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Notes

NEBBIA V. NEW YORK AND BUSINESS AFFECTED WITH THE PUBLIC INTEREST

The economic theory dominant until recently requires as little governmental interference as possible. Certain regulations have nevertheless been required and have been justified as exercises of the police power. Economic law has been considered so immutable that these regulations have not been allowed to extend to prices except when the judicial incantation that the regulated business was "affected with a public interest" was properly recited. Recently extreme doubt has been cast upon the immutability of so-called economic law and the more recent decision of the Supreme Court in *Nebbia v. New York*[1] has raised serious question with regard to the affectation principle. In order to view the decision with proper perspective it is necessary to examine the principle as it previously existed.

The seventeenth century inadvertance of Sir Matthew Hale and its misapplication[2] to nineteenth century conditions has been a source of much confusion. The principle of effectation with a public interest was first expressed in *Munn v. Illinois*[3] and reiterated in numerous subsequent cases. One of its most able statements was by Chief Justice Taft in *Wolff Packing Company v. Court of Industrial Relations*[4] when he said:

> "Business said to be clothed with a public interest justifying some public regulation may be divided into three classes:

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[1] (1934) 54 Sup. Ct. 505.
[2] McAllister, Lord Hale and Business Affected with a Public Interest (1930) 43 Harv. L. Rev. 759.
[3] (1876) 94 U. S. 113.
[4] (1923) 262 U. S. 522, l. c. 535.

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"(1) Of those which are carried on under the authority of a public grant of privileges which either expressly or impliedly imposes the affirmative duty of rendering a public service demanded by any member of the public. Such are the railroads, other common carriers and public utilities.

"(2) Certain occupations, regarded as exceptional, the public interest attaching to which, recognized from earliest times, has survived the period of arbitrary laws by Parliament or colonial legislatures for regulating all trades and callings. Such are those of the keepers of inns, cabs, and grist-mills. . . .

"(3) Businesses which, though not public at their inception, may be fairly said to have risen to be such and become subject in consequence to some government regulation. They have come to hold such a peculiar relation to the public that this is superimposed upon them. In the language of the cases, the owner by devoting his business to the public use, in effect grants the public an interest in that use and subjects himself to public regulation to the extent of that interest although the property continues to belong to its private owner and to be entitled to protection accordingly. . . ."

Although each enumeration raises certain questions the third has occasioned by far the most controversy. This is due to the general nature of the statement of the principle. There is no suggestion as to what definite tests can be followed to determine when a particular business has become affected with the public interest so as to justify price control. It is little more than a re-phrasing of the oft-quoted statement of Chief Justice Waite in *Munn v. Illinois*.[5]

Indirectly, however, various tests have been suggested. These fall into two general groups: affirmative and negative. The latter have reference to those features of a business which the Court has said do not cause it to be affected with the public interest. They include the size of the business[6] or the amount of initial investment[7] required; the fact that "one makes commodities for, and sells to, the public in the common callings";[8] the fact that the "public derives benefit, accommodation, ease or enjoyment from

[5] "When, therefore, one devotes his property to a use in which the public has an interest, he, in effect, grants to the public an interest in that use, and must submit to be controlled by the public for the common good, to the extent of the interest he has thus created. He may withdraw his grant by discontinuing the use; but, so long as he maintains the use, he must submit to the control." l. c. 126

[6] Tyson v. Banton (1927) 273 U. S. 418.

[7] New State Ice Co. v. Liebmann (1932) 285 U. S. 262.

[8] Wolff Packing Co. v. Court of Industrial Relations, *supra*.

the existence or operation of the business."[9] The application of the principle is not limited to property.[10]

There are other negative elements entering into the judicial consideration but they do not pertain to the characteristics of the particular business. These pertain rather to the legislation, such as, mere legislative declaration,[11] the experimental character of the statute.[12]

Later cases state that the controlling affirmative test applied in *Munn v. Illinois* was the monopolistic character of the grain elevator business.[13] It is questionable whether that carried much weight since a comparatively short time later similar legislation was sustained without the presence of the element of monopoly.[14] Furthermore this characteristic was merely one of several mentioned by the Court in its factual description of the business.

