



UNC
SCHOOL OF LAW

NORTH CAROLINA LAW REVIEW

Volume 20 | Number 1

Article 12

12-1-1941

Constitutional Law -- Price Regulation -- Rationale of "Affected With a Public Interest"

James F. Lawrence Jr.

Follow this and additional works at: <http://scholarship.law.unc.edu/nclr>



Part of the [Law Commons](#)

Recommended Citation

James F. Lawrence Jr., *Constitutional Law -- Price Regulation -- Rationale of "Affected With a Public Interest"*, 20 N.C. L. REV. 83 (1941).
Available at: <http://scholarship.law.unc.edu/nclr/vol20/iss1/12>

This Note is brought to you for free and open access by Carolina Law Scholarship Repository. It has been accepted for inclusion in North Carolina Law Review by an authorized editor of Carolina Law Scholarship Repository. For more information, please contact law_repository@unc.edu.

NOTES AND COMMENTS

Constitutional Law—Price Regulation—Rationale of “Affected With a Public Interest”

The United States Supreme Court in *Olsen v. Nebraska*¹ swept away the remaining vestige of the confusing notion that legislative price fixing could only be exercised in businesses found by the Court to be “affected with a public interest”. The Court upheld, against an attack founded on the due process clause, a Nebraska statute which provided that no licensed employment agency should collect from an applicant, as compensation for its services, more than the aggregate of a stated registration fee and 10% of the first month’s wages.² The Supreme Court of Nebraska had held this legislation unconstitutional,³ basing their decision on *Ribnik v. McBride*,⁴ in which case the United States Supreme Court had declared a similar New Jersey statute invalid. However, in the instant case, the Court, in reversing the state court, unequivocally stated,⁵ (1) that the *Ribnik* case had been overruled by more recent decisions; (2) “that the phrase ‘affected with a public interest’ can mean no more than that an industry, for adequate reason, is subject to control for the public good”, and (3) that the wisdom, need and appropriateness of such legislation “should be left where it was left by the Constitution—to the states and to Congress”.

The power to regulate business or economic activity for the general welfare is inherent in any government. This regulatory power, known as the police power, justifies the regulation of private enterprise when necessary for the protection and promotion of the public health, safety, morals, or general welfare. The Fifth Amendment, controlling federal action, and the Fourteenth, controlling state action, serve as limits for the exercise of the police power. They confine the exercise of the police power to its proper ends and insure that the ends shall be accomplished by methods consistent with due process. In determining whether price-fixing regulation was within the objectives of the police power⁶

¹ 61 Sup. Ct. 862, 85 L. ed. (Adv. Ops.) 820 (1941).

² NEB. COMP. STAT. (1929) §§48-508.

³ *State v. Kinney*, 138 Neb. 574, 293 S. W. 393 (1940).

⁴ 277 U. S. 350, 48 Sup. Ct. 545, 72 L. ed. 913 (1927).

⁵ *Olsen v. Nebraska*, 61 Sup. Ct. 862, 865, 85 L. ed. (Adv. Ops.) 820, 824 (1941).

⁶ It is not within the scope of this note to discuss those instances where price regulations have been upheld on some basis other than the conclusion that the business involved was “affected with a public interest”, e.g., *Margolin v. United States*, 269 U. S. 93, 46 Sup. Ct. 64, 70 L. ed. 176 (1925), upholding statute limiting amount chargeable by attorneys prosecuting various claims against the United States; and *Griffith v. State of Connecticut*, 218 U. S. 563, 31 Sup. Ct. 132, 54 L. ed. 1151 (1910), sustaining a state usury statute.

the courts until recently treated the right of the owner of property to fix the price at which his property could be sold or used as an inherent attribute of the property itself.⁷ Accordingly some special circumstances had to exist in order to justify price regulation under the police power. Commonly where the regulation was upheld the Court drew from the circumstances the conclusion that the business was "affected with a public interest".⁸ No such conclusion was necessary in order to justify many other types of police regulation; for example, health regulations could be visited upon enterprises whether or not they were "affected with a public interest".⁹ However, health regulation is used to attack health problems. Hitherto it was thought that price regulation was supportable only where there were special price problems. The judicial requirement that a business be "affected with a public interest", *i.e.*, be in a special category, before price regulation was justified, was the judicial counterpart of the economic doctrine of *laissez faire*. The economic system was founded on free enterprise; price regulation was an exception requiring justification.

