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CONSTITUTIONAL LAW—POLICE POWER—PRICE FIXING
BY THE STATE

Ordinary citizens might wonder how, under a free enterprise system of economics such as exists in the United States, a state could legally regulate the prices charged by a private business. Be that as it may, price fixing by the states dates back to about 1870, although there were occasional cases appearing earlier,¹ and in recent years it has gained force in every state in the union.

The fixing of prices by the states began with attempts to regulate the prices charged by public utilities such as gas, electric, and water and transportation businesses. As the years passed more types of businesses have come within the scope of price fixing and as the realm has been enlarged, the basis of the state's power has undergone a change. Originally it was considered that the public utilities were so affected with a public interest, and so vitally connected with community life, that the states had power to regulate prices as a necessary part of the general power to regulate for the public interest. But with the widening of the realm of price fixing to additional businesses, the theory has arisen that the state's power to fix prices of businesses, public or private, is based on the police power of the state.

This paper will treat only briefly the question of the regulation of public utilities as such, and the main body of the paper will be devoted to a study of whether the police power of a state can extend so far as to permit state regulation of private businesses and the prices charged by these businesses.

Under modern conditions, the life of the community has become largely dependent upon the utilities. Because of non-competitive conditions under which most utilities operate, the user must be protected from too high rates and from unfair discrimination. Also, it is in the public interest that the companies be allowed a reasonable amount or margin of profit so as to assure that satisfactory service will be maintained, improved and expanded.

It is difficult to find a satisfactory legal definition of "public utility" because the meaning of the term is constantly changing. It has come to be recognized that the rendering of certain services which are indispensable to the general public definitely affects the public. To businesses of this character, the state grants special privileges denied to private businesses, and protects them in the enjoyment of these special privileges. Correspondingly, the state regulates these businesses so as

¹ *Yuille v. Mobile*, 3 Ala. (New Series) 137 (1841).

to protect the public from any possible abuses. Because the law has recognized that the public has an interest in such businesses, they have come to be known as "public utilities." To use the terminology used by some courts, private property used as a public utility ceases to be purely private property because when so used it becomes "affected with a public interest."²

As has been said, the original basis for state regulation of private business was on the theory that the state had the inherent power to regulate those businesses which were affected with a public interest. This theory is supported by the earlier cases and at least one prominent authority on Constitutional Law,³ although the current view seems to rest the power on the police power of the state.

Willoughby, in his work on Constitutional Law, says that states have constitutional authority to regulate prices charged and the services rendered by public utilities and businesses affected with a public interest.⁴ This power is closely related to, but definitely distinct from the state's police power. He says that while such businesses are subject to the same police power that private businesses are, they are also, because of what Willoughby calls their essential nature, subject to further regulation.

Willoughby then distinguishes the police power of the state and the right to regulate public utilities by saying:

The power that is recognized to be possessed by the State for the regulation of industries of a public character, or industries affected with a public interest, is deduced from the peculiar public, or partly public character, of the industries regulated. The field open for legal regulation is thus a comparatively limited one even though its boundaries are somewhat indefinite. The right of control exercisable under the police power is, however, coextensive with the social and economic activities of men, and finds its limits not in the public or quasi-public character of the industries affected, but in the nature of the acts forbidden or required, and finds its jurisdiction upon the direct relation of these acts to the public welfare.⁵

This conception of the power to regulate "businesses affected with the public interest" was adopted by the Supreme Court in 1876 in the first important case involving the state regulation of such a business. This case was *Munn v. Illinois*,⁶ concerning the validity of a state statute regulating the rates charged by grain elevators. The Supreme Court said, while holding such regulation constitutional, that:

² See McAllister, *Lord Hale and Business Affected With a Public Interest*. 43 HARV. L. REV. 759 (1930).

³ WILLOUGHBY, PRINCIPLES OF THE CONSTITUTIONAL LAW OF THE UNITED STATES 752 (2d Ed. 1930).

⁴ *Idem*.

⁵ *Id.* at 767.