Other tests are continuity of service;[15] the indispensable nature of the service;[16] the existence of grave emergency such as that caused by war;[17] arbitrary control to which the public would be subjected without regulation;[18] accumulation of legislative regulation;[19] the imponderable statement that the peculiarities of the business concerned are to be considered.[20]

It is apparent, and the Court has recognized it,[21] that no clear

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[9] Tyson v. Banton, *supra.*

[10] German Alliance Insurance Co. v. Lewis (1914) 233 U. S. 389; Tagg Bros. v. United States (1930) 277 U. S. 350.

[11] Tyson v. Banton, *supra.*

[12] New State Ice Co. v. Liebmann, *supra.*

[13] See Budd v. New York (1892) 143 U. S. 517; German Alliance Insurance Co. v. Lewis, *supra.*

[14] Brass v. North Dakota ex rel. Stoeser (1894) 153 U. S. 391 involved grain elevators also but they were scattered throughout the state and there was no unity of control or ownership. The Court said, "When it is once admitted, as it is admitted here, that it is competent for the legislative power to control the business of elevating and storing grain, whether carried on by individuals or associations, in cities of one size and in some circumstances, it follows that such power may be legally exerted over the same business when carried on in smaller cities and in other circumstances." l. c. 403. Cf. Nebbia v. New York, *supra.*

[15] German Alliance Insurance Co. v. Lewis, *supra.*

[16] *Ibid.*; Wolff Packing Co. v. Court of Industrial Relations, *supra;* New State Ice Co. v. Liebmann, *supra.*

[17] Block v. Hirsh (1921) 256 U. S. 135; Marcus Brown Holding Co. v. Feldman (1921) 256 U. S. 170; Levy Leasing Co. v. Siegel (1922) 258 U. S. 242.

[18] German Alliance Insurance Co. v. Lewis, *supra;* Wolff Packing Co. v. Court of Industrial Relations, *supra.*

[19] See Keezer & May, The Public Control of Business (1930) p. 97 et seq.

[20] Tyson v. Banton, *supra.*

[21] Wolff Packing Co. v. Court of Industrial Relations, *supra;* Ribnik v. McBride, *supra.*

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statement of the principle is possible.[22] An attempt to classify the cases on a factual basis would fail because of the utter differences prevailing and the disposition of the Court to ignore real similarities. In the instance of grain elevators where the decision in *Brass v. North Dakota ex rel. Stoeser* was based upon comparison with *Munn v. Illinois* the factual similarities were present only in name. The actual conditions surrounding the grain elevator business in Chicago were totally different from those found in North Dakota.

In *German Alliance Insurance Co. v. Lewis* one of the major grounds for the decision was the necessitous character of fire insurance.[23] But when meat packing, equally necessitous, was involved the indispensable nature of the commodity was brushed aside. Perhaps the explanation of the Court's attitude in the *Wolff Case* is that the regulation there concerned labor. It is well known that whenever the Court has been confronted with a statute designed for the economic and social welfare of laborers an attitude approaching reaction has been frequently adopted.[24] This has been especially true when attempts have been made to fix wages. Possibly this attitude explains the decisions in the employment agency cases even though in *Ribnik v. McBride* the specious position was taken that employment brokers were exactly like theatre ticket brokers who, the Court had concluded in *Tyson v. Banton,* could not be subjected to regulation of commissions on resales.

It is sufficient merely to mention other businesses which have been before the Court on this question to demonstrate their heterogeneity: commodity exchanges,[25] banking,[26] cotton gins,[27] ice manufacture,[28] contract motor carriers,[29] sellers of gasoline.[30]

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[22] It has been suggested that "industries affected with the public interest are those which have been declared so by a legislature without subsequent contradiction by the courts." Keezer & May, op. cit., p. 8.

[23] Analogy was carried over from fixing of rates of insurance to regulation of the compensation of insurance agents. O'Gorman & Young v. Hartford Fire Insurance Co. (1931) 282 U. S. 251.

