

James L. Morrison

Research Paper

Freedom to Contract and Individual Autonomy

Copyright Oklahoma Institute for Civic Studies, Inc. 2016

Freedom to Contract and Individual Autonomy

Introduction

The law always seems engaged in controlling the tensions between tyranny and liberty, and between society/state and an individual's liberty. These tensions open the door for ideology to impact decisions of citizens, legislatures, administrators, and the courts. Property interests and contract law are inextricably interwoven through the Constitution and statutory and case law. If one is abridged the other is also likely abridged by definition since contract includes the necessity of an exchange for something of value. Though the defense raised was that of religious liberty the issue in the Oregon baker case was ideologically a tension between societal rights of non-discrimination and an individual's property interests and their right to freedom of contract.¹ To complicate matters at the time of the individual's original refusal to enter the contract the legality of the State's marriage statute was in question and had not been fully decided. It does not appear that due process was at issue, since the state and the courts went through plenty of administrative and legal processes and on the surface at least the defendants had their day in court. However as Blum asserts "where the contract involves the rendition of personal services by an individual, that person's right to dispose of her labor or withhold it unless she wishes to dispose of it is protected by the prohibition on involuntary servitude in the Thirteenth Amendment."² Blum goes on to explain "The ideological basis of contract freedom is reinforced by the pragmatic consideration that economic intercourse is most efficient when its participants desire it and are free to bargain with each other to reach mutually desirable terms."³ Obviously the state has an interest in "prohibiting criminal enterprise, protecting the environment, forbidding anticompetitive behavior,"⁴ or prohibiting discrimination, i.e. the state has a vested interest in protecting the health, safety and order of the governed. This may be where the ideological warfare begins, at which end of the continuum, society/state versus individual liberty, is the decision properly placed? Interestingly, the Blum seems to stress freedom of contract as a strong tenant of contract law, "no one may be bound in contract absent

¹ Curtis M. Wong, *Anti Gay Oregon Bakers Read Mean Tweets About Themselves*. Huffington Post, February 2, 2016 at 1. Retrieved from <http://www.huffingtonpost.com/news/aaron-klein/> on 5/4/16.

² Brian A. Blum, *Contracts: Examples and Explanations*, (6th Ed.) §1.4.1 (2013).

³ *Id.*

⁴ *Id.*

of that person's assent."⁵ One might subscribe to the understanding that all rights are properly derived from property and contract rights, and without those two fundamental rights, religious freedoms, freedom of the press, or even implied Constitutional rights cannot exist. Perhaps we should consider James Madison's advice that "[One] has a **property of peculiar value in his religious opinions**, and in the profession and practice dictated by them. He has a property very dear to him in the safety and liberty of his person. He has **equal property in the free use of his faculties and free choice of the objects on which to employ them.**"⁶ [emphasis added]. The crux of the matter still seems to be, in which direction the current swing of the ideological pendulum will take us, from the extreme of individual liberty to the opposite extreme of the interests of society as represented by the state.⁷

History and Context

The topic of this research paper is the examination of the freedom to contract as fundamental to liberty in general and an integral part of personal liberty. The thesis of the paper is that indeed, the freedom to contract is integral and fundamental to personal liberty. The basic outline of the paper includes: 1) a concise introduction to the topic giving the history and context of freedom to contract and individual autonomy, 2) the Constitutional foundations and protections relating to freedom to contract, 3) definitions of liberty, freedom to contract, and individual autonomy, 4) statutory and case law with regards to freedom to contract, 5) application of the law to the freedom to contract, 5) arguments for and against the thesis, 6) summary of the arguments and practical applications and conclusions.

Liberty of contract or freedom of contract originated in two lines of precedents well established in early American constitutional law. The first was the protection of economic liberty and property rights through substantive use of the U.S. Constitution's due process clauses or equivalent provisions in state constitutions. The second was the limitation of state police powers through the enforcement of certain constitutional rules, both written and unwritten. What was new in the late 19th century was judicial

⁵ *Id.*

⁶ James Madison, 1792 essay as quoted in David Mayer, *Liberty of Contract: Rediscovering a Lost Constitutional Right*, 18 (2011).

⁷ James L. Morrison, *discussion board post LSTD508 Contract Law*, May 4, 2016.

identification of these doctrines, taken together, as the right of “liberty of contract” and the protection of this right through the due process clause of the Fourteenth Amendment.⁸ The idea of liberty was a central tenant of the U.S. Constitution and to American law seen as a “natural right... a freedom of individuals to do what they will, provided they do not violate the equal rights of others.”⁹ Two principles were established at an early stage of American law “first the essential function of government was **to protect the rights of individuals** (including their right to liberty) and second, that the essential function of the constitution was to limit or control government power, which both protected and threatened individual rights.”¹⁰ The concept of individual right versus the rights of groups is a fundamental tension in the arguments concerning freedom to contract.

