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## CONSTITUTIONAL LAW -- DUE PROCESS -- PRICE-FIXING

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CONSTITUTIONAL LAW — DUE PROCESS — PRICE-FIXING — A Nebraska statute required the licensing of private employment agencies and limited maximum compensation for services rendered to ten per cent of the first month's salary or wages of the person for whom employment was obtained. In this case the Secretary of Labor of Nebraska refused to issue a license because of the applicant's refusal to limit its compensation to the statutory maximum. In a suit for a peremptory writ of mandamus to compel the issuing of the license, the Secretary of Labor relied on the statute. In reliance on *Ribnik v. McBride*,<sup>1</sup>

<sup>1</sup> 277 U. S. 350, 48 S. Ct. 545 (1928).

the Supreme Court of Nebraska, with one judge dissenting, held the statute invalid under the due process clause of the Fourteenth Amendment and ordered the peremptory writ of mandamus to be issued.<sup>2</sup> On certiorari, *held* that the statute did not deny due process of law and the judgment of the state court ordered reversed. *Olsen v. Nebraska ex rel. Western Reference & Bond Association*, 313 U. S. 236, 61 S. Ct. 862 (1941).

In view of *Nebbia v. New York*,<sup>3</sup> the result in the principal case was hardly a surprise. *Ribnik v. McBride*, now definitely overruled, was the source of dissent at the time it was decided.<sup>4</sup> In its blind reliance on *Tyson & Brother v. Banton*,<sup>5</sup> its emphasis on the verbal tests presented by such language as "dedicated to a public use" and "affected with a public interest," its failure to distinguish between public utility regulation and other regulation of a much less comprehensive type, its disregard of abuses practiced by uncontrolled employment agencies, and its indication of a general hostility to all forms of price-fixing, the opinion of the majority in the *Ribnik* case stood condemned even according to conservative standards of judicial interpretation under the due process clause. The *Nebbia* case reduced review in the name of due process to a scrutiny of the reasonableness of the legislative ends to be achieved and a scrutiny of the reasonableness of the legislative means employed. Price-fixing was no longer objectionable per se. The *Nebbia* case seemed to restore the basic thought pattern of *Munn v. Illinois*,<sup>6</sup> by removing the accumulated gloss of subsequent restrictive interpretation.<sup>7</sup> After reviewing recent decisions upholding price-fixing legislation, Justice Douglas states the matter succinctly in the principal case: "These cases represent more than scattered examples of constitutionally permissible price-fixing schemes. They represent in large measure a basic departure from the philosophy and approach of the majority in the *Ribnik* case."<sup>8</sup> But it was argued that the state of Nebraska had made no showing in this case that conditions existed which made it reasonably necessary to regulate the fees of private employment agencies in the interests of the public welfare, and that, on the contrary, a state of competition existed which served to prevent extortion in the charging of fees. To this argument the Court replied as follows: "We are not concerned, however, with the wisdom, need, or appropriateness of the legislation. Differences of opinion on that score suggest a choice which 'should be left where . . . it was left by the Constitution—to the States and to Congress.' . . . There is no necessity for the state to demonstrate before us that evils persist despite the competition which attends the bargaining in this field. In final analysis, the only constitutional prohibitions or restraints which respondents have suggested for the invalidation of this legislation are those notions of public policy embedded in

<sup>2</sup> State ex rel. Western Reference & Bond Assn. v. Kinney, 138 Neb. 574, 293 N. W. 393 (1941).

<sup>3</sup> 291 U. S. 502, 54 S. Ct. 505 (1934).

<sup>4</sup> See the dissenting opinion of Justice Stone, concurred in by Justice Holmes and Brandeis. *Ribnik v. McBride*, 277 U. S. 350 at 359 et seq., 48 S. Ct. 545 (1928).

<sup>5</sup> 273 U. S. 418, 47 S. Ct. 426 (1927).

<sup>6</sup> 94 U. S. 113 (1877).

<sup>7</sup> See McAllister, "Lord Hale and Business Affected With a Public Interest," 43 HARV. L. REV. 759 (1930).

