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CONSTITUTIONAL LAW-PRICE-FIXING - CHANGING ATTITUDES

CONSTITUTIONAL LAW — PRICE-FIXING — CHANGING ATTITUDES — The urgent need for rebuilding and readjusting our economic system has forced the various governments to devise methods by which to achieve those ends. The legislative enactments resulting from the efforts to bring about a "recovery" are destined to be challenged on the due process ground. The public is keenly concerned not alone in the practicality of the methods selected, but in their constitutionality as well. The recent case of *Nebbia v. People*[1] is not only of interest to the lawyer; it was accepted as "good copy" in leading lay publications. The Supreme Court affirmed the conviction of one Nebbia, a retail grocer, for violation of an order of the Milk Control Board which had fixed a minimum price under Chapter 158 of the New York Laws of 1933. The view is current that the decision in the *Nebbia* case represents a distinct break with the past, a kind of judicial revolution.[2] This view seems to be based upon the assumption that legal principles develop in a smooth, continuous manner, marked by a careful consistency. Those familiar with the law know that the development is frequently spasmodic, broken, and characterized by a trial-and-error approach. The decision in the *Nebbia* case comes at a critical time, and it may be of value to examine into the reasoning and authority upon which the result was based.

A review of the decided cases touching upon the problem reveals that they fall into two opposed groups.[3] It is upon the force of these

[1] (U. S. Sup. Ct.) 1 U. S. LAW WEEK. (Mar. 6, 1934, p. 7), index p. 551.

[2] NEW REPUBLIC, Mar. 21, 1934, pp. 416-17. An article blatantly entitled, "The Supreme Court Eats Crow."

[3] Holding price regulation valid: Munn v. Illinois, 94 U. S. 113, 24 L. ed. 77 (1876); Budd v. New York, 143 U. S. 517, 12 Sup. Ct. 468 (1892); Brass v. North Dakota, 153 U. S. 391, 14 Sup. Ct. 857 (1894); Frisbie v. United States, 157 U. S. 160, 15 Sup. Ct. 586 (1895); Griffith v. Connecticut, 218 U. S. 563, 31 Sup. Ct. 132 (1910); German Alliance Ins. Co. v. Lewis, 233 U. S. 389, 34 Sup. Ct. 612 (1914); Calhoun v. Massie, 253 U. S. 170, 40 Sup. Ct. 474 (1920); Tagg Bros. & Moorhead v. United States, 280 U. S. 420, 50 Sup. Ct. 220 (1930); O'Gorman & Young, Inc. v. Hartford Fire Ins. Co., 282 U. S. 251, 51 Sup. Ct. 130 (1931); Stephenson v. Binford, 287 U. S. 251, 53 Sup. Ct. 181 (1932). Holding price regulation invalid: Tyson & Bro. v. Banton, 273 U. S. 418, 47 Sup. Ct. 426 (1927); Fairmont Creamery Co. v. Minnesota, 274 U. S. 1, 47 Sup. Ct. 506 (1927); Ribnik v. McBride, 277 U. S. 350, 48 Sup. Ct. 545 (1928); Williams v. Standard Oil Co., 278 U. S. 35, 49 Sup. Ct. 115 (1929). For this view see also: Adkins v. Children's Hospital, 261 U. S. 525, 43 Sup. Ct. 394 (1923); Wolff Packing Co. v. Court of Industrial Relations of Kansas, 262 U. S. 522, 43 Sup. Ct. 630 (1923); New State Ice Co. v. Liebmann, 285 U. S. 262, 52 Sup. Ct. 371 (1932).

two groups of cases that the Court divided. The decisions have alternated between them throughout the years and are notable for vigorous dissenting opinions. It is possible to draw lines of distinction between the particular cases, but these would necessarily depend upon narrow legalistic and factual differences.[4] The decisions and the dicta offer more than an opportunity for exercise in the art of distinguishing cases; they are fundamentally irreconcilable on principle.