Definition of contract

Robert A. Hillman, the Edwin H. Woodruff Professor of Law at Cornell Law School provides a concise definition of a contract “An offer and acceptance form an agreement that is legally enforceable (a contract).”¹¹ This rather simplified definition serves well when the concept of “consideration doctrine” is added. Brian Blum, Professor of Law, Lewis and Clarke Law School, adds the promise to the crucial elements of contracts, “Consideration is an essential element of contract, and a promise is not recognized or enforced [by law] as contractual unless consideration has been given for it.”¹² There are some exceptions that exist beyond the scope of this paper. Blum add some broader clarity to the definition “A contract may be defined as an exchange relationship created by oral or written agreement between two or more persons, containing at least one promise and recognized in law as enforceable.”¹³ He further breaks down the “essential elements 1) an oral or written agreement between two or more persons, 2) an exchange relationship, 3) at least one promise, and 4) enforceability.”¹⁴ With these elements in mind one can easily make the case that citizens of the United States should have freedom to contract, or freedom to enter agreements without coercion, making promises in exchange for some advantage to their person i.e. individual autonomy.

⁸ David N. Mayer, *Liberty of Contract: Rediscovering a Lost Constitutional Right*. 11 (2011).

⁹ *Id.* at 12.

¹⁰ *Id.*

¹¹ Robert A. Hillman, *Principles of Contract Law*, (3rd ed.) 49 (2014).

¹² Brian A. Blum, *Contracts: Examples and Explanations*, (6th ed.) 178 (2013).

¹³ *Id.* at 2.

¹⁴ *Id.*

Constitutional Basis for Freedom of Contract and Individual Autonomy

Blum further emphasizes that “The power to enter contracts and to formulate the terms of the contractual relationship is regarded in our legal system as an exercise of individual autonomy – an integral part of personal liberty.”¹⁵ He makes the point that this liberty is greater than the English common law protection because the freedom to contract is “guaranteed by the Constitution. (The due process clause, U.S. Const. amends. V and XIV, and the contracts clause U.S. Const. art. 1 §10, provide the constitutional safeguards of liberty of contract.)”¹⁶ Blum also addressed the connection between property and freedom to contract since “Contracts involve the exchange of economic values, whether in form of tangible property, services, or intangible rights. These are property rights...”¹⁷ Further to the concept, a person’s right to dispose of his or her labor (services) “is protected by the prohibition on involuntary servitude in the Thirteenth Amendment.”¹⁸ Finally, Blum affirms the “ideological basis of contract freedom is reinforced by the pragmatic consideration that economic intercourse is most efficient when its participants desire it and are free to bargain with each other to reach mutually desirable terms.”¹⁹ Essentially Blum is arguing that freedom to contract underlies the effective and efficient free market as well as providing a foundation for liberty through property rights and interests. Blum also notes there are public policy considerations in tension with this freedom to contract. Historian Henry S. Morgan observed “For eighteenth century Americans, property and liberty were one and inseparable, because property was the only foundation yet conceived for security of life and liberty: without security for his property, it was thought, no man could live or be free except at the mercy of another.”²⁰ Again, the right to dispose of property interest and a person’s services is integral to the protection of property rights. The interconnectedness of property rights and the freedom to contract was reinforced by the rationale for the decision of the Illinois Supreme court in *Ritchie v. People* “ Liberty includes the right to acquire property, and that means and includes the right to make and enforce contracts... in this country the legislature has no power to prevent persons who are *sui juris* from making their own contracts.”²¹

¹⁵ *Id.* at 9.

¹⁶ *Id.* at 10.

¹⁷ *Id.* at 10.

¹⁸ *Id.*

¹⁹ *Id.*

²⁰ In Mayer, *supra* note 8, at 16.

²¹ *Ritchie v. People*, 155 Ill. 98 (1895). In Mayer *supra* note 8, at 24.

