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Some Constitutional Aspects of War Rent Regulation Measures

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SOME CONSTITUTIONAL ASPECTS OF WAR
RENT REGULATION MEASURES.

The mobilization of a great peaceful population into an efficient fighting force requires the marshalling and direction of every resource of that population, human or material. The production, transportation and distribution of commodities must be controlled and everything directed to the one end of winning the war. Self preservation is the first law of nations as well as of nature. Reorganizing our industrial life to fit such a program during the late world war, we found ourselves confronted with many difficult problems, not the least of which was the "housing" problem.

A hasty survey of the situation will indicate that the housing emergency was not confined to any particular place, or to any particular period of the war. It was widespread in its sweep, universal in its accompanying hardship and everywhere fraught with the same grave social and economic evils. It was but another evidence of the serious social and economic disorganization that attends the successful pursuance of a modern war.

Other countries faced the necessity and pushed through varying types of laws to remedy the emergency conditions. In England, Scotland, Ireland, Wales, Canada, Australia, New Zealand, British South Africa, India, France, Belgium, Spain, Germany, Holland, Switzerland, Norway, Sweden, Finland, Austria, Hungary and Czecho-Slovakia, housing difficulties arising out of war conditions directly or indirectly led to regulation of rentals in some form to improve the whole housing situation.

In our own country the federal government and many of the states took action along these lines. Many cities, large and small, were also compelled by the housing emergency to adopt measures regulating the relationship existing between landlord and ten-


2 A general review of foreign housing activity and legislation will be found in the brief of the Attorney General of the State of New York in Guttag v. Schatschke, 194 Appellate Division 569 (N. Y.); 230 N. Y. Reports 847; N. Y. Law Journal December 27, 1920.
These measures were not always a direct regulation of the relationship but they certainly had an effect upon it. Legislation was enacted stimulating building by tax exemptions, or by direct subsidies affected rentals in so far as they succeeded in increasing the supply of available houses.

Where high rentals prevailed whether in large metropolitan center or in small industrial town, suddenly expanded by war time contracts, the social and economic consequences that followed were much the same. An adequate housing supply is a basic essential for a wholesome, healthy people. Speaker after speaker before the Senate Committee on Reconstruction and Production sounded a note of alarm as to the effects of the housing shortage on the general moral tone of the country. Representatives of business groups concerned more with profits than social welfare were apprehensive of the effects of the housing shortage on the American standard of life. These fears were not without basis.

A competent health authority commenting on the New York situation said, "As a result of the abnormal overcrowding thousands of families are forced into unsanitary and dangerous quarters. Health authorities are powerless because it is impossible to vacate such premises under present conditions. This usual legal remedy is useless to cope with the present conditions. It cannot be used because there are no other better places to which such families can remove.

Overcrowding means close contact, and has resulted in a marked increase in the infant death rate. The relation of bad housing to child death is startling. Infant mortality is 50 per cent higher in districts where there is the greatest overcrowding."

*For a general survey of this subject see the hearings in 1918 on the bills to prevent profiteering in the District of Columbia; before the Subcommittee on the District of Columbia of the Senate on H. R. 9248; before the Committee on the Judiciary of the House of Representatives on the Bill H. R. 12443; before the Committee on Public Buildings and Grounds of the House of Representatives on the bill H. R. 12818 (also H. R. 12835). The British Increase of Rent and Mortgage Rent (War restrictions) Act of 1915, to restrict increases of rent during the War is also of interest. For a good statement of the arguments against rent regulation see The Weekly Review, August 25, 1920.

**Hearing before the Select Committee on Reconstruction and Production, United States Senate, 66th Congress, 3rd Session, Pursuant to Senate Resolution 350, Washington, Government Printing Office, 1921.
In Washington, D. C., the government was forced to concentrate in a very small area an army of civil employees altogether out of proportion to the District's permanent population. This great influx of population placed the whole body of civil employees at the mercy of those controlling the available housing facilities. The high rents demanded of the war-workers resulted in conditions of over-crowding. Over-crowding caused conditions dangerous to health. During the influenza epidemic it became particularly dangerous.

