UKnowledge

Kentucky Law Journal

Volume 27 | Issue 1 Article 9

1938

The Significance of Nebbia v. The People--A Classification of Businesses Devoted to Public Use

Phillip Schiff
University of Kentucky

Follow this and additional works at: https://uknowledge.uky.edu/klj

 Part of the Business Organizations Law Commons

Right click to open a feedback form in a new tab to let us know how this document benefits you.

Recommended Citation

Schiff, Phillip (1938) "The Significance of Nebbia v. The People--A Classification of Businesses Devoted to Public Use," *Kentucky Law Journal*: Vol. 27: Iss. 1, Article 9.
Available at: https://uknowledge.uky.edu/klj/vol27/iss1/9

This Note is brought to you for free and open access by the Law Journals at UKnowledge. It has been accepted for inclusion in Kentucky Law Journal by an authorized editor of UKnowledge. For more information, please contact UKnowledge@lsv.uky.edu.

Our conclusion is that the legislatures have been responsible for the changes that have been made from the gross negligence rule to the tort standard in those jurisdictions applying it in all cases and also in those jurisdictions applying it in certain cases only. It is further suggested that any future changes will depend upon legislation on the particular subject and will not be made by the courts in the absence of such legislation.

RAMON A. WOODALL, II.

THE SIGNIFICANCE OF NEBBIA v. THE PEOPLE—A CLASSIFICATION OF BUSINESSES DEVOTED TO PUBLIC USE.

In ascertaining the significance of *Nebbia* v. *The People*[1] and determining its effect upon the classification of businesses subject to governmental regulation, it is first necessary to review, briefly, the history of the development of the law of public utilities which has led up to this momentous case.

More than two hundred fifty years ago, in his treatise *De Portibus Maris*,[2] Lord Hale laid the foundation of the historical approach to the determination of the question, what is a public utility? The earliest cases on this question held that inns and carriers were subject to governmental regulation, because of the fact that the public were at their mercy.[3] Gradually, starting from these historical public callings as a base, the courts, reasoning by analogy, soon extended their classification to include other related public callings. A notable example of this is a case decided in 1810, where the English court said that the government could regulate the rates charged by a public warehouse, since this business was "clothed with a public interest".[4]

Munn v. *Illinois*[5] in which the Supreme Court held that the business of storing grain was subject to regulation by the state, was the first of a line of decisions in this country adopting the "historical approach" to the problem. The analogy to the historic public calling, carriers, is

---

would not do under all of the circumstances surrounding the particular case.") Accord: People v. Anderson, 58 Cal. App. Rep. 267, 208 Pac. 315 (1923); Michael and Wechsler, *A Rationale of the Law of Homicide* (1937) 37 Col. L. Rev. 1261; Risenberg, *Negligent Homicide: A Study in Statutory Interpretation* (1936) 25 Calif. L. Rev. 1; Notes (1936) 25 Ky. L. J. 70, 98, 103, (1930) 70 L. J. 118, (1935) 10 Temp. L. Q. 67, (1937) 22 Iowa L. Rev. 659, (1936) 24 Calif. L. Rev. 555, 569, (1923) 11 Calif. L. Rev. 434.

[1] 291 U. S. 502, 54 Sup. Ct. 505, 78 L. Ed. 940 (1934).

[2] 1 Harg. Law Tracts 78, as cited in 11 Amer. Juris., Sec. 293, p. 1059, where Lord Hale said: "When private property is affected with a public interest, it ceases to be *juris privati* only. . ."

[3] Regulation was necessary in order to prevent the murder or robbery of the guests at the hands of their hosts.

[4] Aldnutt v. Inglis, 12 East. 527 (1810).

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

clear from the Court's emphasis upon the fact that a grain warehouse is a "connecting link in transporting grain".

Next in this line was *Tyson* v. *Banton*,[6] the famous New York "ticket scalping case", in which a New York statute declared that the price charged for admission to theaters was affected with a public interest, and limited the price charged for theater tickets, on resale by licensed brokers, to a maximum of fifty cents in excess of the price printed on the tickets. By a five-four decision, the Supreme Court declared that the law contravened the due process clause of the Fourteenth Amendment and was therefore unconstitutional. Mr. Justice Sutherland delivered the majority opinion, declaring that the theater "had never been considered a business impressed with public interest or dedicated to the public use".[7] Mr. Justice Holmes, in a very excellent dissenting opinion, declared that the state legislature should be allowed to go as far as it will in the regulation of private business, if it has sufficient public force behind it, so long as it does not directly contravene the Constitution. As we shall see in the *Nebbia Case*, Mr. Justice Holmes was reasoning several years ahead of the court. A year later, the same court, using the same approach, decided that the business of an employment agency is not one affected with a public interest, and that, therefore, a statute fixing the fees of such an agency was invalid.[8] Mr. Justice Sutherland, again writing the majority opinion, said that the decisions of the court had made it the general rule that "the fixing of prices for food or clothing, of house rental or wages to be paid, whether maximum or minimum, is beyond the legislative power".[9]