In the famous case of *Munn v. Illinois*,[5] Chief Justice Waite borrowed an argument from appellants' brief. Their attorneys had opposed regulation by price-fixing with a citation from Sir Matthew Hale. The Court upheld the legislation, and in justifying and explaining the result declared that grain warehouses are "affected with a public interest."[6] The phrase has had a curious history. It was introduced as a means of broadening the scope of police power in price-fixing cases; it became the chief barrier to legislative action in this field.[7] Too often this is what happens: a principle used to justify action is itself used to prevent further growth. There have been developed two main methods of approach to the problem of determining the constitutionality of price regulation. One treats price-fixing as a regulatory device distinct from regulation of the conduct of a business. The legislature can fix prices only as to businesses "affected with a public interest."[8] The other approach treats price regulation as merely one of the indefinite and unparticularized total of regulatory devices. It does not set up a requirement that the business be one affected with a public interest.[9]

[4] The majority disposes of the cases *contra* very briefly in this language: "These decisions must rest, finally, upon the basis that the requirements of due process were not met because the laws were found arbitrary in their operation and effect." Nebbia v. People, (U. S. Sup. Ct.) 1 U. S. LAW WEEK (Mar. 6, 1934, p. 7 at 11), index p. 551 at 555. For an interesting attempt to distinguish the cases see 18 MINN. L. REV. 73 (1933).

[5] 94 U. S. 113, 24 L. ed. 77 (1876).

[6] Hamilton, "Affectation With Public Interest," 39 YALE L. J. 1089 at 1095 (1930).

[7] Goddard, "The Evolution and Devolution of Public Utility Law," 32 MICH. L. REV. 577 at 585 (1934). See also 22 CAL. L. REV. 86 at 91 (1933).

[8] "It is settled by recent decisions of this Court that a state legislature is without constitutional power to fix prices at which commodities may be sold, services rendered, or property used, unless the business or property involved is 'affected with a public interest.'" Williams v. Standard Oil Co., 278 U. S. 235 at 239, 49 Sup. Ct. 115 at 116 (1929).

[9] "It is clear that there is no closed class or category of businesses affected with a public interest, and the function of the courts in the application of the Fifth and Fourteenth Amendments is to determine in each case whether circumstances vindicate the challenged regulation as a reasonable exertion of governmental authority or condemn it as arbitrary or discriminatory." Nebbia v. People, (U. S. Sup. Ct.) 1 U. S. LAW WEEK (Mar. 6, 1934, p. 7 at 11), index p. 551 at 555; See also German Alliance Ins. Co. v. Lewis, 233 U. S. 389 at 411, 415, 34 Sup. Ct. 612 at 618, 621 (1914).

The clear line between these two methods of approach has been cut across by a variation applicable to "emergency" situations.[10] The majority opinion in the *Nebbia* case does not purport to depend upon the "emergency" variation, though the same result might have been reached on the basis of that doctrine.[11] The Supreme Court was faced with the necessity of making a choice. It decided to limit its choice to one of the two major methods of approach. The legislation in question could have been either sustained or invalidated upon sufficient authority.[12] A majority of the Court accepted[13] the approach which divorces legislative power to regulate prices from the concept of a business "affected with a public interest."[14] It cannot be assumed that the continued struggle on this matter has been ended. A change in the personnel of the Court might bring about a return to the other approach.[15] An important principle of constitutional interpretation may be very slow to develop. The issue is simply one of determining which approach is the more sound.

Generally speaking, commentators have decried the use of the test demanding that price regulation be confined to businesses affected with a public interest.[16] Research has revealed that this test is not an accurate application of Hale's idea,[17] that it is not even clear that Hale was

[10] Block v. Hirsh, 256 U. S. 135, 41 Sup. Ct. 458 (1921); Marcus Brown Holding Co. v. Feldman, 256 U. S. 170, 41 Sup. Ct. 465 (1921). For a discussion of the true place and meaning of the "emergency" doctrine see 32 MICH. L. REV. 63 at 65 (1933).

[11] People v. Nebbia, 262 N. Y. 259, 186 N. E. 694 (1933). Discussed in 32 MICH. L. REV. 63 (1933); 47 HARV. L. REV. 130 (1933); 28 ILL. L. REV. 560 (1933); 18 MINN. L. REV. 73 (1933); 11 N. Y. U. L. Q. REV. 285 (1933). The case was considered in most of the law reviews.

[12] See notes 3, 10, and 11 supra.

[13] "Accepted" is hardly a sufficiently strong term; included in the majority are those who have long contended for this approach. See dissenting opinions by Mr. Justice Stone in Tyson & Bro. v. Banton, 273 U. S. 418, 447, 47 Sup. Ct. 426 (1927), and Ribnik v. McBride, 277 U. S. 350, 359, 48 Sup. Ct. 545 (1928). See dissenting opinion by Mr. Justice Brandeis in New State Ice Co. v. Liebmann, 285 U. S. 262 at 280, 52 Sup. Ct. 371 at 375 (1932).

[14] "The phrase 'affected with a public interest' can, in the nature of things, mean no more than that an industry, for adequate reason, is subject to control for the public good." Nebbia v. People, (U. S. Sup. Ct.) 1 U. S. LAW WEEK (Mar. 6, 1934, p. 7 at 11), index p. 551 at 555.

