

Loss of the Right to Contract

By David N. Mayer

Is economic liberty the same as personal liberty? This question has been subject to some of the most controversial court rulings, including major U.S. Supreme Court decisions made over the past century. David N. Mayer examines the history of the liberty of contract and shows how this right has been continuously diminished by court decisions and by our country's growing regulatory and welfare state.

Is an employee in a bakery free to work as many hours as he and his employer agree to, in order to earn more money for himself or his family? May a female hotel elevator operator choose to accept part of her wages in the form of room and board? Is the owner of a new business free to

BOOK EXCERPT

enter a market and compete with established companies? Do homeowners have the right to sell their houses to whomever they wish, despite a city ordinance forbidding them from selling to someone of a different race? May parents choose to have their children taught in a language other than English, and may a teacher earn his living by instructing non-English-speaking students? Or are parents free to choose to send their children to a private school, whether a parochial school or a private military academy, and are such private schools free to compete with government schools?

At one time in American history the United States Supreme Court answered "yes" to each of the above questions, protecting as a constitutional right something known as "liberty of contract." Exercising its power of judicial review, the Court declared unconstitutional various state and federal laws that abridged this liberty by denying individuals the freedom to bargain over the terms of their own contracts — maximum-hour laws, minimum-wage laws, business licensing laws, housing-segregation laws, and compulsory education laws — laws that interfered with individuals' liberty of contract in each of the above-mentioned cases.

For a period of exactly forty years, from 1897 until 1937, the Supreme Court protected liberty of contract as a fundamental right, one aspect of the basic right to liberty safeguarded under the Constitution's Due Process Clauses, which prohibit government — the federal government, under the Fifth Amendment, and states, under the Fourteenth Amendment — from depriving persons of "life, liberty, or property without due process of law." No period in American constitutional history is more misunderstood than this forty-year stretch. Known as the "Lochner era," it is named for the best-known U.S. Supreme Court decision protecting liberty of contract, *Lochner v. New York* (1905). Traditionally, this period



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has been known as a time of "laissez-faire constitutionalism," when supposedly activist judges — allegedly reading a "laissez-faire" philosophy into the Constitution — struck down as unconstitutional laws that they disagreed with on policy grounds.

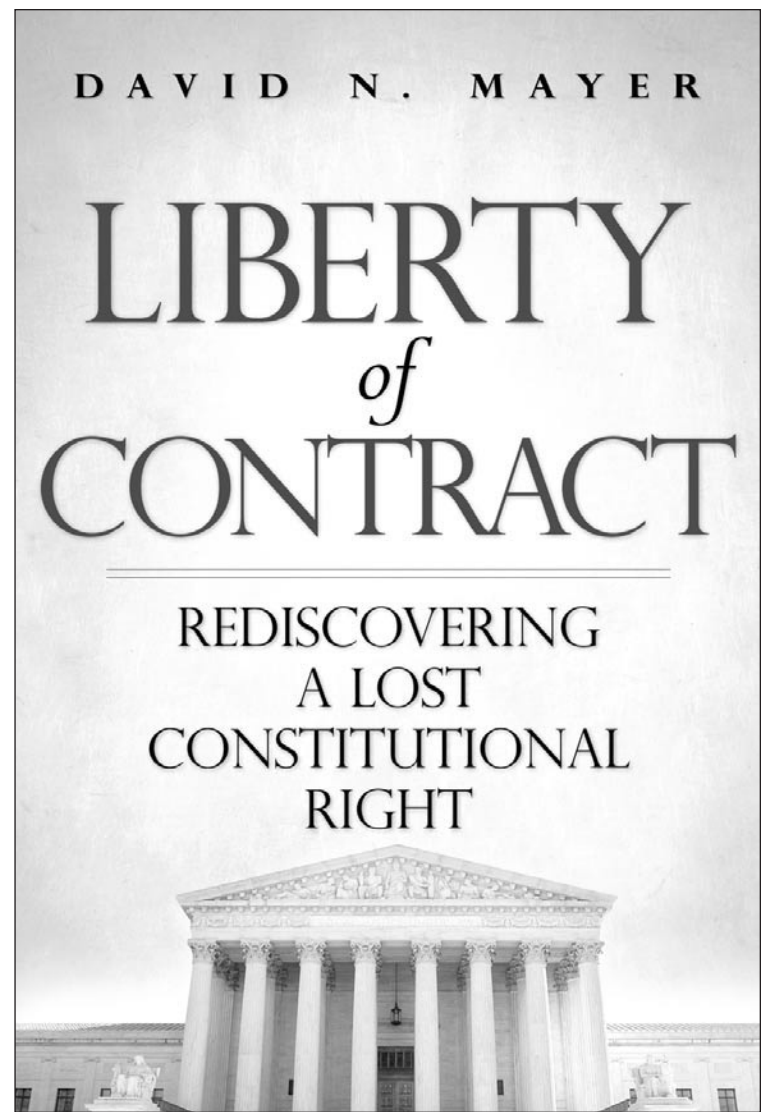
This traditional view, however, is a myth, or perhaps more accurately, a folktale, the equivalent in constitutional law of a modern urban legend. The folktale was invented by early twentieth-century Progressive-movement scholars and has been perpetuated by modern-day apologists for the twentieth century welfare/regulatory state. In each of its key parts, that folktale not only is wrong but often turns the truth entirely on its head.

