98 N. Y. 98.

stand against the power of the state in a case where labor was involved. The freedom in that case, however, was asserted in favor of the individual workman and the relation between employer and employees was not directly discussed. The novel doctrine of freedom of contract between capital and labor was inaugurated in 1886 by two decisions; one from Pennsylvania,<sup>6</sup> the other from Illinois.<sup>7</sup> It is not until the 90's that the judicial mind can be said to be aroused to the realization that important constitutional problems are involved in labor legislation. Yet the same period of time has been long enough to see nearly all the judges who pronounced the leading decisions in the respective states pass from the bench, and in many instances the entire membership of the court has changed.

What then is the legacy which this past generation of judges has bequeathed to their successors of the present day?

A survey of judicial decisions on labor legislation may be summarized as follows: The great mass of labor statutes have not been contested in the courts. This by itself must not be taken to mean that they have been accepted as valid, for it is notorious that a great many laws have never been enforced. Of those that have been questioned in the courts practically all that had any immediate bearing on safety, sanitation or decency have been sustained, the few exceptions being due to special features not going to the root of the law.<sup>8</sup> Neither the question of the control or restraint of organizations, nor that of liability or compensation or insurance, nor that of arbitration, have as yet been considered by the courts to any extent from a constitutional point of view. The controversy has revolved mainly around three subjects: The protection of labor organizations; the method of payment of wages; the limitation of hours of labor. There have been in the neighborhood of twenty decisions declaring as many statutes on those points unconstitutional, and while, with reference at least to the two subjects last mentioned, there have been weighty decisions and opinions the other way so that it is difficult to assign a distinct preponderance of authority to either side, it is undeniable that the adverse decisions coming from many different sections of the country have produced a great impression upon

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<sup>6</sup>*Godcharles v. Wigeman*, 113 Pa. St. 431.

<sup>7</sup>*Millett v. People*, 117 Ill. 294.

<sup>8</sup>See, e. g., *Starne v. People*, 222 Ill. 89.

the legal profession and the community at large, and have created a general sense of uncertainty as to the extent of permissible legislation. It is important to consider to what extent this impression is justified.

I shall pass over the cases dealing with the protection of labor organizations against coercion or discrimination practiced on the part of employers in hiring or discharging workmen, not because the problem involved in the legislation is without interest or importance, but because, as the acts were framed or as the courts interpreted them, the issue has been narrowed down to a point where it is deprived of deeper significance. If this legislation necessarily means that a relation is to be forced upon the employer which the employee is free to let alone or discontinue, it is not surprising that the courts have with practical unanimity pronounced against its validity. It deserves further consideration whether it is not possible to frame a valid law which will respect the right of the employer to form and sever relations of employment with the same freedom as that enjoyed by the employee, and will yet compel him to maintain at least an outward attitude of neutrality toward labor organizations by forbidding offensive threats and other forms of coercion and intimidation either to harm or to benefit them.

The cases concerning truck and other wage payment acts have been conspicuous for the part which they have played in the judicial history of labor legislation, those concerning hours of labor for the general interest which they have drawn to the issues involved. Both presented the issue between individual liberty and the power of public regulation, but, as the further discussion will show, in very different aspects, although it is customary to cite them indiscriminately.

It will be of advantage to recall to the mind very briefly the course of the judicial decisions. The keynote was struck by the brief and pointed denunciation of a store order act which is found in the first case already referred to, decided by the Supreme Court of Pennsylvania.<sup>9</sup> The act was declared to be an infringement alike of the right of the employer and the employee;

"More than this, it is an insulting attempt to put the laborer under a legislative tutelage which is not only degrading to his manhood, but sub-

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<sup>9</sup>*Godcharles v. Wigeman*, 113 Pa. St. 431.

versive of his rights as a citizen of the United States. He may sell his labor for what he thinks best, whether money or goods, just as his employer may sell his iron or coal, and any and every law that proposes to prevent him from so doing is an infringement of his constitutional privileges and consequently vicious and void.<sup>10</sup>