[15] Goddard, "The Evolution and Devolution of Public Utility Law," 32 MICH. L. REV. 577 at 588 (1934).

[16] Finkelstein, "From Munn v. Illinois to Tyson v. Banton," 27 COL. L. REV. 769 (1927); McAllister, "Lord Hale And Business Affected With A Public Interest," 43 HARV. L. REV. 759 (1930); Hamilton, "Affectation With Public Interest," 39 YALE L. J. 1089 (1930); Arterburn, "The Origin And First Test of Public Callings," 75 UNIV. PA. L. REV. 411 (1927). Among many others: 19 MICH. L. REV. 74 (1920); 25 MICH. L. REV. 880 (1927); 30 MICH. L. REV. 1277 (1932); 32 MICH. L. REV. 63 (1933). *Contra*, see 18 VA. L. REV. 769 (1932).

[17] McAllister, "Lord Hale And Business Affected With A Public Interest," 43

correct in his analysis of the law,[18] and that certain early English and American sources show that control was exercised over the sale price of numerous commodities and services.[19] It has been suggested,[20] not without cause, that the use of the public interest doctrine has superimposed Hale's phrase upon our Constitution, and this has been done despite the fact that there is little, if any, sound historical basis for the doctrine. The power to regulate prices was used when it was deemed necessary,[21] but economic changes removed the necessity as to most businesses. Now that further changes in the economic system have caused legislatures to feel that price control is again necessary or advisable, their power so to act, provided all the general requirements of due process are met, should not be questioned.[22] Indeed, Sir Matthew Hale, by his own word, would be among the last to apply the doctrine attributed to him in order to prevent legislative action designed to regulate by means of price-fixing.[23]

HARV. L. REV. 759 at 762ff. (1930); Hamilton, "Affectation With Public Interest," 39 YALE L. J. 1089 at 1094 (1930).

[18] McAllister, "Lord Hale And Business Affected With A Public Interest," 43 HARV. L. REV. 759 at 766 (1930). And see Arterburn, "The Origin And First Test Of Public Callings," 75 UNIV. PA. L. REV. 411 at 420ff. (1927).

[19] Finkelstein, "From Munn v. Illinois to Tyson v. Banton," 27 COL. L. REV. 769 at 779 (1927); McAllister, "Lord Hale And Business Affected With A Public Interest," 43 HARV. L. REV. 759 at 767 (1930); 33 HARV. L. REV. 838 (1920); 19 MICH. L. REV. 74 (1920).

[20] Hamilton, "Affectation With Public Interest," 39 YALE L. J. 1089 (1930).

[21] 19 MICH. L. REV. 74 (1920), and see citations in n. 19, supra.

[22] A parallel argument is suggested in 19 MICH. L. REV. 74 (1920).

[23] The following statement by Sir Matthew Hale was used very effectively by McAllister in "Lord Hale And Business Affected With A Public Interest," 43 HARV. L. REV. 759, 790 (1930); it is to be found also in HARGRAVE, LAW TRACTS 269-270 (1787):

> "Glanville wrote a system of our English lawes in the time of H. 2. Bracton in the time of H. 3. Britton in the time of E.1. Let any man read them, and see, whether he can by any means accommodate that administration to the present state of things, or the present regiment or order of things to that. Nay, if we come to the year-books of the time of E. 3 any man that knowes any thing in this kind, will most certainly find, that it cannot fit us; for where is there now one assise or real action brought, unless where they have no other remedy? So that the stream of things have as it were left that channell, and taken a new one; and he, that thinks a state can be exactly steered by the same lawes in every kind, as it was two or three hundred years since, may as well imagine, that the cloaths that fitted him when he was a child should serve him when he is grown a man. The matter changeth the custom; the contracts the commerce; the dispositions educations and tempers of men and societies change in a long tract of time; and so must their lawes in some measure be changed, or they will not be usefull for their state and condition. And besides all this, as I before said, time is the wisest thing under heaven. These very lawes, which at first seemed the wisest constitution under heaven, have some flawes and defects discovered in them by time. As manufactures, mechanical arts, architecture and building, and philosophy itself, receive