<sup>8</sup> 313 U. S. at 245.

earlier decisions of this Court but which, as Mr. Justice Holmes long admonished, should not be read into the Constitution. . . . Since they do not find expression in the Constitution, we cannot give them continuing vitality as standards by which the constitutionality of the economic and social programs of the states is to be determined."<sup>9</sup> The significance of this language is that it seems to repudiate even the limited review of the *Nebbia* case by indicating that the questions of necessity and appropriateness of the legislation are none of the Court's business. This seems to be but a way of saying that the Court will not review the reasonableness of the ends or of the means employed. That this is the meaning intended seems clear when consideration is given the statement that notions of public policy are not imbedded in the Constitution. This is a restatement of Justice Holmes' more pungent expression that the Fourteenth Amendment does not enact Herbert Spencer's *Social Statics*.<sup>10</sup> In short, the presumption in favor of freedom of contract under a laissez faire economy is no longer to be considered a starting point in the Court's reasoning. If the presumption in favor of freedom of contract is abandoned, it follows naturally that there is no occasion for passing upon the reasonableness of the legislation in its substantive aspects. This not only goes beyond the *Nebbia* case but exceeds the liberalism of Justice Brandeis and Chief Justice Stone expressed in earlier cases.<sup>11</sup> The language quoted also goes beyond the view stressed recently that legislation affecting economic interests will be presumed valid in the absence of a showing of unreasonableness.<sup>12</sup> Justice Douglas' opinion indicates a complete lack of constitutional

<sup>9</sup> Id. 246-247.

<sup>10</sup> Expressed in his dissent in *Lochner v. New York*, 198 U. S. 45 at 75, 25 S. Ct. 539 (1905).

<sup>11</sup> "The limitation is that set by the due process clause, which, as construed, requires that the regulation shall not be unreasonable, arbitrary or capricious; and that the means of regulation selected shall have a real or substantial relation to the object sought to be obtained. . . . In my opinion, the true principle is that the State's power extends to every regulation of any business *reasonably required and appropriate for the public protection*." Justice Brandeis dissenting (italics added) in *New State Ice Co. v. Liebmann*, 285 U. S. 262 at 302-303, 52 S. Ct. 371 (1932).

"It is undoubtedly true as a general proposition that one of the incidents of the ownership of property is the power to fix the price at which it may be disposed. It may also be assumed that as a general proposition, under the decisions of this Court, the power of state governments to regulate and control prices may be invoked only in special and not well defined circumstances." Justice Stone dissenting in *Tyson & Brother v. Banton*, 273 U. S. 418 at 450, 47 S. Ct. 426 (1927). See also his statement referred to in note 12, *infra*.

<sup>12</sup> "We may assume for present purposes that no pronouncement of a legislature can forestall attack upon the constitutionality of the prohibition which it enacts by applying opprobrious epithets to the prohibited act, and that a statute would deny due process which precluded the disproof in judicial proceeding of all facts which would show or tend to show that a statute depriving the suitor of life, liberty or property had a rational basis.

"But such we think is not the purpose or construction of the statutory characterization of filled milk as injurious to health and as a fraud upon the public. There is no need to consider it here as more than a declaration of the legislative findings deemed to support and justify the action taken as a constitutional exertion of the legislative power, aiding informed judicial review, as do the reports of legislative committees, by

foundation for the assertion of private right under the due process clause where contractual or proprietary interests are involved.<sup>13</sup> How widely this extreme view is shared by other members of the Court remains to be seen.

<sup>1</sup> Cal. Gen. Laws (Deering, 1937), Act 143a (Stat. 1933, p. 1969; as amended by Stat. 1935, pp. 1586, 2087).

<sup>2</sup> *Townsend v. Yeomans*, 301 U. S. 441, 57 S. Ct. 842 (1937); *California v. Thompson*, 313 U. S. 109, 61 S. Ct. 930 (1941).

<sup>3</sup> *Champlin Refining Co. v. Corporation Commission of Oklahoma*, 286 U. S. 210, 52 S. Ct. 559 (1932).

<sup>4</sup> *Sligh v. Kirkwood*, 237 U. S. 52, 35 S. Ct. 501 (1915).

<sup>5</sup> *Oliver Iron Mining Co. v. Lord*, 262 U. S. 172, 43 S. Ct. 526 (1923); *Henneford v. Silas Mason Co.*, 300 U. S. 577, 57 S. Ct. 524 (1937); *Ford Motor Co. v. Beauchamp*, 308 U. S. 331, 60 S. Ct. 273 (1939); *McGoldrick v. Berwind-White Coal Mining Co.*, 309 U. S. 33, 60 S. Ct. 388 (1940).