Mayer once again raises the issue of individual rights balanced against those of the state/society as he deals with the idea in many court cases of legislation that abridges the rights of one class of individuals versus the rights of another class of individuals, “the prohibition of class legislation is best viewed as a limitation of the police power that was conceptually related to, but jurisprudentially distinct from, the court’s substantive use of due process clauses to protect what eventually came to be recognized as liberty of contract.”²² With the Fourteenth Amendment and its privileges and immunities clause came the federalization of freedom to contract, according to Mayer

there is ample evidence that the framers of the amendment, at least, intended it to impose significant substantive limits of the police powers of the states, including, but not limited to – all the specific rights protected by the Federal Bill of Rights. These included economic liberty rights as well as property rights.²³

That this Amendment was meant to be applied to the protection of individual’s rights was underscored by the man who managed the amendment for the joint committee in the Senate, Senator Jacob Howard, his recorded comments in reference to the equal protection clause of the Fourteenth Amendment included the assertion that the amendment “abolishes all class legislation in the States and does away with the injustice of subjecting one caste of persons to a code not applicable to another.”²⁴ This comment was against the backdrop of the southern states use of legislation to deny former slaves equal access to their economic right to freedom of contract and their property rights as citizens of the United States.

The scope of liberty of contract was most cogently presented in Justice Peckham’s opinion for the court in its *Allgeyer v. Louisiana* decision

“but the right of a person “to be free in the enjoyment of all his faculties; to be free to use them in all lawful ways; to live and work where he will; to earn his livelihood by any lawful calling; to pursue any livelihood or avocation...” and freedom to enter into “all contracts which may be necessary and essential to carry out those purposes.”²⁵

This perspective necessarily includes freedom from the coercion of the state to enter into contracts that one wishes not to perform! William Graham Sumner captured the essence of the

²² *Id.* at 32.

²³ *Id.* at 34.

²⁴ *Id.* at 36.

²⁵ *Allgeyer v. Louisian*, 165 U.S. 578 (187) in Mayer *supra* note 8, at 69.

why freedom of contract is so vitally important to all of society “A society based on contract is a society of free and independent men, who form ties without favor or obligation, and co-operate without cringing or intrigue. A society based on contract, therefore, gives the utmost room and chance for individual development, and for self-reliance and dignity of free man.”²⁶ One might need to add the term virtuous in front of the term society in order to assure the self-reliance and dignity of mankind.

Current Application of Constitutional Articles and Clauses to Freedom to Contract

Due Process Clause

Even today one of the most controversial cases in Supreme Court history is *Lochner v. New York* in which the Supreme Court was asked to rule on the constitutionality of a New York law limiting employees in bakeries to no more than 60 hours per week.²⁷ The case engenders such comments as this statement the Paulsen’s make in a Chapter entitled *Betrayal*; “The *Lochner* decision now shares, with *Dred Scott* and *Plessy v. Ferguson*, the dubious distinction of being famous as an example of how not to interpret the Constitution.”²⁸ It seems the Paulsen’s had a problem with a Supreme Court that decided, in Paulsen’s words, “Employers and employees should be free to reach whatever arrangement they want concerning wages and hours of work”²⁹ likening the decision that the New York law violated the “liberty” of workers and employers, as “a monster in a bad horror movie, this beast seems to keep returning no matter how many times the good guys kill it.”³⁰ It is not readily apparent how the Paulsen’s connect *Lochner* with *Dred Scott*, a case decided 48 years earlier prior to the civil war and prior to the 13th and 14th Amendments. The Paulsen’s do make a logical argument that the due process clause simply “requires governments must act in accordance with the rule of law” and that the due process clause “says absolutely nothing about the substance of the laws that government may enact. The people may enact whatever laws they like”³¹ a logic one doubts they would apply to a law making involuntary servitude legal. The Paulson’s also leave out the fact that the law in question was lobbied for by the Bakers Union in an attempt to force the nonunion shops to work fewer hours and produce less. Justice Peckham writing for the six justices in the majority was

²⁶ William Graham Sumner in Mayer *supra* note 8, at 47.

²⁷ *Lochner v. New York*, 25 S. Ct. 539 (1905).

²⁸ Michael Stokes Paulsen and Luke Paulsen, *The Constitution: An Introduction*. 215 (2015).

²⁹ *Id.* at 215-216.

³⁰ *Id.* at 216.

³¹ *Id.*

straight forward and clear in his statements “The statute necessarily interferes with the right of contract between the employer and employees, concerning the number of hours in which the latter may labor in the bakery of the employer, and in this case the person was both employee and employer. The general right to make a contract in relation to his business is part of the liberty of the individual protected by the Fourteenth Amendment of the Federal Constitution. *Allgeyer v. Louisiana*, 165 U.S. 578 (1897).”³² The court also recognized the necessity of the state using its police powers to protect the public’s “safety, health, morals and general welfare.”³³ In essence the Court held that the state went too far in its law and in exercising its police powers.