The evil of the use of this test has been a tendency toward the creation of definite categories of businesses in which price regulation is allowed.[24] This crystallization of the powers of the government is a dangerous thing for a people living under a written constitution. The constant changes that take place in the economic and social systems require that constitutional interpretations be designed to lend flexibility to the broad, sweeping provisions such as a due process clause. Early in our history the Supreme Court recognized that fact, and the idea has found repeated expression in its opinions. Chief Justice Marshall said, "We must never forget that it is a constitution that we are expounding . . . a constitution intended to endure for ages to come, consequently to be adapted to the various crises of human affairs." [25] Years later it was asserted by Mr. Justice Brewer, in somewhat similar vein, that "constitutional provisions do not change, but their operation extends to new matters, as the modes of business and the habits of life of the people vary with each succeeding generation." [26] A conceptual jurisprudence runs counter to the frequently-asserted principles upon which the unique power of judicial review is said to rest. The example becomes the class; the specific case, the limitation. It is difficult also to understand how the recognized categories themselves can be justified. By what magic did the power to regulate in respect of those particular cases arise, and, if there was power to extend the regulatory process, why is it unavailable now? "It would be a bold thing to say . . . that government possessed at one time a greater power to recognize the public interest in a business and its regulation to promote the general welfare than government possesses today." [27] In the end the conceptual approach makes it impossible for the government to adapt itself to the needs of a society that is in continual evolution. The defects of this approach stand out the more strongly as the pace of change increases, and at no time has the tempo been faster than it is today. The most telling criticism of it is the laconic remark of Mr. Justice Holmes: "The Fourteenth Amendment does not enact Mr. Herbert Spencer's Social Statics." [28]

This statement by Mr. Justice Holmes suggests another fundamen-

new advantages and discoveries by time and experience; so much more do lawes, which concern the manners and customs of men."

[24] An effort was made to set up categories in Wolff Packing Co. v. Court of Industrial Relations of Kansas, 262 U. S. 522, 43 Sup. Ct. 630 (1923), and an attempt to apply the law in accordance with those divisions was made in Tyson & Bro. v. Banton, 273 U. S. 418, 47 Sup. Ct. 426 (1927).

[25] McCullough v. Maryland, 4 Wheat. (17 U. S.) 316 at 406, 415 (1819).

[26] In re Debs, 158 U. S. 564 at 591, 15 Sup. Ct. 900 at 909 (1895).

[27] German Alliance Ins. Co. v. Lewis, 233 U. S. 389 at 411, 34 Sup. Ct. 612 at 619 (1914).

[28] Lochner v. New York, 198 U. S. 45 at 75, 25 Sup. Ct. 539 at 546 (1905).

tal defect in the doctrine which evaluates the constitutionality of price regulation in terms of "affectation with a public interest." The tendency is to supplant the legislative determination of the wisdom of the regulation by the court's opinion as to its advisability.[29] The general rule is that the legislature rather than the court shall pass upon the expediency of the method of regulation.[30] Where the reasoning proceeds from a particular case to established categories, the court is in a position to exercise more control over legislative acts than it is deemed, in theory, to possess. The language of some of the decisions in this field bears witness to the fact that personal opinion has dictated a conservative view.[31] This is a serious restriction upon legislative action. The courts are not as responsive as the legislatures to the needs of the public nor as willing to meet new problems with new methods. It is not the duty of the courts to perpetuate any outworn social or economic dogma. The standard guiding the courts should be sufficiently flexible to give great weight to existing conditions and to permit the adaptation of methods of governmental control to those conditions.

There remains still another flaw in the rule as expressed by the minority. The rule makes a distinction between the exercise of the police power in the regulation of the conduct of business and the regulation of price.[32] The distinction, based upon the incidence of regulation, cannot be supported on either an economic or constitutional basis.

[29] Finkelstein, "From Munn v. Illinois to Tyson v. Banton," 27 COL. L. REV. 769, 782-783 (1927); 22 CAL. L. REV. 86 (1933).

[30] "The assailed provisions . . . are not ends in and of themselves, but means to the legitimate end of conserving the highways. The extent to which, as means, they conduce to that end, the degree of their efficiency, the closeness of their relation to the ends sought to be attained, are matters addressed to the judgment of the Legislature, and not to that of the courts. It is enough if it can be seen that in any degree, or under any reasonably conceivable circumstances, there is an actual relation between the means and the end." Stephenson v. Binford, 287 U. S. 251 at 272, 53 Sup. Ct. 181 at 187 (1932).