Looking solely to the phraseology of the courts the term "affected with a public interest"¹⁰ eludes the grasp. The Supreme Court, by Mr. Justice Sutherland, conceded that it was undefined and indefinite.¹¹ Its actual effect can best be understood, so far as price legislation is concerned, by examining the situations in which the Court found the enter-

⁷ *Tyson v. Banton*, 273 U. S. 418, 429, 47 Sup. Ct. 426, 71 L. ed. 718, 722 (1927).

⁸ *German Alliance Insurance Co. v. Lewis*, 233 U. S. 389, 34 Sup. Ct. 612, 58 L. ed. 1011 (1914); *Budd v. New York*, 143 U. S. 517, 12 Sup. Ct. 468, 36 L. ed. 247 (1892); *Munn v. Illinois*, 94 U. S. 113, 24 L. ed. 77 (1876).

⁹ *Maryland v. Hyman*, 98 Md. 596, 57 Atl. 6 (1904) (a statute prescribing at least 400 cubic feet of air for each employee in manufacturing establishments was upheld); *People v. Smith*, 108 Mich. 527, 66 N. W. 382 (1896) (statute requiring blowers to carry dust from emery wheels).

¹⁰ This phrase originated in Lord Hale's essay *De Portibus Maris* written in 1670. Discussing the common law duty to charge reasonable prices imposed on owners of wharves to which all must come, he remarked that, "When private property is 'affected with a public interest' it ceases to be *juris privati* only". In attempting to clarify its distinction between those businesses subject to price regulation and those not so subject the Court in *Munn v. Illinois*, 94 U. S. 133, 24 L. ed. 77 (1876), referred to Lord Hale's essay and concluded that prices could be regulated when a business was "affected with a public interest". However, it did not clearly decide whether the classification would be left to the legislature or to the court; subsequent cases held that the court should make this decision. In *Charles Wolff Packing Co. v. Court of Industrial Relations*, 262 U. S. 522, 43 Sup. Ct. 630, 67 L. ed. 1103 (1923), the Court limited businesses "affected with a public interest" to three categories: (1) Where a franchise had been granted, with an affirmative duty of rendering public service. (2) Occupations long subject to exceptional regulations, such as innkeepers and cabmen. (3) Those businesses, *not public at their inception*, which have come to bear such a peculiar relation to the public that they can be said to have been devoted by their owners to a public use, in effect granting the public an interest in that use, and subject to regulation to the extent of that use.

¹¹ *Tyson v. Banton*, 273 U. S. 418, 430, 47 Sup. Ct. 426, 71 L. ed. 718, 722 (1927).

prises involved to be so affected. An examination of the decisions in which the "affected with public interest" doctrine has been applied, and the price regulation upheld, discloses that the element common to all is the existence of a situation or a combination of circumstances materially impairing the regulative force of competition to the extent that serious economic consequences resulted to a very large number of the community.

The decision in *Munn v. Illinois*¹² is clearly explainable on the above basis. There the Court was asked to review an Illinois statute which fixed the maximum price for storage in grain elevators in Chicago. In deciding that the grain elevators were "affected with a public interest" the Court found that because of their strategic location between rail traffic from the interior states and water traffic to the consumer world, these elevators stood in the "gateway of commerce". It also found that the owners had taken advantage of this strategic position and had formulated a single-price schedule which was followed by all, thereby creating a "virtual monopoly" affecting the whole wheat-producing middle west. Thus it was apparent to the Court that the competitive system had broken down and that prices were no longer regulated by the law of supply and demand. Consequently, because of this combination of circumstances a business, private at its inception, had become "affected with a public interest".

Subsequent cases in which price regulations have been upheld on the "affected with public interest" theory have presented situations in which the basic economic facts were the same as above, *i.e.*, there had been a breakdown of the competitive price-fixing system in a business which affected the community as a whole. Thus a Kansas statute fixing the rates of fire insurance companies was upheld.¹³ The facts were that there was an almost universal need for insurance protection, and that while the insurers competed for the business they all fixed their premiums for similar risks according to an agreed schedule of rates.

Similar economic situations were presented in those cases where price fixing was upheld because some emergency had caused the law of supply and demand to become inoperative as a price regulator.¹⁴ In

¹² 94 U. S. 133, 24 L. ed. 77 (1876).