The cases in Illinois involving coal weighing store order and weekly payment legislation were less pronounced.<sup>10</sup> In annulling the statutes in question the elements of discrimination which the court found in them were chiefly relied upon. The insistence upon the freedom of contract, however, which was at first subordinate, was gradually more emphasized and finally the Supreme Court declared it to have been a controlling feature of those decisions.<sup>11</sup> West Virginia and Indiana have been uncertain in their position and their decisions are difficult to reconcile with each other. In both states the latest rulings are favorable to the legislation, but with qualifications.<sup>12</sup> Missouri in 1893, against a strong dissent, condemned a store order act, likewise relying mainly upon unjustifiable discrimination.<sup>13</sup> But it took the broader ground of constitutional liberty when the legislation was made general and was again contested.<sup>14</sup> Decisions condemning the attempt to control the method or time of payment of wages are found moreover in Ohio,<sup>15</sup> Kansas,<sup>16</sup> and Texas.<sup>17</sup> Against these must be set the authority of the United States Supreme Court,<sup>18</sup> which in two decisions has strongly asserted the legislative power to protect the workman against methods of paying or computing his wages which may operate to his disadvantage. The same position is taken by a number of state courts,<sup>19</sup> but it should be observed that Missouri maintained its ground

<sup>10</sup>*Millett v. People*, 117 Ill. 294; *Trover v. People*, 141 Ill. 171; *Braceville Coal Co. v. People*, 147 Ill. 66; *Ramsey v. People*, 142 Ill. 380; *Harding v. People*, 160 Ill. 459.

<sup>11</sup>*Vogel v. Pekoe*, 157 Ill. 339.

<sup>12</sup>*State v. Fire Brick Co.*, 33 W. Va. 188; *Peel Splint Coal Co. v. State*, 36 W. Va. 802; *Hancock v. Yaden*, 121 Ind. 366; *Republic Iron & Steel Co. v. State*, 160 Ind. 379; *Seeleyville Coal & Mining Co. v. McGlosson*, 166 Ind. 561.

<sup>13</sup>*State v. Loomis*, 115 Mo. 307.

<sup>14</sup>*State v. Missouri Tie & Timber Co.*, 181 Mo. 536

<sup>15</sup>*Re Preston*, 63 Oh. St. 428.

<sup>16</sup>*State v. Hann*, 61 Kan. 146.

<sup>17</sup>*Jordan v. State*, 51 Tex. Cr. 531.

<sup>18</sup>*Knoxville Iron Co. v. Harbison*, 183 U. S. 13 (aff'g 103 Tenn. 421); *McLean v. Arkansas*, 211 U. S. 539.

<sup>19</sup>Opinions of Justices in Massachusetts, 163 Mass. 589; Colorado, 23 Colo. 504; South Carolina, 47 S. E. 695; Washington, 88 Pac. 212; Vermont, 64 Atl. 1091. There are decisions sustaining the legislation with reference to corporations in Arkansas, Maryland and Rhode Island.

after the decision of the Supreme Court of the United States had been rendered. It would indeed be futile to ignore the trend of judicial opinion which is represented in the holdings which are adverse to this kind of legislation, or to dispose of the matter by attempting to establish a preponderance of authority against them by simply counting up the number of decisions on either side.

The decisions regarding hours of labor stand as follows: Massachusetts sustained a ten-hour day for women in 1876;<sup>20</sup> Nebraska annulled a ten-hour day (subject to certain exceptions) in 1894;<sup>21</sup> Illinois, an eight-hour day for women in 1895.<sup>22</sup> Utah sustained an eight-hour day for mines and smelting works in 1896;<sup>23</sup> this was confirmed by the United States Supreme Court in 1898.<sup>24</sup> But in 1899 the same legislation was declared unconstitutional in Colorado.<sup>25</sup> In 1900 an inferior court in Pennsylvania sustained a twelve-hour day for women, limited to sixty hours per week.<sup>26</sup> In 1902 Nebraska and Washington sustained ten-hour days for women.<sup>27</sup> In 1903 Missouri sustained an eight-hour day for mines.<sup>28</sup> In 1904 a similar decision was rendered in Nevada.<sup>29</sup> In 1904 New York sustained a ten-hour day for bakers,<sup>30</sup> but was reversed in 1905 by the United States Supreme Court, which declared the law unconstitutional.<sup>31</sup> A ten-hour day for women was sustained in Oregon in 1906;<sup>32</sup> but a law forbidding the night labor of women was declared unconstitutional in New York in 1907.<sup>33</sup> In the following year, however, the decision in the Oregon case was affirmed by the federal Supreme Court.<sup>34</sup> A ten-hour-day law is now before the Illinois Supreme Court. The decisions stand eleven to five in favor of regulation;<sup>35</sup> in the

<sup>20</sup>*Com. v. Hamilton Mfg. Co.*, 120 Mass. 383.