⁶ *Munn v. Illinois*, 94 U.S. 113 (1876).

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.⁷

The purpose of this paper is to examine the power to regulate the prices charged by private businesses under the exercise of the police power. The case of *Munn v. Illinois*,⁸ and cases following it, represented a transition through which the Courts have gradually changed from the public utility theory to the police power theory as the underlying basis for state regulation of the prices charged by private businesses.

The first case that endorsed the police power of the state in regulating the prices of private businesses was *Nebbia v. New York*, decided by the Supreme Court in 1934.⁹ This case involved the constitutionality of a New York statute defining the prices that could be charged for milk in retail stores. In holding the statute valid the court said:

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.¹⁰

Later, in the same opinion, the court said:

In several of the decisions of this court wherein the expressions 'affected with a public interest' and 'clothed with a public use,' 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.¹¹

This language used by the Supreme Court would seem to indicate an abandonment the public interest theory and a shift to the police power as a basis of price regulation by the state. This is the view taken by Rottschaefer in his book on Constitutional Law, who says:

The opinion in the *Nebbia* case rejected the theory that legislative price fixing and price regulation were limited to 'businesses affected with a public interest' in the sense of that phrase as developed in the

⁷ *Id.* 94 U.S. at 126.

⁸ *Ibid.*

¹⁰ *Id.* 291 U.S. at 536.

⁹ *Nebbia v. New York*, 291 U.S. 502 (1934).

¹¹ *Ibid.*

earlier decisions, held that that phrase meant no more than that the business so described was, for adequate reasons, subject to control for the public good, and made the test of liability of any business to governmental price control depend on whether it could be justified by principles applicable in determining the validity of any other form of exercise of a state's police power or the federal government's regulatory power.¹²

Rottschaefer goes on to say that the earlier theory is still being used by some courts, citing a Supreme Court case which arose in Georgia and held that tobacco warehouses could be regulated by the state under the theory that it was affected with the public interest,¹³ but that it has lost the "greater part, if not all, of its mystical power."¹⁴

Following the trend established by the *Nebbia* case, the Supreme Court, in *Olsen v. Nebraska*,¹⁵ reversed a former decision handed down in *Ribnick v. McBride*.¹⁶ In the *Ribnick* case, the validity of a state statute regulating the prices charged by employment agencies was questioned, and the Supreme Court declared that the regulation was invalid as a violation of the due process clause of the 14th Amendment. In the opinion of the court it was stated that the basis for testing the constitutionality of the regulation was whether the business was one which was "affected with a public interest." If such an interest exists, regulation is proper, otherwise it is a violation of the 14th Amendment. Here, the court said, the interest did not exist, and the regulation was unconstitutional. Thirteen years later, and after the *Nebbia* case had been decided, the same problem came before the court again in the *Olsen* case. This time, following the line of the *Nebbia* case, the court said that "the drift away from *Ribnick v. McBride*, has been so great that it can no longer be deemed a controlling authority."¹⁷ After citing the *Nebbia* case and subsequent decisions, the court went on to say:

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 *Ribnick* case. The standard there employed, following that used in *Tyson & Bros. v. Banton*, 273 U.S. 418, 430 *et seq.*, was that the constitutional validity of price fixing legislation, at least in the absence of a so-called emergency, was dependent on whether or not the business in question was 'affected with a public interest.' It was said to

¹² ROTTSCHAEFER, HANDBOOK OF CONSTITUTIONAL LAW 486 (1939).

¹³ *Townsend v. Yeomans*, 301 U.S. 441 (1937).

¹⁴ *Supra*, note 12 at 487. ¹⁵ *Olsen v. Nebraska*, 313 U.S. 236 (1941).

¹⁶ *Ribnick v. McBride*, 277 U.S. 350 (1928).