¹³ *German Alliance Insurance Co. v. Lewis*, 233 U. S. 389, 34 Sup. Ct. 612, 58 L. ed. 1011 (1914). This decision was subsequently used as the basis for upholding a New Jersey statute fixing the commission of insurance agents. *O'Gorman and Young v. Hartford Fire Insurance Co.*, 282 U. S. 251, 51 Sup. Ct. 130, 75 L. ed. 324 (1930). It was also followed in *LaTourteet v. McMaster*, 248 U. S. 465, 39 Sup. Ct. 160, 63 L. ed. 362 (1918) (where regulation of the relation of those engaged in the insurance business was allowed).

¹⁴ War emergency rent statutes were upheld in: *Chastleton Corp. v. Sinclair*, 264 U. S. 543, 44 Sup. Ct. 405, 68 L. ed. 841 (1924); *Marcus Brown Holding Co. v. Feldman*, 256 U. S. 170, 41 Sup. Ct. 465, 65 L. ed. 877 (1921); *Block v. Hirsch*, 256 U. S. 135, 41 Sup. Ct. 458, 65 L. ed. 865 (1921).

Highland v. Russell Car and Snowplow Co., 279 U. S. 253, 49 Sup. Ct. 314, 73

Block v. Hirsch,¹⁵ the first of a series of war emergency rent cases, the power of Congress to fix rents was upheld in the presence of an abnormal demand and a limited supply of housing facilities.

On the other hand, certain cases are apparently inconsistent with the above-mentioned rationale. *Brass v. Stoesser*¹⁶ involved a North Dakota statute regulating charges of some six hundred grain elevators scattered along lines of railroad throughout a sparsely populated region. There was no strangling monopoly and no indication that the regulative power of competition had broken down, yet the legislation was upheld. This can be defended on the basis that when a business is found to be affected with a public interest all units of it are to be put in the same classification though some of them lack the distinguishing characteristics which originally had been used to justify the classification. Grain elevators had already been held subject to price regulation in the *Munn* case. But in *Ribnik v. McBride*¹⁷ the Court failed to declare a public interest in a case involving the requisite economic factors. In that case a six-to-three decision declared unconstitutional a New Jersey statute fixing the maximum fees chargeable by employment agencies.¹⁸ In this business also the price control could have been justified on the ground that free competition failed to fix prices adequately because in practice the agencies took advantage of the unequal bargaining power of the unemployed.

Comparison of the *Brass* and *Ribnik* cases discloses the unsatisfactory operation of the "affected with a public interest" test. In the first case price regulation was supported where there was complete freedom of competition and little apparent need for regulation; in the second, regulation was invalidated in spite of the exceptional need for it.

Gradually various members of the Court became dissatisfied with the old concept, as is evidenced by the presence in some of the more recent decisions of vigorous dissents. Criticizing the majority in *Tyson v. Banton*¹⁹ Justice Holmes was of the opinion that "the notion that a business is clothed with a public interest and has been devoted to a public use" was "little more than a fiction intended to beautify what is

L. ed. 688 (1928) (emergency regulation of coal prices was sustained); *Wilson v. New*, 243 U. S. 332, 37 Sup. Ct. 298, 61 L. ed. 755 (1916) (federal emergency wage regulation was upheld).

¹⁵ 256 U. S. 135, 41 Sup. Ct. 458, 65 L. ed. 865 (1921).

¹⁶ 153 U. S. 391, 14 Sup. Ct. 857, 38 L. ed. 757 (1894).

¹⁷ 277 U. S. 350, 48 Sup. Ct. 545, 72 L. ed. 913 (1927).

¹⁸ LAWS OF NEW JERSEY (1918) c. 277, p. 822.

¹⁹ 273 U. S. 418, 47 Sup. Ct. 426, 71 L. ed. 718 (1927) (the Court was asked to pass on the validity of a New York statute limiting the resale price of theatre tickets by ticket brokers. It was held that the theatre business was essentially private in nature and therefore was not subject to price regulation; by treating the theatre ticket brokers as an appendage of the theatre business it necessarily followed that their charges could not be regulated).