[31] "The paternal theory of government is to me odious. The utmost possible liberty to the individual, and the fullest possible protection to him and his property, is both the limitation and duty of government. If it may regulate the price of one service, which is not a public service, or the compensation for the use of one kind of property which is not devoted to a public use, why may not it with equal reason regulate the price of all service, and the compensation to be paid for the use of all property? And if so, 'Looking Backward' is nearer than a dream." Mr. Justice Brewer dissenting in Budd v. New York, 143 U. S. 517 at 551, 12 Sup. Ct. 468 at 478 (1892). See also Mr. Justice Lamar's dissent in German Alliance Ins. Co. v. Lewis, 233 U. S. 389 at 430, 34 Sup. Ct. 612 at 626 (1914), and Nebbia v. People, (U. S. Sup. Ct.) 1 U. S. LAW WEEK (Mar. 6, 1934, p. 7 at 15), index p. 551 at 559.

[32] "The latter power [to fix prices] is not only a more definite and serious invasion of the rights of property and the freedom of contract, but its exercise cannot always be justified by circumstances which have been held to justify legislative regulation of the manner in which a business shall be carried on." Tyson & Bro. v. Banton, 273 U. S. 418 at 431, 47 Sup. Ct. 426 at 428 (1927).

Regulation under the police power has steadily increased,[33] and these regulations undoubtedly do more than affect the conduct of the business alone. From an economic point of view, they restrain the use of private property and the right to contract in a manner that influences price. The milk industry, for example, is subjected to broad regulation.[34] In the principal case, Nebbia admitted this but contended nevertheless that "the public control of rates or prices is *per se* unreasonable and unconstitutional, save as applied to businesses affected with a public interest." The majority of the court flatly denied that there is any constitutional ground for the principle.[35] The weakness of the distinction was earlier exposed by Mr. Justice Stone, dissenting in *Ribnik v. McBride*,[36] as follows:

> "To say that there is constitutional power to regulate a business or a particular use of property because of the public interest in the welfare of a class peculiarly affected, and to deny such power to regulate price for the accomplishment of the same end, when that alone appears to be an appropriate and effective remedy, is to make a distinction based on no real economic difference, and for which I can find no warrant in the Constitution itself nor any justification in the opinions of this court."

The weaknesses of the approach which allows price regulation only in businesses affected with a public interest are not present in the alternative approach. This alternative, as pointed out above, is to place price regulation on an equal footing with all other regulations. This means that the constitutionality of price regulation is determined in exactly the same way as the constitutionality of any other legislation

[33] A few typical cases: Holden v. Hardy, 169 U. S. 366, 18 Sup. Ct. 383 (1898); Muller v. Oregon, 208 U. S. 412, 28 Sup. Ct. 324 (1908); McLean v. Arkansas, 211 U. S. 539, 29 Sup. Ct. 206 (1909); Bunting v. Oregon, 243 U. S. 426, 37 Sup. Ct. 435 (1917). For a comprehensive list see the cases cited by the majority in the principal case.

[34] Nebbia v. People, (U. S. Sup. Ct.) 1 U. S. LAW WEEK (Mar. 6, 1934, p. 7 at 8), index p. 551 at 552, notes 3, 4, 5, 6, and 7 of majority opinion.

[35] "But if, as must be conceded, the industry is subject to regulation in the public interest, what constitutional principle bars the state from correcting existing maladjustments by legislation touching prices? We think there is no such principle. The due process clause makes no mention of sales or of prices any more than it speaks of business or contracts or buildings or other incidents of property. The thought seems nevertheless to have persisted that there is something peculiarly sacrosanct about the price one may charge for what he makes or sells, and that, however able to regulate other elements of manufacture or trade, with incidental effect upon price, the state is incapable of directly controlling the price itself. The view was negatived many years ago." Nebbia v. People, (U. S. Sup. Ct.) 1 U. S. LAW WEEK (Mar. 6, 1934, p. 7 at 10), index p. 551 at 554.

[36] 277 U. S. 350 at 374, 48 Sup. Ct. 545 at 552 (1928).

designed to control business. If the regulation attempted is neither arbitrary nor discriminatory, and if it is reasonably related to the ends sought by the legislature, then it is constitutional and valid.[87] This approach eliminates the difficulties of hard and fast categories, of the assumption of legislative power by the judiciary, and meets the problem in a thoroughly realistic fashion.[88] The power of the government to regulate and control business is essential to the maintenance of a proper balance between private interest on the one hand and public interest on the other. It is impossible to predict what means will be necessary to maintain that balance. There can be no reasonable assurance that this balance can be maintained unless the due process clause is treated as a standard capable of assimilating within itself the inevitable social and economic changes.

N. L.

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[87] See cases in which price regulation was held valid, note 3 supra, and cases cited in note 33, supra.

[88] Hamilton, "Affectation With Public Interest," 39 YALE L. J. 1089 at 1111 (1930).