¹⁷ See also *Tyson and Bro. United Theatre Ticket Offices v. Banton*, 273 U.S. 418, 47 S.Ct. 426, 71 L.Ed. 718 (1927); which invalidated a state's attempt to regulate fees charged by ticket brokers on ground that such business was not affected with a public interest.

be so affected if it had been 'devoted to the public use' and if in effect an interest had been granted to the 'public in that use.' *Ribnick v. McBride*. That test, labelled by Mr. Justice Holmes in his dissent in the Tyson case as 'little more than a fiction,' was discarded in *Nebbia v. New York*.¹⁸

With these cases, it seems clear that the Supreme Court shifted from the public interest theory to the police power theory as basis for the price regulation of private businesses by the state.

The adoption of the police power theory by the Supreme Court, raised the ever present problem of determining the extent to which the police power may be used to regulate private business without violating the constitutional guarantee of due process. It appears that the police power of the state has no definite boundaries, and the determination of what is a valid exercise of the power and what is a violation of the due process clause of the Fourteenth Amendment still causes difficulty to the courts.

Rottschaefer says:

The judicial problem of defining the scope of regulatory legislation permissible within the limits of those constitutional provisions inevitably involves an evaluative process in which the courts are compelled to discover the values intended to be secured by those provisions and to determine whether the legislative policies are in accord or in conflict therewith. This involves a degree of creative activity varying directly with the breadth of the policy enunciated by the constitutional provisions. . . .

The reasonableness of such legislation, and of the classifications made in connection therewith, frequently depends on the factual situation existing at the time of its enactment or enforcement, and facts bearing thereon should be presented in evidence unless of such character that courts can take judicial notice of them.¹⁹

It therefore appears that the judicial problem of defining the limits of police power regulation and legislation is, in the end, one of appraising the relative merits of individualism and other social values. The Supreme Court in interpreting the due process clause has not prescribed any definite criteria as to how far states may limit freedom to set prices on behalf of the general welfare or public good, so the problem is always one of choosing between alternative values that are so indefinite that it inevitably involves the use of discretion by the courts. In these cases, courts must determine whether the law is a reasonable exercise of the police power of the state in the interest of the public health, safety or welfare, or whether it is an unreasonable and arbitrary use of that power and hence a violation of the due process clause of the Fourteenth Amendment.

¹⁸ *Id.* 313 U.S. at 245.

¹⁹ *Supra*, note 12 at 453.

At the present time, every state in the Union has some type of price fixing statute, and the businesses that are covered by such statutes are so widely diversified that it would be impossible to make the statement that any particular business can be regulated and another one cannot be. One thing, though, that seems fairly clear, is that most of the states base their price regulating statutes on the police power and not on the idea that the business to be regulated must be affected with a public interest. As long as the regulation is not harsh, unreasonable, or arbitrary, under the police power, it will not be a violation of the due process clause of the Fourteenth Amendment.

Even in cases in which price fixing statutes are held unconstitutional, the courts generally seem to indicate that the state has the power to regulate under the police power as long as the regulation is not unreasonable, and as long as it is for the general welfare of the people.²⁰ Of course, the problem is, and always will be one of determining when a statute is reasonable. Since there is no clear standard for this set out in the Constitution or any place else, it has to be left up to the courts to decide in each particular case whether the statute in question is reasonable. In determining this the court will have to take under consideration several different factors. They will always have to keep in mind the due process clause of the Constitution and balance it against the social interests of the people. If the business that is sought to be regulated is one which clearly affects the general public, the solution is not difficult; but where, for instance, the prices charged by barbers are sought to be regulated, it may become very difficult to decide whether the general welfare of the people requires such regulation.²¹

In cases where the regulation of barber shops has been attempted, the courts which have refused to uphold such regulation seem to base such refusal solely on the broad fact that regulation of prices charged will not have enough bearing on the general welfare of the people of the state to warrant the interference of the state under the police power.²² On the other hand, courts upholding such regulation state that the general welfare of the people is elastic enough to include

²⁰ *Christian v. La Forge*, 194 Ore. 450, 242 P. 2d 797 (1952).