First and foremost, in protecting liberty of contract as a fundamental right, the Court during the *Lochner* era was not applying a laissez-faire political or economic philosophy — "enacting Mr. Herbert Spencer's *Social Statics*," as Justice Oliver Wendell Holmes, Jr. accused the majority of doing, in his dissent in *Lochner*. Rather, the Court applied a presumption in favor of liberty, which recognized the validity of government's police power in its traditional scope, as a protection of public health, safety, and morals. Virtually every law that the Court invalidated as abridging liberty of contract was a new kind of "social legislation," unprecedented and inconsistent with the traditional scope of police powers. The Court, in short, based its liberty of contract jurisprudence on well-established principles of American constitutional law.

Another myth about the Court's *Lochner*-era jurisprudence is that it protected only "economic" freedom. That caricature is flawed in several important respects. First, it is based on a false distinction between "economic" and "personal" liberty — a distinction that ignores the fact that what some people regard as mere economic freedom is quite "personal" to the individuals who wish to exercise it. The Court, in protecting liberty of contract as a fundamental right, understood that the word *liberty* as used in the Constitution encompassed a broad array of freedoms. Justice Rufus Peckham, in his opinion for the Court in its first liberty-of-contract decision, *Allgeyer v. Louisiana* (1897), understood *liberty* to include "the right of the citizen 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;" and "to pursue any livelihood or avocation."

This suggests another flaw in the traditional, stereotypical view of the "*Lochner* era:" it ignores the full scope of liberty of contract as it was protected by the Court during the 1897-1937 period. Through its liberty of contract jurisprudence, the Court protected various aspects of liberty, including not only economic freedom in the context of the employer-employee relationship (as in the famous cases of *Lochner v. New York* and *Adkins v. Children's Hospital*) but other important aspects of economic freedom, as well as other aspects of liberty that today would be regarded as "personal" freedom. Moreover, the Court protected not just the wealthy or powerful but also relatively powerless individuals and members of minority groups — as illustrated in its important (but largely overlooked) decisions in *Buchanan v. Warley* (1917) and the two 1920s "school cases," *Meyer* and *Pierce*.

Finally, it was not the *Lochner* era Court that was guilty of "judicial activism" in protecting liberty of contract. Its liberty of contract jurisprudence objectively applied established rules of constitutional law. The activism came, rather, with the Court's abandonment of liberty of contract as a fundamental right following the so-called "New Deal revolution" in 1937. That activism is evident today in the "double standard"



that the modern Court applies in its substantive due process jurisprudence. Certain "preferred freedoms" — including not only certain rights enumerated in the Bill of Rights such as First Amendment freedom of speech and religion but also the unenumerated "right of privacy" — are more strongly protected than are economic freedom or property rights, the rights stereotypically associated with *Lochner* era jurisprudence. The irony is that, among the aspects of liberty protected today as the right to privacy, are the last remaining vestiges of the old Court's liberty-of-contract jurisprudence. Indeed, the great untold story in American constitutional law today is the debt that modern protection of personal freedoms and civil liberties owes to the Court's pre-1937 protection of liberty of contract.

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A Racial Right of Passage

By Devon W. Carbado

In "12 Angry Men," a dozen black men offer shocking and revealing first-person accounts of racial profiling. Including well-known public figures, professors, and everyday people, this diverse collection of stories exposes the lived experiences of citizens subjected to a controversial yet increasingly common law enforcement practice.

7: NOTES OF A NATURALIZED SON

Devon W. Carbado is a vice dean and law professor at UCLA School of Law, where he has twice been elected Professor of the Year and has received both the Rutter Award for Excellence in Teaching and the university-wide Distinguished Teaching Award. A Fletcher Fellow, he, along with Rachel Moran, is editor of *Race Law Stories*. His book *Acting Black, Acting White: Working Identity with Mitu Gulati* is forthcoming from Oxford University Press. The incidents in the story that follows speak to the inescapable nature of racial profiling in the United States. As a black man from another country, Carbado recounts two baseless police searches that revealed to him a naturalization process outside the official government procedures familiar to many U.S. immigrants. After only a few sobering lessons in the black-and-white dynamics of police encounters, he quickly became "one step closer to becoming [a] black American."