<sup>21</sup>*Low v. Rees Printing Co.*, 41 Neb. 127.

<sup>22</sup>*Ritchie v. People*, 155 Ill. 98.

<sup>23</sup>14 Utah, 71, 96.

<sup>24</sup>*Holden v. Hardy*, 169 U. S. 366.

<sup>25</sup>*Re Morgan*, 26 Colo. 415.

<sup>26</sup>*Com. v. Beattie*, 15 Pa. Super 5.

<sup>27</sup>*Wenham v. State*, 65 Neb. 400; *State v. Buchanan*, 29 Wash. 603.

<sup>28</sup>*State v. Cantwell*, 179 Mo. 245.

<sup>29</sup>*Re Boyce*, 27 Nev. 299.

<sup>30</sup>*People v. Lochner*, 177 N. Y. 145.

<sup>31</sup>*Lochner v. New York*, 198 U. S. 45.

<sup>32</sup>*State v. Muller*, 48 Or. 252.

<sup>33</sup>*People v. Williams*, 189 N. Y. 131.

<sup>34</sup>*Muller v. Oregon*, 208 U. S. 412.

<sup>35</sup>A Colorado decision annulling an eight-hour day for women is not taken into account, because rendered on technical grounds.

United States Supreme Court two to one. With regard to women the proportion is six to two; with regard to men five to three.

It is moreover proper to advert to some facts which bear upon the adverse decisions. In Nebraska the unfavorable ruling is offset by a later one that is favorable. The decision in Colorado was followed by a constitutional amendment which would leave a new law subject only to the federal constitution, which has been construed in favor of it. The decision on the night work of women in New York was dictated by submission to the supposed doctrine of the United States Supreme Court, the decision of that court in the case from Oregon not having then been rendered. And with reference to the first case from Illinois, it might be deemed advisable to suspend judgment until the pending case shall be decided. Under these circumstances there might be some temptation to make light of the decisions adverse to the legislative power. In view of the position taken by the federal Supreme Court with reference to the bakers' ten-hour law, this would be obviously a mistake. And it is to be noted particularly that there is not one among the decisions which have sustained this legislation that does not clearly intimate that if the legislature should overstep certain not very clearly defined limits in this form of legislation, the courts would be bound to afford relief.

It is this general adhesion to the principle of limitation and control which is significant. Its recognition implies a fundamental difference between the European and our conception of legislative power. In all civilized countries the legislature acknowledges itself bound to the observance of certain fundamental principles of individual right, and although without judicial sanction, these principles are on the whole scrupulously and inviolably respected. But these principles are not supposed to include the acceptance of any theory of economic liberty. However firmly economic principles may be adhered to, they are still regarded as matters of policy and not of right, and hence within the acknowledged control of the legislature.

There is no evidence whatever to indicate that until within a relatively recent period our general constitutional theory of legislative power was different, except that, through the exercise of a power nowhere conferred in express terms, the

judicial sanction which had been lacking in Europe had come to be supplied. Where fundamental rights were sought to be asserted against the exercise of general legislative power, they were invariably associated with the impairment of the obligation of contracts, which implied a vested right. The standard treatises on constitutional law contained no suggestion that the due process clauses could be relied upon to build up new limitations, and when Mr. Justice Field, in his dissenting opinion in *Munn v. Illinois*, contended for a limitation of the legislative power upon this basis, he was not in a position to cite any authority in support of his view. It was therefore an innovation upon established constitutional doctrine when the labor decisions recognized traditional immunities from public control as positive and primary constitutional rights in the face of which legislation would have to justify itself before the courts by showing some affirmative ground of interference.