Although the housing shortage was most certainly a result of the dislocation of the existing social and economic order that came from the world war, it did not appear with mathematical simultaneousness at the invasion of Belgium, neither did it end with the signing of the Armistice. In many places the stage was set for an acute housing shortage before the war, if one did not already exist. The war simply aggravated the situation or brought the matter to a head. The shortage continued long after the actual fighting was over. In fact housing conditions in many places were much more acute in that difficult period of readjustment which followed the demobilization of the armies than during the war period proper. If we had housing shortages in the earlier days of the war because of the necessity of building "Satellite cities" around munition works or shipyards, we had the same conditions in 1920 from different causes. Throwing the war machinery out of gear meant directing millions of men back into peaceful pursuits; tearing down the tremendous industrial system set up to win the war; taking large numbers out of strictly war industries and directing them into normal business activities. During this period of unscrambling conditions were worse than before the Armistice.

The means used to correct the problem were quite similar in the main both in this country and abroad. There were two different devices used. The first method used was an attempt to regulate rental rates directly by setting up some system of determining what was a reasonable rate and what was not. The second method used was an attempt to regulate rental rates indirectly by correcting the monopoly condition which enabled the landlord to charge exorbitant rates. This latter method usually took the form of a subsidy to aid building by some gov-
ernmental agency. The housing supply being increased, the law of supply and demand took care of the rental rate.

The legislation which attempted to regulate the rates of rentals directly took two main forms in this country. The first type is represented by the District of Columbia law passed by Congress in connection with certain amendments of the Food Control Law (Lever Act); the second type is represented by the series of acts passed by the New York Legislature in the spring of 1920.

The Legislation of the first type as a general thing was predicated on the establishment of a commission. This commission was the regulating agency, empowered by the law to determine and fix just and reasonable charges for the use of rented property.

Legislation of the second type operated directly through the courts. For example, the New York law made the fact that rent was unjust and unreasonable a defense to an action for its recovery, and also laid down the rule that an increase of more than 25 per cent over the rent existing in a year before should be presumed unreasonable and oppressive. By another act of the same series, the landlord in order to avail himself of summary proceedings for possession was required to prove that the rent demanded was no greater than the amount paid the month preceding the default, or had not been increased more than 25 per cent over the rent existing a year prior to the suit.

The New York legislation is different from the federal legislation in fixing by way of presumption, a definite percentage of permissible increases for the individual case and in making the determination of a reasonable rent incidental to the exercise of the court's judicial function in respect of the recovery of debt and the restitution of possession. Both types of legislation rest upon the same common principle—the existence of a public interest in the landlord and tenant relationship arising out of the distressing conditions prevailing in congested centers.

Legislation granting subsidies to relieve the housing shortage was passed by the federal government and by several of our state and local governments. In taking this step they were following the course adopted in many European countries.

The rent measures attempted by Congress did not have to wait long for judicial interpretation. The Saulsbury Resolution passed on May 31, 1918, by Congress was declared unconstitutional shortly afterwards in the cases of Willison v. McDonnell and Groot v. Riley, as a taking of property without just compensation. The case of Willison v. McDonnell, testing the constitutionality of the Saulsbury Resolution was submitted to the Court of Appeals of the District of Columbia on October 13, 1919, decided on December 1, 1919, and on motion for re-argument on December 24, 1919.

The Saulsbury Resolution did not attempt to regulate rents. What it did was to declare openly that the existing possession of a tenant, except in certain unusual cases might continue at his option, notwithstanding the expiration of the tenancy. Payment of the rent fixed by the expired lease was the consideration for the occupancy so continued. It was not the payment of a fair and reasonable rent. The Resolution provided that though the occupancy might continue indefinitely it was beyond the power of the landlord to increase the rent or to appeal to any tribunal for relief.

No provision was contained in the Resolution regulating rents on a basis of reasonableness, nor for a continuance of possession based upon fair and reasonable compensation. One result of the Resolution was to cut down the reversionary interest of the landlord at the will of the tenant by postponing until the conclusion of the treaty of peace his right to re-enter and repossess his land. For this transfer of an admitted and valuable right of property, the Resolution provided no consideration. There was no presumption either of law or fact that rent fixed under altogether different conditions and circumstances for a term already past, would be fair and reasonable for an indefinite future occupancy owing its existence entirely to the Resolution itself. Viewed in this light, the effect of the Resolution was to deprive the owner of this property without compensation.