A year later the Supreme Court decided the case of *Williams* v. *The Standard Oil Co.*,[10] the third in this chain of cases. Mr. Justice Sutherland again wrote the majority opinion, relying upon the *Tyson* and *Ribnik* cases as authority. "Once more we have the enunciation of an absolute constitutional prohibition against governmental price fixing *except in those fields where it gains sanction from past practice*,"[11] and the historical approach in determining the validity of price fixing regulations became a fixed part of our law at this point.

After these three cases, the situation may be summarized as follows: if you have a public utility, price regulation is constitutional, and if you may regulate the price, it is a public utility. The circuity of this reasoning is very unsatisfactory. There is nothing tangible upon which we may seize in determining what may be classed as a public utility, except, perhaps, a rather vague historical approach.

We are still confronted with the question, what determines a public utility? When a state's attempt to regulate prices is questioned, the

---

[6] 273 U. S. 418, 47 Sup. Ct. 426 (1927).

[7] *Id.* at 441.

[8] Ribnik v. McBride, 277 U. S. 350, 48 Sup. Ct., 545 (1928).

[9] *Id.* at 357.

[10] 278 U. S. 235, 49 Sup. Ct. 115, 73 L. Ed. 287 (1929).

[11] M. H. Merrill, (1929), *The New Judicial Approach to Due Process and Price Fixing*, 18 Ky. L. J. 1 at 14.

question of due process arises, and the Supreme Court is called upon to determine whether the legislation falls within constitutional limitations. Historically, the question of due process depended upon whether it was a public utility. Up to 1934, public utilities had a definite connection with the due process clause, and as we have seen, the Supreme Court used the historical approach.

From what source do the states derive this power to regulate public utilities? It is generally conceded that the rights of states to regulate public utilities is founded upon the state police powers.[12] Police power is the power inherent in a government to enact laws, within constitutional limits, to promote the order, safety, health, morals, and general welfare of society.[13] This power is flexible, some courts holding that it changes from time to time to meet the changed conditions of society.[14] Other courts, perhaps more accurately, say that the power itself remains the same and that its apparent extension is only the application of the principle to new conditions as they arise.[15] Up to 1934, the police power of the states to regulate public utilities had not extended beyond the businesses which were historically considered to be utilities.

How does the *Nebbia Case* affect this situation? Here the business in question was not a public utility in the historical sense. Because of the fact that milk was selling below the cost of production, and, as a result, the producers were not getting a fair return on their products, the New York legislature passed a law regulating the price of milk. The Supreme Court upheld the validity of the statute. In speaking of the police power with respect to the regulation of private business, the court showed a distinct break from the historical approach,[16] and the

[12] Alabama Public Service Comm. v. Mobile Gas Co., 213 Ala. 50, 104 So. 538 (1925); Board of Commerce of Franklin County v. Public Utility Comm., 107 Ohio St. 442, 140 N. E. 87, 30 A. L. R. 429 (1923); East End Light, Heat, and Power Company's Petition, 63 Pa. Super. 16 (1916); Commonwealth Telephone Co. v. Carley et al., 192 Wis. 464, 213 N. W. 469 (1927); *Cooley's Constitutional Limitations* (8th ed. 1927), p. 1300 et. seq.; *Freund, The Police Power* (1904), Sec. 12, et. seq. But see *Willoughby on the Constitution of the United States* (2d ed. 1929), where he says at page 1751: "According to the writer's judgment it is, however, better to give a more restricted and more definite connotation to the term police power according to which the constitutional right of the state to regulate industries or undertakings affected with public interest is not embraced within it."

[13] 12 C. J., Constitutional Law, Sec. 412, p. 904, see cases cited in note 89.

[14] Carr v. State, 175 Ind. 241, 93 N. E. 1071, 32 L. R. A. (NS) 1190 (1911); State R. Comm, v. Grand Trunk Western R. R. Co., 179 Ind. 255, 100 N. E. 852 (1913).

[15] State v. Missouri Pac. R. Co., 242 Mo. 339, 147 S. W. 118 (1912); Stettler v. O'Hara, 69 Ore. 519, 139 Pac. 743 (1914); Harbison v. Knoxville Iron Co., 103 Tenn. 421, 53 S. W. 955 (1899).