After I had been living in America for about a year, I purchased my first car: a \$1,500 used yellow convertible Triumph Spitfire. Two weeks later, my brother, who had been in the States for under a month, and I were on our way to a friend's house. It was about nine p.m. We were in Inglewood,

a predominantly black neighborhood south of Los Angeles, when we heard a siren and a police car signaled for us to pull over. One officer approached my window; the other stationed himself beside the passenger door. He directed his flashlight inside the car, alternating its beam on our two faces.

"Anything wrong, officers?" I asked, trying to discern the face behind the flashlight. Neither officer responded. I inquired again as to whether we had done anything wrong. Again, no response. Instead, one of the officers instructed, "Step outside the car with your hands on your heads." We did as he asked. He then told us to sit on the side of the curb. Grudgingly, we complied.

As we sat on the pavement, "racially exposed," our backs to the officers, our feet in the road, I asked a third time whether we had done anything wrong. One officer responded, rather curtly, that I should "shut up and not make any trouble." Perhaps foolishly, I insisted on knowing why we were being stopped: "We have a right to know, don't we? We're not criminals, after all."

Today, I might act differently, less defiantly. But, at the time of this incident, my strange career with race, at least in America, had only just begun. In other words, I had not yet lived in America long enough to learn the ways of the police, the racial conventions of

black and white police encounters, and the so-called rules of the game: don't do anything. Nothing. Don't talk. Don't move. Nothing — except what the officer explicitly authorizes you to do. Just say yes to whatever the officer tells you to do. No one had explained these things to me, and they were not intuitive — not to me, anyway. It had not occurred to me that my encounter with these officers was potentially life threatening. This was one of my many racial blind spots. Eventually, I would develop my second sight.

The officer discerned that I was not American. Presumably, my accent provided the clue, although my lack of racial etiquette — mouthing off to white police officers in a "high-crime" area in the middle of the night — might have suggested that I was an outsider to the racial dynamics of police encounters. My assertion of my rights, my attempts to maintain my dignity, and my confronting authority might have signaled that I was not from here and, more importantly, that I had not been racially socialized into, or internalized the racial survival strategy of, performing obedience to the police.

The officer looked at my brother and me, seemingly puzzled. He needed more information to process us racially, to make sense of what he might have experienced as a moment of racial incongruity. While our phenotypical blackness may have been apparent, our performance of blackness could have created a racial indeterminacy problem. That is, to the extent that the officers held the view that our blackness meant we were criminals or thugs, our English accents might have challenged it. However, at best, this challenge was partial. The officer could see — with his "inner eyes" — that we had the souls of black folk. He simply needed to confirm our racial stock.

"Where are you guys from?"
"The U.K.," my brother responded.
"The what?"

TRUE
STORIES
OF
BEING
A
BLACK
MAN
IN
AMERICA
TODAY

TWELVE
ANGRY
MEN

INTRODUCTION BY
LANI GUINIER

"England."
"England?"
"Yes, England."
"You were born in England?"
"Yes."
"What part?"
"Birmingham."
"Uhhh..." We were strange fruit. Our racial identity had to be grounded.
"Where are your parents from?"
"The West Indies."
At last, we made racial sense. The officers had located our racial roots.
"How long has he been in America?" The officer wanted to know, pointing at me.
"About a year," my brother responded.
"Well, tell him that if he doesn't want to find himself in jail, he should shut the fuck up."
The history of racial violence contained in his words existentially moved us. We were now squarely within a subregion of the borders of American blackness. Our rite of passage was almost complete.
My brother nudged me several times with his elbows. "Cool it," he muttered under his breath. The intense look in his eyes inflicted his words. "Don't provoke them."
By this time, my brother needn't have said anything. I was beginning to see the black and white racial picture. We had the right to do whatever they

wanted us to do, a reasonable expectation of uncertainty.

With that awareness, I simply sat there — quietly. My brother did the same. We were in a state of rightlessness.

Although I didn't know it at the time, we were one step closer to becoming black Americans. Unwillingly, we were participating in a naturalization ceremony within which our submission to authority reflected and reproduced a quintessential black racial experience.

We were being "pushed" through the racial body of America to be born again; a new motherland awaited us. Eventually we would become naturalized sons — black American males.

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