The supposed advance or gain consisted in extending the protection previously accorded only to the vested right of property, to a merely potential right, the capacity to earn, to use one's faculties for individual advancement—on the face of it a principle of strong democratic implication. This implication was further emphasized by using the phrase that labor was property. The general formula, however, under which the doctrine was proclaimed was that of freedom of contract. The terms used were calculated to convey the impression that the rights involved were those of the workman as well as of the employer. This is not entirely without plausibility as far as hours of labor are concerned;<sup>36</sup> with reference to the wage payment acts it is an obvious fallacy, unless the liberty to compete for employment upon unfavorable terms be regarded as a valuable right. Payment at frequent intervals or redemption of store orders in cash is a pure benefit, and in having the right to this benefit made inalienable, the workman surrenders absolutely nothing except through the remote contingency that the obligations which the law imposes upon the employer may deter him from entering the business or drive him into insolvency, and that consequently the opportunity to earn a living may be diminished. Where an arrangement

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<sup>36</sup>That even organized labor may have an interest in not having hours of labor reduced by law, is shown by the opposition of strong sections of English coal miners to the introduction of the eight-hour law. See Ashley, *Adjustment of Wages*, p. 80-82.



operates necessarily to the detriment of one party to the contract, its prohibition cannot in any just sense be denounced as an infringement upon his liberty. Under such circumstances, to proclaim a freedom of contract is a misleading phrase which obscures the real issue involved in this legislation. The only real right at issue in the wage payment acts is that of the employer, the right of the owner of a business to direct its internal arrangements according to his own discretion.

Let us remember that almost a century after the beginning of factory legislation, American courts questioned whether the police power was properly exercised where there was no danger except to employees who voluntarily incurred it;<sup>37</sup> that the same idea is still potent in the law of liability; that the state even now does not undertake to regulate purely domestic arrangements, although those exposed to the consequences of mismanagement and neglect do not enter voluntarily and are not free to escape, and that as a matter of history the law of employment has grown out of that of domestic control; and we may understand something of the spirit that says: "The gates are mine to open as the gates are mine to close, and I set my house in order." There can, of course, to-day be no reasonable doubt of the right of the state to legislate, under the old established heads of the police power, for the protection of the employees of the business as well as of the general public, and these would include not only safety, health, morals and decency, but also the protection against fraud, and certain forms of oppression and exploitation which the history of legislation has treated as equivalent to fraud.

If it were possible to establish that the various forms of statutes relating to the payment of wages were aimed merely at the suppression of fraudulent or unconscionable practices, they would clearly fall within the principle of the traditional exercise of the police power and the case would be plain. With reference to truck legislation, this view was strongly and ably

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<sup>37</sup>"How can an alleged law that purports to be the result of an exercise of the police power, be such in reality, when it has for its only object, not the protection of others or the public health, safety, morals or general welfare, but the welfare of him whose act is prohibited, when, if committed, it will injure him who commits it and him only?" *Re Morgan*, 26 Col. 415.

"To justify this law, it would not be sufficient that the use of tobacco may be injurious to some persons or that its manipulation may be injurious to those who are engaged in its preparation and manufacture." *In re Jacobs*, 98 N. Y. 98. Quoted with approval in *Ritchie v. People*, 155 Ill. 98.

pressed in a dissenting opinion delivered in the first Missouri case, and the antiquity of this legislation which reaches back to the middle of the fifteenth century indicates the existence of widespread and old grievances in this matter. There is also considerable evidence tending to show that the coal weighing acts were occasioned by the prevalence of methods which were at least capable of being abused to the prejudice of the mine workers. From this point of view it would be quite impossible to support the denunciation of this legislation, so far as its general principle is concerned, upon any consistent theory.

Without very much fuller data than seem to be available concerning conditions in different industries and localities, it is difficult to pass final judgment on the character and effect of the practices which the statutes sought to abolish.<sup>38</sup> With reference to the requirement of the weekly or bi-weekly payment of wages especially, it must be observed that the customary practice of longer intervals of payment not only could not in any proper sense be termed an abuse or form of oppression, but that the new requirement, where sustained, in many cases worked such hardship that its rigorous enforcement proved at first impracticable.<sup>39</sup> However this may be, the controlling fact for the purpose of understanding the decisions is that the courts declined to see in the forbidden practices merely an unconscionable form of oppression or exploitation, but treated the matter as one of fair controversy between employer and employee.