disagreeable to the sufferers", and further that "the proper course is to recognize that a state legislature can do whatever it sees fit to do unless it is restrained by some express prohibition. . . . Courts should be careful not to extend such prohibitions beyond their obvious meaning by reading into them conceptions of public policy that the particular Court may happen to entertain".²⁰ In the same case Justice Stone (dissenting) attempted to give reality to previous decisions by saying that in all those cases where price fixing had been upheld there had been a breakdown of the "regulative force of competition" affecting seriously "a large number of the members of the community". He insisted that a similar situation existed in this case, and concluded that the solution to the problem "turns upon considerations of economics about which there may be reasonable difference of opinion. Choice between these views takes us from the judicial to the legislative field. The judicial function ends when it is determined that there is a basis for legislative action in a field not withheld from legislative power by the Constitution as interpreted by the decisions of this Court".²¹

Justice Stone again dissenting in the *Ribnik* case added another criticism of the "affected with a public interest" view, saying that he could not distinguish a difference between "reasonable regulation of price, if appropriate to the evil to be remedied, and other forms of appropriate regulation" since either affected the economic return of a business.²² Justice Brandeis, dissenting in *New State Ice Co. v. Liebmann*,²³ was of the opinion that "the notion of a distinct category of business 'affected with a public interest' employing property devoted to a public use rests upon historical error . . . the true principle is that the State's power extends to every regulation of any business reasonably required and appropriate for the public protection".

As a result of their efforts, in 1929 these dissenters seem to have won a "moral victory" in *Tagg Brothers v. United States*.²⁴ That decision, written by Justice Brandeis, unanimously upheld the validity of an order of the Secretary of Agriculture fixing the maximum fees chargeable by marketing agencies or commission men operating in the Omaha Stockyards, which order was made pursuant to authority granted to the Secretary in the Packers and Stockyards Act.²⁵ The Court simply stated that the commission men enjoyed a substantial monopoly

²⁰ *Id.* at 446, 47 Sup. Ct. 426, 41 L. ed. at 729 (1927).

²¹ *Id.* at 454, 47 Sup. Ct. at 436, 71 L. ed. at 733 (1927).

²² 277 U. S. at 373, 48 Sup. Ct. at 552, 72 L. ed. at 923 (1927).

²³ 285 U. S. at 302, 52 Sup. Ct. at 383, 76 L. ed. at 766 (1931) (a statute making a certificate of public necessity and convenience a prerequisite of engaging in the business of manufacturing and distributing ice was held invalid).

²⁴ 280 U. S. 420, 50 Sup. Ct. 220, 74 L. ed. 524 (1930).

²⁵ Act of Aug. 15, 1921, c. 64, §§301-16, 42 Stat. 159, 163-68, 7 U. S. C. §§201-17 (1926).

and performed an indispensable service in the interstate commerce in livestock, and left undiscussed the question of whether or not the business was "affected with a public interest", even though they could have decided the case on this basis. The Court appeared ready to give the phrase "affected with a public interest" a well-earned rest. However, it was not until 1934 that the Court, in *Nebbia v. New York*,²⁶ finally overthrow *in toto* the idea that price control legislation could act only on businesses "affected with a public interest". This decision involved a statute giving a milk control board power to fix minimum prices for milk, and was based on the legislative finding that an emergency existed due to the oversupply of raw milk; therefore, the control of price through the law of supply and demand was no longer effective. Moreover, the circumstances were such that if the Court had desired to do so they could have upheld the statute either on the authority of the emergency rent cases or by declaring the milk industry "affected with a public interest", since competition had failed to fix a fair price and the industry was of vast public importance. Instead of this, the majority chose to abandon the *laissez-faire* idea that price regulation would be permitted only in those exceptional cases in which the Court found the business or industry "affected with a public interest". The arguments used in upholding the statute were those which had previously appeared only in dissenting opinions and the conclusion reached was that the phrase "affected with a public interest" meant only that the business so described was, for adequate reasons, subject to control for the public good. Commenting at the time on the decision, James E. Beck declared that the Court had "calmly discarded its decisions of fifty years" without even paying "those decisions the obsequious respect of a final oration".²⁷

That the Supreme Court had abandoned the old method of reviewing price regulations should have been apparent to all in the *Nebbia* case. In subsequent decisions the Court has followed the new approach in approving fair trade acts (which are analagous in requiring dealers to observe minimum resale prices fixed in contracts to which they were not parties),²⁸ Federal milk price fixing,²⁹ minimum wages,³⁰ and state regulation of tobacco warehouse charges.³¹ However, in the face of these

²⁶ 291 U. S. 502, 54 Sup. Ct. 505, 78 L. ed. 940 (1934).

²⁷ Cong. Rec., March 24, 1934, at 5480.