Judge Robb in passing on its constitutionality pointed out that the purpose of Congress in passing the Resolution was to prevent owners of real estate in the District of Columbia from

(1919) 266 Federal 1008.
collecting excessive rents during the war. This was to be accomplished by closing the doors of the courts to owners who should attempt to get possession of their property, occupied or to be occupied under oral or written agreements, including those already expired, so long as the tenant or occupant continued to pay rent at the rate he had been paying before.

The effect of this, the court showed, was that the owners of property unoccupied at the date of the Resolution or completed after that date were much more advantageously situated than were the owners of property occupied at that time, since it was permissible for owners of the former class to demand whatever rent the tenant would agree to pay. Accordingly, one who became a tenant after the passage of the Resolution, might and probably would pay substantially more than a tenant in possession of like property under similar conditions. It was quite probable also that the new rate would more nearly approximate the fair rental since the increased cost of living normally would affect the cost of maintenance and upkeep of property and hence the rental rates.

The Resolution did not prescribe rates, uniform or otherwise. In other words varying rates under varying conditions and circumstances were arbitrarily continued in force. Consequently the court said, it not only deprived the citizen of property without compensation, but its operation was not uniform, for it affected and was intended to affect in one way property already under lease. One class of owners was arbitrarily required to accept a rental based in many instances upon pre-war conditions, and which, therefore might be so inadequate under war conditions as to amount to taking of private property without compensation, while another class was left free to exact whatever rent they might obtain. The Resolution likewise prevented the sale for business purposes of one class of property and permitted the sale of another. For these reasons the court held it invalid.

The failure of the Saulsbury Resolution was the signal for renewed activity on the part of Congress. The result was the Ball Rent Law of October 22, 1919. This act provided for a commission vested with the power to regulate rents and the matter of service in connection with the letting of dwelling premises,

\[41\] Statutes at Large, Federal Statutes Annotated, 1919 Supplement.
business property and hotels. By its provisions the tenant could not be evicted so long as he paid the rent fixed by the commission unless the owner himself or a bona fide purchaser from the owner wanted to occupy the premises.

This Act was held unconstitutional in Hirsh v. Block by the Court of Appeals of the District of Columbia in a two to one decision, the Chief Justice dissenting. In this case the District Court held that there was no analogy between the power to fix rental rates between private individuals and the power of the legislature to fix rates for service where the owner has devoted the business affected to a public use.

In this way the court distinguished between the case before it and the Grain Elevator Case, the Railroad Rate Cases, the Insurance Cases, the Bank-Guarantee Case, the Irrigation Cases, the Wharf Case, and the Pipe Line Case.

On March 3, 1921, the case was argued before the Supreme Court of the United States. On April 18, 1921, that body in a five to four decision held the Ball Rent Law constitutional. Associate Justice Holmes spoke for the majority in this case. He was supported by Associate Justices Brandeis, Pitney, Day and Clarke, Associate Justice McKenna rendered the dissenting opinion. He was joined in his dissent by Chief Justice Edward White and Associate Justice Van Devanter and McReynolds.

The Ball Act proposed to secure for the landlord a reasonable rent. The court agreed that the interpretation of the word "reasonable" would probably deprive the landlord in part at least of the power of profiting by the sudden influx of people to Washington, and accordingly of a right usually attached to fortunately situated property. However, restrictions placed upon these properties derived from an economic situation arising out of a national misfortune were looked upon by the court

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9 (1876) 94 U. S. 113.
as quite justifiable in view of the fact that similar restrictions accomplished through taxation measures have been accepted. The restrictions here the court felt were quite similar to the one put upon the rights of the owner of money by the usury laws. Because of this state of affairs the Court deemed the Ball Rent Law constitutional and valid.

In the final analysis this case aside from its temporary feature illustrates a more extended application of the doctrine of *Munn v. Illinois*[^15] which was enlarged in the case of the *German Alliance Company*. It may be said to represent the views concerning the police power expressed by Mr. Justice Holmes in his dissent in the *Lochner case*[^16] and in his majority opinion in the *Noble State Bank v. Haskell case*.[^17]

In *Chastleton Corporation et al. v. Sinclair et al., Rent Commission of the District of Columbia, et al.* we have the sequel to *Block v. Hirsh*. In this case the plaintiffs alleged that the emergency which originally justified the law no longer existed and that they were deprived of their property without due process of law. Mr. Justice Holmes speaking for the court held this contention presumptively true and that for convenience the facts should be gathered and weighed by the court of first instance and the evidence preserved for the Supreme Court if necessary. He held that while the legislative declaration that a justifying emergency exists as a present fact is entitled to every good respect, so far as this declaration looked to the future it could be no more than a prophecy and was liable to be controlled by events. He also pointed out that a law depending upon the existence of an emergency or other certain state of facts to uphold it might cease to operate if the emergency ceased or the facts changed even though valid when passed.[^18]