The legitimacy of this point of view assumed or conceded, the conflict of decisions turns upon a very important issue. The problem would be this: If the old established landmarks of the police power are abandoned, at what point is the right of the owner to control his own business and the relation to his employees secure from legislative interference? The Granger cases had established the principle that certain classes of business of a monopolistic character were subject to control in the economic interest of the general community. Was there an analogous principle according to which the employment of labor might be regulated in the economic interest of the employees? To some of our courts this undoubtedly

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<sup>38</sup>There is some testimony as to conditions in the Colorado mining industry in the Report of the Industrial Commission, Vol. 12, LXV-LXXII; as to Illinois, see the Report of Bureau of Labor Statistics, 1890, appendix.

<sup>39</sup>See New York Factory Inspector's Report, 1890, p. 102, 103.

seemed to be the issue involved in the legislation, the validity of which was contested before them, and it is easy to gather from the tone of the decisions that they considered a determined resistance to the new principle necessary. Some of the adverse decisions certainly lend themselves to the construction that the principle was repudiated without any qualification. In annulling the statutory requirements, they did not rely upon the hardship or injustice they inflicted upon the employers. The points in which the legislature had sought to impose terms upon the contract of employment had not touched any very vital elements in the relation. In Illinois, where the legislation was chiefly aimed at conditions in the coal mines, all the points successfully contested before the courts were subsequently conceded to the miners by the free agreement of the operators. This very course of development, however, shows that there was no imperative need of legislative interference.

On the other hand, the courts which have sustained the statutes in question have done so in a half-hearted way without committing themselves to more than the particular provisions absolutely required. They stand apparently upon no principle but the equities of the legislation, and while recognizing limitations, refuse to define them. It would be pure speculation to attempt to predict upon what principles limitations will be eventually worked out. The difficulty of assigning limits to the power, once it is recognized, may serve to explain the uncompromising stand taken against its recognition at the outset in so many jurisdictions.

Under a system of elective judges holding office for fixed terms, it is at least a fair presumption that a principle involving questions of public policy cannot gain a strong foothold if squarely opposed to generally prevailing notions of justice. More than once in recent times the courts have spoken of the inequality between the parties to the labor contract as justifying legislative interference. If this inequality were hopeless or permanent, the so-called doctrine of freedom of contract would be opposed to every principle of social justice. If it can be maintained, it is only because there is some possibility of contracting on equal terms through the power of collective bargaining. Constitutional limitations upon the power to legislate in the interest of labor would, in other words, be impracticable were it not for the fact that organization furnishes a substitute for legislation.

Two questions suggest themselves in this connection, which at some time may demand an answer.

1. If the adjustment of labor difficulties is to be left entirely to the power of combination, will not the state be ultimately compelled to have a voice in the control of its organization? We have seen that in recent years the political party has thus been treated as an instrument of government, and in connection with the machinery of the election laws has become an object of legal regulation. If the labor organization is in a similar way essential to the working of the industrial system, a similar result may have to follow. State regulation may thus come at this point if repudiated at the other.

2. How should the attitude of the state be affected by the absence of organization? Mr. Justice Brewer, in the Oregon case, seemed inclined to assign to women an inferior political status, relying upon their dependent nature and other temperamental peculiarities. It would have been more satisfactory if he had pointed out that the industrial work of women, owing to the dominating influence of domestic functions or prospects, is of an adventitious rather than of a professional character, and that consequently the inducement and the opportunity for organization is seriously diminished. An argument for larger control might be placed on this ground, to which women could take no just exception. Similar considerations might apply in other classes of labor, which, owing to peculiar conditions, must remain without effective organization, and the exceptional treatment of sailors may be explained upon this basis.

There are, moreover, two conditions implied in the acceptance of collective voluntary effort as a substitute for legislation: one, that it prove equal to the adequate performance of its functions. the other that the power of organization be not used in such a manner as to make the substitution of the power of the state a practical necessity.