²¹ Cases which rejected price control: *State Board of Barber Examiners v. Cloud*, 220 Ind. 552, 44 N.E. 2d 972 (1942); *State v. Greeson*, 174 Tenn. 178, 124 S.W. 2d 253 (1939); *Edwards v. State Board of Barber Examiners*, 72 Ariz. 108, 231 P. 2d 450 (1951). Cases upholding price control: *Board of Barber Examiners of Louisiana v. Parker*, 190 La. 214, 182 So. 485 (1939); *Vandervort v. Keen*, 184 Okl. 121, 85 P. 2d 405 (1938); *Arnold v. Board of Barber Examiners*, 45 N.M. 57, 109 P. 2d 779 (1941).

²² *State Board of Barber Examiners v. Cloud*, 220 Ind. 552, 44 N.E. 2d 972 (1942); *State v. Greeson*, 174 Tenn. 178, 124 S.W. 253 (1939); *Edwards v. State Board of Barber Examiners*, 72 Ariz. 108, 231 P. 2d 450 (1951).

regulation of prices charged by barber shops.²³ Following this latter line it was said in an Oklahoma case decided in 1938:

The limitations of the police power are plastic in their nature and will expand to meet the actual requirements of an advancing civilization and adjust themselves to the necessities of our multiplying complexities in moral, sanitary, economic and social conditions.²⁴

The courts have held many different businesses subject to price regulation and it seems that the tendency is toward an elastic police power to include more different types of businesses. In an Oklahoma case,²⁵ the price charged for natural gas at the well was regulated and upheld as a valid exercise of the police power; in a Florida case,²⁶ a statute regulating the prices paid by canning companies to citrus fruit growers was questioned and upheld under the police power of the state; and in a Louisiana case,²⁷ it was held that the 14th Amendment does not operate as a limitation on the state police power, but must of necessity yield to the valid exercise of the police power. So, it would seem clear that the test is now, not whether a business is affected with a public interest, but whether the statute in question is one that can be classified as a valid exercise of the state's police power.

There are few modern cases now in which it was held that the test of whether a business may be regulated is whether it is clothed with a public interest, but occasionally, one will still appear. In Georgia in 1937, the case of *Townsend v. Yeomans*,²⁸ upheld a Georgia statute fixing the prices charged by tobacco warehouses on the ground that the tobacco industry was so vitally connected with the public interest in Georgia that the state had the authority to regulate it in the interest of the public. This opinion though, did hint that the police power of the state might possibly be the proper basis of the decision. Today, courts that still base their decisions on price fixing on public interest are definitely in the minority.

It seems to the writer that the more appropriate and most logical approach to the problem of whether the state has power to regulate the prices charged by private businesses to regard the regulation as an exercise of police power. By basing regulation on the police power of

²³ *Board of Barber Examiners of Louisiana v. Parker*, 190 La. 214, 182 So. 485 (1938); *Vandervort v. Keen*, 184 Okl. 121, 85 P. 2d 405 (1938); *Arnold v. Board of Barber Examiners*, 45 N.M. 57 P. 2d 779 (1941).

²⁴ Syllabus of the Court, *Vandervort v. Keen*, 184 Okl. 121, 85 P. 2d 405 (1938).

²⁵ *Cities Service Co. v. Peerless Oil and Gas Co.*, 340 U.S. 179 (1950).

²⁶ *Mayo v. Lakeland Highlands Canning Co.*, 309 U.S. 310 (1940).

²⁷ *Board of Barber Examiners of Louisiana v. Parker*, 190 La. 214, 182 So. 485 (1938).

²⁸ *Supra*, note 13.

the state, there would be no need of the theory of public utility. It has never been questioned that public utilities can be regulated under the police power and to that extent it seems senseless to have two bases for the power of the state when one would cover the territory previously covered by both. In the present day so many different businesses are being regulated that it would be impossible to fit all of them under the public utility theory. But by using the police power theory, it is properly possible to bring almost any type business under the police power of the state and within the realm of price fixing by use of the indefinite term, general welfare. Still, the courts could guard against any abuse of this power by determining that in a particular case the legislation was so unreasonable as to violate the due process clause of the Fourteenth Amendment.

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