[24] Lochner v. New York (1905) 198 U. S. 45; Coppage v. Kansas (1915) 236 U. S. 1; Adams v. Tanner (1917) 244 U. S. 590; Adkins v. Children's Hospital (1923) 261 U. S. 525. Cf. Holden v. Hardy (1898) 169 U. S. 366; Muller v. Oregon (1908) 208 U. S. 412; Brazee v. Michigan (1916) 241 U. S. 340; Bunting v. Oregon (1917) 243 U. S. 426; Stettler v. O'Hara (1917) 243 U. S. 629.

[25] Stafford v. Wallace (1922) 258 U. S. 495; Chicago Board of Trade v. Olsen (1923) 262 U. S. 1; Tagg Bros. v. United States (1930) 280 U. S. 420.

[26] Noble State Bank v. Haskell (1911) 219 U. S. 104, 575.

[27] Frost v. Corporation Commission of Okla. (1929) 278 U. S. 515.

[28] New State Ice Co. v. Liebmann, *supra.*

[29] Stephenson v. Binford (1932) 287 U. S. 251; see Note (1933) 18 ST. LOUIS L. REV. 228.

[30] Williams v. Standard Oil Co. (1929) 278 U. S. 235.

About the only test that is realistic and practicable is the one which relies strongly upon the peculiar circumstances of each instance. Even then principle is sacrified to judicial intuition. In ultimate analysis that is what has actually controlled the personnel of the Court in passing upon the question whenever it was presented. Most of the attempts of the Court at exposition have been mere callings of names. A business is said to be private, therefore not affected with the public interest.[31] Begging the question never tends to explain and clarify.

Mr. Justice Stone, however, in his frequent dissents has taken a pragmatic approach. He expressed his view clearly when he disagreed with the Court in *Tyson v. Banton*:[32]

> "An examination of the decisions of this Court in which price regulation has been upheld will disclose that the element common to all is the existence of a situation or a combination of circumstances materially restricting the regulative force of competition, so that buyers or sellers are placed at such a disadvantage in the bargaining struggle that serious economic consequences result to a very large number of members of the community."

This approach would not only aid in the final settlement of the affectation problem but would also materially aid in the exposition of the doctrine of judicial review. It is not the position of the Court to impose any particular economic theory upon the country; that is a purely legislative matter.

This was the state of the law when the legislature of the state of New York concluded, after thorough investigation, that the conditions prevailing in the milk industry necessitated further governmental interference. It was found that this billion dollar industry was suffering from unfair and destructive trade practices. The producers were weak in the market because they were unorganized; the distributors were organized; there was an ever-present surplus; prices consequently were demoralized.[33] Almost every other aspect of the industry had already been subjected to regulation.[34] It was therefore but a short step to include fixation of prices. A statute was passed establishing a Milk Control Board which was empowered to fix the prices of milk.[35] This was done and a case arose to test the constitution-

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[31] New State Ice Co. v. Liebmann, *supra.*

[32] (1927) 273 U. S. 418, l. c. 451; this view was reiterated in a dissent in Ribnik v. McBride, *supra.*

[33] Note (1933) 42 Yale L. J. 1259.

[34] See Manley, Constitutionality of Regulating Milk as a Public Utility (1933) 18 Corn. L. Q. 410; Note (1932) 80 A. L. R. 1225.

[35] New York Laws of 1933, c. 158, an amendment to the Agriculture and

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ality of the statute. The defendant, Nebbia, sold a bottle of milk and a loaf of bread for only the prescribed price of the milk. He was indicted and convicted. The conviction was sustained by the New York Court of Appeals.[36] The defendant appealed to the United States Supreme Court on the grounds that the law denied him equal protection and deprived him of property without due process.

The equal protection contention was disposed of almost summarily. Even if different prices were imposed upon the defendant who bought from the distributor and the distributor in his sales directly to the consumer the law is not arbitrary and unreasonable because there are "obvious distinctions" between the two kinds of merchants justifying different treatment if the legislature has the power to fix prices.