These are serious but undeniable qualifications attaching to the operation of the prevailing constitutional theory. If there could be any serious doubt of the hold which this theory has upon our courts, it would be dispelled by a study of the decisions concerning hours of labor. Contrary to the impression produced by the variety of rulings, these cases have given rise to no serious conflict of principle. The courts seem unanimous in the view that the right of the workman to utilize his capacity for work is a valuable constitutional right which will yield to statutory

restraints where excessive labor involves some appreciable danger to the particular class of employees or to the community, but not where it is only a question of realizing those aims and ideals which are involved in the eight-hour day. The conflict of decisions seems to be entirely due to the manner in which this principle is applied. Conceding that it requires some tangible element of danger to compel a reduction of hours of labor, the existence or non-existence of this danger is a question of fact. The fact may be notorious, or the relevant conditions may be doubtful and obscure, and ascertainable only by special study and observation. It is the latter contingency which creates the whole difficulty in this branch of labor legislation.

A theory has gained considerable currency according to which the courts judge of the validity of the grounds upon which legislation is enacted, but the actual existence of the conditions which give the abstract ground concrete reality—the exigency—is a matter for the legislature to determine.<sup>40</sup> The faithful application of this theory would in many cases amount to a total surrender of judicial control. It would only be necessary to entitle an act for the limitation of hours of labor as an act to safeguard the health of those engaged in it, or to make a recital to that effect, in order to insure the validity of the act in all cases in which the maximum number of hours was not absurdly low. Would it be seriously contended that such a title or recital would have saved the women's eight-hour law in Illinois, or the bakers' ten-hour law in the Supreme Court of the United States? It certainly did not help the tenement labor law in New York, that it designated itself as an act to improve the public health, and in the *Lochner* case the Supreme Court expressly denies that it is bound by the proclaimed purpose of the statute. No other construction can be placed upon these decisions than that the courts assume the power to look into the question of fact.

Concede that there are constitutional rights which should not be impaired unless some danger to the public welfare demands it, concede the possibility of the enactment of measures impairing those rights, although the danger does not in fact exist, and it follows that the judicial protection of constitutional rights may under circumstances involve the questioning of the legislative

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<sup>40</sup>It was first enunciated by the Supreme Court of Illinois in *Lake View v. Rose Hill Cemetery Co.*, 70 Ill. 91, 95: "As a general proposition it may be stated it is the province of the law-making power to determine when the exigency exists calling into exercise this (the police) power. What are the subjects of its exercise, is clearly a judicial question."

judgment which is implied in the passage of the statute. And everyone knows that the supposed contingency is not wholly imaginary. The theory of the conclusiveness of the legislative finding of fact, therefore, not only is not followed, but it cannot be followed, if constitutional rights are to be effectually protected by the courts.

The requirement of due process is now generally applied to legislation. Were it applied in its original and proper sense, it would mean that the legislature must hear and determine with at least some of the guaranties of impartiality that are supposed to belong to judicial procedure. That would not be an extraordinary demand, and perhaps at some future time the legislature will voluntarily satisfy it. But as long as under the constitutions the legislative bodies have absolute control over their own rules, the courts obviously cannot set up any procedural standards for legislative action upon compliance with which they may insist. There is consequently no formal test by which the courts can judge the fairness of the legislative judgment. Upon what basis then may they exercise their control, if there is serious doubt as to the reality of the exigency? The question presents a peculiar and in a manner unprecedented problem. The courts are required to take cognizance of questions of fact, which are not so notorious that judicial notice may be taken of them, and which yet cannot be subject to the ordinary rules of evidence, since they are part of the law of the case. The testimony of experts has been rejected in some cases.

"If the constitutionality of all laws enacted for the promotion of public health and safety can be assailed in this manner," says the Supreme Court of Missouri,<sup>41</sup> "truly and sadly would it be declared that our laws rest upon a very weak and unstable foundation."<sup>42</sup>

Conceivably, the court might with the aid of counsel enter upon an independent investigation of the relevant facts and conditions, and determine for itself the preponderance of evidence as to the existence or non-existence of the exigency. Assuming that the legislative conclusion is not to be trusted implicitly, and considering that it is the obscure and half-understood agencies and influences concerning which it is easiest to create exaggerated impressions and apprehensions, and which can best be made to serve special interests, such a course would perhaps furnish the only adequate protection to private rights. However, this is not

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<sup>41</sup>*State v. Cantwell*, 179 Mo. 245.