In the early 1930’s the Court began finding exceptions to freedom of contract, the case which seemingly introduced the most exceptions *Adkins v. Children’s Hospital*, Justice Sutherland writing for the majority. Justice Sutherland observed “There is of course, no such thing as absolute freedom of contract... freedom of contract is, never the less, the general rule and restraint the exception...”³⁴ The categorical exceptions, states right to fix the hours of labor for particular classes of individuals; also, “statutes relating to contracts for performance of public work” and statutes describing the character, methods, and time for payment of wages.”³⁵ Note the inclusion of classes of people as part of the broad categories of exceptions.

Argument

An underlying current in freedom of contract is the aspect of the moral obligation of the promise, “The Latin maxim *pacta sunt servanda* (agreements must be kept) comes from Canon law.” backed up by the law.”³⁶ Though courts generally deal with contract law on purely economic terms the moral obligation one has to keep their promises underlies even the economic approach. A breach of contract deliberately, unethically, or in bad faith, does impact court decisions both in determining whether the contract existed in the first place, is void or now avoidable, and the extent of damages when considering remedies. There are those who would argue that beginning in the 1930’s the Supreme Court decisions “allowed Congress to assume virtually limitless power, especially under the commerce clause and the so-called spending

³² *Lochner v. New York*, 25 S. Ct. 541 (1905) *supra* note 26, at 541.

³³ *Id.*

³⁴ Mayer *supra* note 8, at 100.

³⁵ *Id.*

³⁶ Blum, *supra* note 2, at 11.

power: while abandoning “its protection of liberty of contract as a fundamental right... affording less protection for property rights and economic liberty than for other, noneconomic rights.”³⁷

Mayer in the chapter entitled the “Demise of Liberty of Contract” asserts “jurisprudential position taken by modern liberal constitutionalists is definitely not neutral but rather based on a social or economic theory that favor government regulation of the competitive process, despite the Constitution’s clear limits on government control over such matters.”³⁸ This does not appear to be a recent development rather one that has been evolving over time since perhaps the turning point, may have been as Mayer suggests 1934, citing the case *Nebbia v. New York*,³⁹ when the court’s opinion stated “the 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.”⁴⁰ Thus the many modern day court cases that find for the state; by ruling that there was a public interest in taking a person’s property to enable a private entity to construct a factory; or finding it was appropriate for a state to force an insurance company to cover particular risks, whether or not the company desires to cover that risk; or federal laws that require a person to purchase a product whether they want that product or not.

Conclusions

It appears that the freedom contract has become the exception rather than the rule. It appears that governments, whether federal, state, or local governments are presumed to have the right of life, liberty and property rather than the individual retaining those constitutional rights. The position of many commentators matches that of Blum et al. “Although the general rule of law favors freedom of contract, **equally fundamental with private right to contract is the public’s right** to exercise its police power and to regulate the private right to contract in the common interest.”⁴¹ The jurisdictional position taken by many justices seems no longer to be neutral and their jurisdictional position to be “based on a social or economic theory that favors government regulation of the competitive process, despite the Constitution’s clear limits on government control over such matters.”⁴² It is interesting that the Constitution “provides that no

³⁷ Mayer, *supra* note 8, at 106.

³⁸ *Id.* at 108.

³⁹ *Nebbia v. New York*, 291 U.S. 502 (1934).

⁴⁰ Justice Roberts as quoted in Mayer *supra* note 8, at 108.

⁴¹ George Blum, et al. 16B Am Jur 2nd Constitutional Law §641.

⁴² Mayer *supra* note 8, at 108.

state shall pass any law impairing the obligation of contracts restricts the states from passing laws which affect existing contractual obligations but does not create a specific constitutional right to freedom of contract.”⁴³ Though this clause of the constitution clearly restricts the states from passing laws “impairing the obligation of contracts”⁴⁴ there is no reference to the clause in the materials found regarding freedom to contract. The pages and pages of federal government regulations and rules propagated by the bureaucracy bear adequate witness to the indictment that freedom of contract is a fast disappearing right. And though the courts recognize that freedom of contract underlies an individual’s liberty in reference to specific performance of a breached contract “the compulsion takes on the aspect of involuntary servitude”⁴⁵ and therefore courts are extremely reluctant to order that performance. It seems only fitting to allow the Fourteenth Amendment of the U.S. Constitution to have the last word

No State shall make or enforce any law which shall abridge the privileges and immunities of citizens of the United States; 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.⁴⁶

⁴³ George Blum, et al. *supra* note 41.

⁴⁴ U.S. Const. Article 1 §10.

⁴⁵ Blum *supra* note 2, at 660.

⁴⁶ U.S. Const. amend XIV.