[^15]: (1876) 94 U. S. 113.
[^16]: (1905) 198 U. S. 45—Judge Holmes in this case made his frequently quoted statement that “The Fourteenth Amendment does not enact Mr. Herbert Spencer’s Social Statics.” “A constitution,” he says in the case, “is not intended to embody a particular economic theory whether of fraternalism and the organic relation of the citizen to the State or of laissezfaire. It is made for people of fundamentally differing views, and the accident of our finding certain opinions natural and familiar, or novel and even shocking, ought not to conclude our judgment upon the question whether statutes embodying them conflict with the Constitution of the United States.
[^17]: (1911) 219 U. S. 104.
As to whether the exigency existed upon which the continued operation of the law depended, the court found that it was a matter of common knowledge that living conditions in Washington, D. C. had improved considerably. The court did not attempt to decide for itself on the basis of off-hand judicial knowledge the existence or non-existence of the facts upon which the validity of the legislative act must depend. In spite of a prima facie indication that justifying facts did not exist and that the statute was void, the court sent the case back to the lower courts for future interrogation.

**STATE LEGISLATION.**

State Legislatures in relying upon the police force to regulate rents went to the doctrine established in the case of *Munn v. Illinois* that where property is so held that the facts give to its owner a practical monopoly and where the service rendered by the property-owner is a service necessary to industry, the property is impressed with a public interest, and its use becomes subject to legislative regulation by virtue of the police power of the state.

The *Munn* case was decided in 1876. The doctrine of property with a public interest was definitely formulated in that case. The court stated the principle that "when one devoted 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."

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U. S. 533, 539, 541. The court also refers to the case of *Newton v. Consolidated Gas Company*, 258 U. S. 165 in which a statutory rate that had been held valid for earlier years in *Wilcox v. Consolidated Gas Company*, 212 U. S. 19, was held confiscatory for 1918 and 1919.

It is a matter of public knowledge," the court said, "that the Government has considerably diminished its demand for employees that was one of the great causes of the sudden influx of people to Washington and that other causes have lost at least much of their power. It is conceivable that as is shown in an affidavit attached to the bill, extensive activity in building has added to the case of finding an abode. If about all that remains of war conditions is the increased cost of living, that it is not in itself a justification of the act. Without going beyond the limits of judicial knowledge, we can say at least that the plaintiff's allegations cannot be declared off hand to be unmaintainable, and that it is not impossible that a full development of the facts will show them to be true. In that case the operation of the statute would be at an end."

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(1876) 94 U. S. 113.
The business affected in the *Munn* case was the storage of grain in elevators in the city of Chicago; the public control exercised consisted in the regulation of the charge. Two justices dissented in this holding on the ground that such regulation not being for the protection of health, safety, or morals could only be imposed upon businesses exercising a *public use*, as distinguished from those exercising a *use in which the public has an interest*, that is, that a business could only be so regulated which a state might carry on, or which was invested with powers reserved to the state such as eminent domain. Despite this contention a number of cases were decided about this time sustaining similar control exercised over railroads. These cases were called the Granger cases and mark the beginning of a rapidly expanding doctrine of state regulation.

In *Brass v. North Dakota* 21 the court took a step in advance of the *Munn* case. The Granger cases might be construed as making the power to regulate *charges* dependent upon the monopolistic character of the business; the same view might be taken of the decision in *Budd v. New York* 22 in which the court likewise emphasized the virtual monopoly enjoyed by the business; the same point was emphasized in *Spring Valley Waterworks v. Schottler* 23 where the court recognized that the state may regulate the supply of water if the supply is monopolized. But in the *Brass* case the requirements of a *monopoly, legal or actual*, as a justification for the legislative regulation of charges, was abandoned. The expression in the earlier cases concerning the monopolistic character of the business were now declared to have gone only to the question of the property, not the power of such legislation. Four judges dissented vigorously from this opinion with the objection that only a practical monopoly justifies the regulation of charges.