<sup>42</sup>Expert testimony was admitted in the Oleomargarine case in New York. *People v. Marx*, 99 N. Y. 377.

the practice, and in many cases would be impracticable. The courts could not command the necessary funds for an independent examination, and the result would be that the more resourceful of the two parties would succeed in presenting the stronger case. Something less must, therefore, be sufficient.

But why should not the courts demand in cases of genuine doubt, that the legislative judgment be supported by a respectable body of fact and opinion accessible to the public, and sufficient in strength that it might reasonably have persuaded the legislature of the existence of the exigency? Such a course would furnish a safeguard, not adequate in all cases, yet sufficient to protect against a gross abuse of power, and the best available under the circumstances. The significance of the briefs of Mr. Brandeis in the women's ten-hour cases lies in the compliance with this unexpressed demand.

For the present, however, there is no certain standard as to what the courts require or even as to whether they require any evidence. The Supreme Court of the United States, in *Holden v. Hardy*, the Utah eight-hour case, speaks of

"Reasonable grounds for believing that the legislative determination is supported by the facts."

But it does not appear how these reasonable grounds are to be made manifest. And as long as this is a matter of speculation there must be a considerable amount of arbitrariness in the exercise of judicial control. Judicial may be substituted for legislative conjecture, and it is quite as possible that right legislation will be annulled as that wrong legislation will be sustained. After the eight-hour law for miners had been sustained, the disapproval of the ten-hour law for bakers was, to say the least, a grave inconsistency.

The course of decisions in the matter of hours of labor reveals a judicial censorship which is based upon no fixed principle, and which, however conscientiously exercised, cannot be expected to inspire that confidence which is essential to the well working of judicial institutions. The substitution of some intelligible and uniform principle of control is therefore a requirement of policy as well as of justice. The analogy of the appellate review of judicial decisions of fact suggests such a principle, approved by long experience. Applied to the statutes in question, it would mean that there must have been evidence of facts within the reach of the legislature sufficient to support its judgment that

an exigency existed for its interference. Such a test would not be unduly rigorous; and its effect upon legislation itself would not be otherwise than salutary.<sup>43</sup> For the protection of constitutional rights such a principle would be more important than the insistence upon those limitations of a more substantive character which within so recent a period have sought to crystallize economic theories into rules of constitutional law.

In the case of *Muller v. Oregon*, the court declared it to be the peculiar nature of a written constitution that it places in unchanging form limitations upon legislative action and gives a permanence and stability to popular government which otherwise would be lacking. The applicability of this observation to the limitations upon labor legislation may well be doubted. These limitations are entirely the product of judicial action. They may be supposed to have been created in conformity to widespread and ruling convictions as to the nature of our institutions, but these convictions bear no guaranty of permanence.

Our views on social relations and public control may undergo considerable changes. A certain standard of living may come to seem as important as the preservation of health; industrial employment may become affected with a public interest, and regulation may supersede contract, as contract has superseded status. If such changes come, it will require no constitutional amendment to give them effect. It has perhaps been a matter of deliberate judicial policy which has left this branch of the law the least exact in our constitutional system; not one of the principles of limitation has been formulated in so explicit a manner that its abandonment would require much more than the familiar process of distinguishing precedents. All that is vague, shifting or contradictory in the present doctrines will facilitate their modification or abandonment, if necessary, so that there will be no difficulty in accommodating the substantive content of constitutional rights to altered social or economic conceptions. And it is quite possible that after another quarter of a century the limitations which our courts treat to-day as fixed and essential requirements of American institutions will appear to have been an interesting, perhaps an inevitable, but after all a merely passing phase of our constitutional development.

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<sup>43</sup>The same theory of judicial control might also be applied to the problem of special legislation. In most cases it is entirely a question of fact whether there is invalid discrimination or valid classification. If it were understood that the need of differentiation must be established to the satisfaction of the courts, much of the prevailing uncertainty and apparent arbitrariness of this phase of constitutional law would disappear.