[16] 291 U. S. at 536, the court said: "There is no closed class or category of businesses affected with a public interest, and the function of

inauguration of what may be termed a "factual approach", gained by inductive reasoning. The court no longer reasons by analogy, asking itself: "Is this, historically, a public utility?" but asks: "Is there a need for regulation for the public good?" If so, the business is declared subject to public regulation, whether it was considered, historically, to be "clothed with a public interest" or not. The formula "affected with a public interest", is now without value in determining the power of the state to regulate private business. The only limitation on the extent to which the legislature may go, if there is a need for regulation for the public good, is that the legislation may not be arbitrary or discriminatory.[17]

As we stated in the opening paragraph, it is the purpose of this note to determine the significance of the *Nebbia Case* and its resultant effect upon the classification of businesses which are subject to governmental regulation. The first part of this problem has been discussed, and as a solution to the last part, the following is submitted as a classification of businesses subject to governmental regulations:

I. *Those callings which were historically considered subject to regulation, and the modern extensions thereof.* Historical examples of this class were inns, certain carriers, such as hacks, and warehouses.[18] Some of the modern extensions are taxicabs,[19] grain warehouses,[20] public refrigeration plants,[21] and aviation fields.[22]

II. *Those businesses which are carried on under public grant or franchise.* These enterprises are usually accorded special privileges, such as eminent domain[23] and freedom from competition, and in return, the government granting such privileges has a right to regulate. Examples of this class are railroads,[24] companies engaged in furnishing utilities such as heat, light, and water,[25] and street bus or railway systems.[26]

---

the court in the application of the Fifth and Fourteenth Amendments is to determine in each case whether circumstances indicate the challenged regulation as a reasonable exertion of governmental authority or condemn it as arbitrary or discriminatory."

[17] See note, 89 A. L. R. 1495.

[18] *Supra* n. 4.

[19] Terminal Taxicab Co. v. Kutz, 241 U. S. 252, 60 L. Ed. 984, 36 Sup. Ct. 583 (1916).

[20] Munn v. Illinois, supra n. 5.

[21] Public Utilities Comm. v. Monarch Refrig. Co., 267 Ill. 528, 108 N. E. 716 (1915).

[22] State v. Johnson, 117 Neb. 301, 220 N. W. 273 (1928); State v. Jackson, 32 Oh. App. 152, 160 N. E. 396 (1929).

[23] Traber v. Railroad Comm., 183 Cal. 304, 191 Pac. 366 (1920).

[24] Sea Board Air Line Ry. v. McRainey, 69 Fla. 462, 68 So. 753 (1915).

[25] Gainesville v. Gainesville Gas & Elec. Power Co., 95 Fla. 404, 62 So. 919 (1913); Asher v. Hutchinson Water Co., 66 Kan. 496, 71 Pac. 813 (1903); Acquackamonk Water Co. v. Board of Public Utilities Comm., 97 N. J. L. 366, 118 Atl. 535 (1922); Oklahoma Nat. Gas Co. v. Corporation Comm. of Oklahoma, 80 Okla. 84, 216 Pac. 917 (1923); Pabst Corp. v. City of Milwaukee, 190 Wis. 349, 208 N. W. 493 (1926).

[26] Platt v. City and County of San Francisco, 158 Cal. 74, 110 Pac.

III. *Those businesses where it appears that reasonable regulation is necessary to promote the safety, health, morals, and general welfare of society.* This class is necessarily broad. It is into the latter class that the *Nebbia Case* falls, and, viewing the effect of this decision, which has been followed by the court in the last few years,[27] if we were to predict the future trend of valid legislative regulation of private business, it is conceivable to forecast regulation of all kinds of food and drink prepared for human consumption, as businesses falling within this class.[28]

PHILLIP SCHIFF.

304, (1910); Turner v. North Carolina Public Service Comm., 170 N. C. 172, 86 S. E. 1033 (1915).

[27] Borden's Farm Products Co. v. Ten Eyck, 297 U. S. 241, 80 L. Ed. 669 (1935); Precision Castings Co. v. Boland, 13 F. Supp. 877 (1936) which at 887 cited the Nebbia case as standing for the proposition that "The Fifth Amendment in the field of federal activity, and the Fourteenth as respects state action, do not prohibit governmental regulation for the public welfare"; West Coast Hotel Co. v. Parrish, 300 U. S. 397, 81 L. Ed. 703 (1936) which approved the extension of the police power of the states, saying: "The reasonableness of the exercise of the police power of the state must be considered in the light of current economic conditions"; Highland Farms Dairy v. Agnew, 300 U. S. 601, 81 L. Ed. 853 (1936); National Labor Relations Board v. Mackay Radio and Tel. Co., 87 Fed. (2d) 611 (1937).

[28] It is submitted, furthermore, that a state may, under its police power, regulate any private business, which is affected with or concerns the safety, health, morals, or general welfare of society, so long as such regulation is not arbitrary or discriminatory.