"The more serious question is whether, in the light of the conditions disclosed, the enforcement of section 312 (e) denied the appellant the due process secured to him by the Fourteenth Amendment." The thoroughness of the existing regulation of the milk industry in New York is pointed out. Generally the use of property and the making of contracts are free from governmental interference. That is not an absolute right; it must yield to the equally fundamental right of the public to regulate in the common interest. The exercise of this police power is subject only to the constitutional restraint of the Fifth and Fourteenth

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Markets Law, establishes a Milk Control Board and prescribes its powers. The pertinent provision is sec. 312: "(a) The board shall ascertain by such investigations and proofs as the emergency permits, what prices for milk in the several localities and markets of the state, and under varying conditions, will best protect the milk industry in the state and insure a sufficient quantity of pure and wholesome milk . . . and most in the public interest. The board shall take into consideration all conditions affecting the milk industry including the amount necessary to yield a reasonable return to the producer and to the milk dealer." (b) The board shall then by official order fix minimum and maximum wholesale and retail prices of milk. (c) The intention of the law is that the benefit of any advance in price granted to dealers shall be passed on to the producer. If the board, after due hearing, finds this has not been done, the dealer's license may be revoked, and the dealer may be subjected to the prescribed penalties. (d) After investigation the board may fix the prices to be paid by dealers to producers. (e) "After the board shall have fixed prices to be charged or paid for milk in any form . . . it shall be unlawful for a milk dealer to sell or buy or offer to sell or buy milk at any price less or more than such price, . . . and no method or device shall be lawful whereby milk is bought or sold . . . at a price less or more than such price . . . whether by any discount, or rebate, or free service, or advertising allowance, or a combined price for such milk together with another commodity or commodities, or service or services, which is less or more than the aggregate of the prices for such other commodity or commodities, or service or services, when sold or offered for sale separately or otherwise. . . ."

[36] People v. Nebbia (1933) 262 N. Y. 259, 186 N. E. 694.

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Amendments which do not prohibit but merely condition the exertion of the admitted power.

The defendant concedes general regulatory power to the State but contends that the control of prices is *per se* unreasonable and unconstitutional save as applied to businesses affected with the public interest and the milk industry is not so affected. It is admitted that the milk industry is not a public utility, not monopolistic, nor dependent upon public franchise. "But if as must be conceded, the industry is subject to regulation in the public interest, what constitutional principle bars the state from correcting maladjustments by legislation touching prices?" Price is not of such sacrosanct nature as to be exempted from regulation. Affected with public interest as used in *Munn v. Illinois* means nothing more than "subject to the exercise of the police power."

It is contended that to subject to rate regulation there must be a voluntary devotion to a known public use. The Court answers, "The statement that one has dedicated his property to a public use is . . . merely another way of saying that if one embarks in a business which public interest demands shall be regulated, he must know regulation will ensue."

Clearly there is no closed class or category of businesses affected with the public interest. In final analysis, the application of the Fifth and Fourteenth Amendments depends upon the circumstances of each case.

> "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. In several of the decisions of this court wherein the expressions . . . have been brought forward as the criteria of the validity of price control, it has been admitted that they are not susceptible of definition and form an unsatisfactory test of the constitutionality of legislation directed at business practices or prices. 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. But there can be no doubt that upon proper occasion and by appropriate measures the state may regulate a business in any of its aspects, including the prices to be charged for the products or commodities it sells. . . . Price control, like any other form of regulation, is unconstitutional only if arbitrary, discriminatory, or demonstrably irrelevant to the policy the legislature is free to adopt, and hence an unnecessary and unwarranted interference with individual liberty."