²⁸ *Old Dearborn Distrib. Co. v. Seagram Distillers Corp.* 299 U. S. 183, 57 Sup. Ct. 139, 81 L. ed. 109 (1936).

²⁹ *United States v. Rock Royal Coöp.*, 307 U. S. 533, 59 Sup. Ct. 993, 83 L. ed. 1446 (1939).

³⁰ *West Coast Hotel Co. v. Parrish*, 300 U. S. 379, 57 Sup. Ct. 578, 81 L. ed. 703 (1937) (overruling *Adkins v. Childrens' Hospital*, 261 U. S. 525, 43 Sup. Ct. 394, 67 L. ed. 785 (1923), which had declared unconstitutional a minimum wage statute applied to women).

³¹ *Townsend v. Yeomans*, 301 U. S. 441, 57 Sup. Ct. 842, 81 L. ed. 1210

decisions some authorities persisted in clinging to the old view. This attitude appeared in the decision in the state court in the instant case.³² The effect of the decision of the Supreme Court should be to make it plain that its attitude in the *Nebbia* case is now its settled policy; that hereafter price legislation need be justified by no special circumstances under the label "affected with a public interest" or otherwise. This decision is in line with recent trends toward a controlled economy, and obviously makes it possible for governmental action to supplant free competition as our principal means of determining prices. The new approach will eliminate judicial legislation as to which businesses are suitable for price control; yet by treating price fixing as an ordinary exercise of the police power, a check against capricious and arbitrary legislation will be preserved.

JAMES F. LAWRENCE, JR.

Contempt of Court—Construction of Federal Statute Concerning Punishment for Contempt

In the case of *Nye v. United States*,¹ the Supreme Court, by construction of section 268 of the judicial code,² has stringently abridged the power of the federal district courts³ to punish summarily for contempt.⁴

(1937); *Mayo v. Lakeland Highlands Canning Co., Inc.*, 309 U. S. 310, 60 Sup. Ct. 517, 84 L. ed. 481 (1940) (a preliminary injunction was denied against enforcement of a statute fixing prices of citrus juices in the citrus fruit industry). State price regulation has been upheld in the following cases: *Highland Farms Dairy, Inc. v. Agnew*, 300 U. S. 608, 57 Sup. Ct. 549, 81 L. ed. 835 (1937); *Borden's Farm Products Co. v. Ten Eyck*, 297 U. S. 251, 56 Sup. Ct. 453, 80 L. ed. 669 (1936); *Hegeman Farms Corp. v. Baldwin*, 293 U. S. 163, 55 Sup. Ct. 7, 79 L. ed. 259 (1934); *cf. Mayflower Farms, Inc. v. Ten Eyck*, 297 U. S. 266, 56 Sup. Ct. 457, 80 L. ed. 675 (1936) (the court held unreasonable and arbitrary a classification created by a N. Y. statute which limited the benefit of a price differential to milk dealers not having a well-advertised trade name to those who were already engaged in the milk business at a certain date).

³² *State v. Kinney*, 138 Neb. 574, 293 S. W. 393 (1940).

¹ *Nye v. United States*, 61 Sup. Ct. 810, 85 L. ed. Adv. Ops. 733 (1941), Note (1941) 54 HARV. L. REV. 1397. Followed in *Millinocket Theatre v. Kurston*, 39 F. Supp. 979 (D. Me., 1941). *Warring v. Colpoys*, 122 F. (2d) 642 (App. D. C. 1941) (retroactive operation of *Nye* decision).

² 36 Stat. 1163 (1911), 28 U. S. C. A. §385 (1928) ("The said courts shall have the power to impose and administer all necessary oaths, and to punish, by fine or imprisonment, at the discretion of the court, contempts of their authority. Such power to punish contempts shall not be construed to extend to any cases except the misbehavior of any person in their presence, or so near thereto as to obstruct the administration of justice, the misbehavior of any of the officers of said courts in their official transactions, and the disobedience or resistance by any such officer, or by any party, juror, witness, or other person to any lawful writ, process, order, rule, decree, or command of the said courts").

³ As to bankruptcy proceedings, see *Boyd v. Glucklick*, 116 Fed. 131 (D. Iowa, 1902). As to disobedience of an injunction outside the district, see *Myers v. United States*, 264 U. S. 95, 44 Sup. Ct. 272, 62 L. ed. 577 (D. C. W. D. Mo., 1924).

⁴ This note will not deal with the constitutionality of the statute. The power