Since a state can adopt any economic policy reasonably deemed to promote the public welfare and in view of circumstances pe-

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culiar to the milk industry in New York the statute does not violate the due process clause of the Fourteenth Amendment. The conviction was, therefore, affirmed.[37]

In the popular mind this decision is significant for its bearing upon the attitude of the Supreme Court toward the legislation of the Seventy-Third Congress. Not a great deal of reliance should be placed upon the opinion in this respect. The fact that in this instance the legislation was by a state and in the other by the national government is difference enough to change the judicial reaction. The most that can be said is that there is here indicated the personal equation which will undoubtedly have some effect upon the constitutionality of the "New Deal" legislation. One dictum would justify a less cautious conclusion: "Touching the matters committed to it by the Constitution the United States possesses the power, as do the states in their sovereign capacity touching all subjects jurisdiction of which is not surrendered to the federal government . . ."[38]

From a legal point of view the result is to place the judicial attitude toward governmental regulation of business much nearer that toward governmental participation in business. In the past it has been unconstitutional for a state to regulate, e. g., the price of gasoline[39] but it could actually determine the price by engaging in the business of selling gasoline.[40] The authority of a state to carry on private business is limited only by the broad principle that taxation must be for a public purpose.[41]

The decision is a closer approximation of the view of Mr. Justice Stone as expressed in his dissents in *Tyson v. Banton* and *Ribnik v. McBride.* That is, the governmental regulation is sustainable when the competitive system has broken down as a means of substantially protecting both the buyer and the seller. The legislative determination of the feasibility of the means adopted to attain a designated end is viewed more as a finality; it is less open to judicial inquiry, especially from the point of view of substance, than has been the tendency hitherto.

The decision could be accepted as authority for a position even beyond that of Mr. Justice Stone. It can almost be said that the "apologetic phrase" affected with the public interest no longer represents a separate compartment of that governmental authority equally apologetically termed the police power. This con-

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[37] McReynolds, J., wrote a dissenting opinion in which Van Devanter, Butler, Sutherland, JJ, concurred.

[38] See Note (1933) 19 St. Louis L. Rev. 25.

[39] Williams v. Standard Oil Co., *supra.*

[40] Standard Oil Co. v. City of Lincoln (1927) 275 U. S. 504.

[41] See Jones v. City of Portland (1917) 245 U. S. 217; Green v. Frazier (1920) 253 U. S. 233; dissent of Brandeis, J, in New State Ice Co. v. Liebmann, *supra.*

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clusion is deprived of its fullest significance by the apparent delusion of the Court that it is here merely applying the old and established principle when it says, "The course of decision in this court exhibits a firm adherence to these principles." That is highly questionable, to say the least. Opportunities, however, are presented. The door to economic realism has been opened; it remains to be seen whether the judicial mind will choose to cross the threshold.

NORMAN PARKER, '34.

THE EXTENT OF THE RIGHT OF A PUBLIC UTILITY TO REFUSE SERVICE

The primary question in any discussion of the activities known as public utilities always comes back to one central point, which is the problem of regulation. In facing this pervasive issue we are bound to arrive either immediately or ultimately at the limits of the regulative power. Perhaps the two main divisions into which all the problems fall are simple, namely, (1) is the particular issue one in which the public is interested as a body? or (2) is the issue one in which primarily an individual and the public utility are at odds? Of course, the classification cannot be as simple as stated because in many situations the individual is involved as one of the public and, therefore, it is a public question. Again, the utility may appear to have infringed the rights of some individual and the infringement may be unjustfied because it is a discrimination, while in another instance an apparent discrimination may be due entirely to action on the part of the individual and investigation may show that in the particular case the action taken by the utility is not discriminatory in its nature.

The word "regulate" seems always to be used in connection with the state and federal commissions' administrative functions in regard to public utilities and few persons ever think of the utilities right of self-regulation. Yet such a right exists, though it is not as self-evident and as prominent as in businesses which are not affected with a public interest. This right of self-regulation is that right of management in the business of utilities which the law concedes to remain in them after the commissions are delegated their general supervisory and regulatory powers, since the power of the state to regulate the conduct and business of a public service corporation is limited by the consideration that it is not the owner of the property of such corporation, nor clothed with the general power of management incident to ownership.[1]

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[1] Missouri ex rel. Southwestern Bell Tel. Co. v. Mo. P. S. Comm. (1923) 262 U. S. 275.

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