Although the strong dissent left the question somewhat in doubt for a time, this doubt was dispelled by the holding in the case of *German Alliance Insurance Company v. Kansas* 24 in which the doctrine of the *Brass* case was expressly approved and applied to the insurance business. In this decision and similar ones the courts have taken a very liberal view of what

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21 (1914) 233 U. S. 389.
22 (1891) 143 U. S. 517.
23 (1883) 110 U. S. 347.
24 (1914) 233 U. S. 381.
makes a business public in character and the police power has been interpreted broadly.

The power of regulation which had long been applied to innkeeper, wharfingers and common carriers, was extended in turn to grain elevators,\textsuperscript{25} to stockyards,\textsuperscript{26} to the ginning of cotton\textsuperscript{27} to the collection and distribution of news,\textsuperscript{28} to employment agencies,\textsuperscript{29} to insurance,\textsuperscript{30} and to banking.\textsuperscript{31}

In these cases the courts have had to lay down certain fundamentals concerning regulation. As remarked by Mr. Justice McKenna, "These cases demonstrate that a business, by circumstances and its nature, may arise from a private to be of public concern, and be subject to consequence of governmental regulation. And they demonstrate, to apply the language of Judge Andrews in the \textit{Budd} case that the attempts made to place the right of public regulation in the cases in which it has been exerted, and of which we have given examples, upon the ground of special privilege conferred by the public or those affected, cannot be supported." The underlying principle is that business of certain kinds holds such a peculiar relation to the public interest that there is super-induced upon it the right of public regulation.\textsuperscript{32}

In these cases the courts have shown that there are no fixed classes of property fixed with a public interest. The courts have also shown that the considerations that justify regulatory legislation are too numerous to be set down in any given formula.\textsuperscript{33} They have also shown that verbal definition being out of the question, the scope of legislative authority in this respect must be worked out by the gradual process of inclusion and exclusion.\textsuperscript{34}

\textsuperscript{25}Munn \textit{v.} Illinois, (1876) 94 U. S. 113, 133.
\textsuperscript{26}\textit{Ratcliff} \textit{v.} Wichita Union Stockyards Company, (Kansas) 86 Pacific 150, 6 L. R. A. (N. S.) 839.
\textsuperscript{27}\textit{Oklahoma Gin Company} \textit{v.} State, 158 Pacific 629.
\textsuperscript{28}\textit{Inter-Ocean Publishing Company} \textit{v.} Associated Press, 184 Ill. 483, 56 N. E. 322.
\textsuperscript{29}Brazee \textit{v.} Michigan, (1916) 241 U. S. 340.
\textsuperscript{30}\textit{German Alliance Insurance Company} \textit{v.} Kansas, (1914) 233 U. S. 389, 411.
\textsuperscript{31}\textit{Noble State Bank} \textit{v.} Haskell, (1911) 219 U. S. 104, 112.
\textsuperscript{32}Statement by Mr. Justice McKenna in \textit{German Alliance Insurance Company} \textit{v.} Lewis at p. 406.
\textsuperscript{33}See \textit{Hudson County Water Company} \textit{v.} McCarter, 207 U. S. 349.
\textsuperscript{34}See \textit{Davidson} \textit{v.} New Orleans, 96 U. S. 104; \textit{Budd} \textit{v.} New York, 143 U. S. 517, 534; \textit{Noble State Bank} \textit{v.} Haskell, 219 U. S. 104, 112.
With these facts before them the courts of this country were brought face to face with the question as to whether the housing and rental situation in the cities of the country disclosed those distinguishing features, those essential elements—present in other cases of public interest.

Those who were opposed to rent regulation vigorously contended that those distinguishing characteristics found in other cases of public interest were not present here. They went back of the Brass case and the German Alliance Insurance Company case and contended that the renting of real property presented no real element of special privilege such as would imply an obligation to the public. They recurred to the contention set forth in the Granger Cases and in the Budd Case that the power of regulation vesting in the legislature is dependent upon the monopolistic character of the business. They argued that the landlord's right to rent his property existed not as a special privilege but as an incident of the right of use and disposition inherent in ownership.

Connecting up the power of regulation with the grant of a monopoly, or franchise, or some special statutory privilege they refused to accept the validity of rent regulation. The fact that these matters did not enter into the consideration of the courts in later cases affecting regulation and that it has been contended that they never had a real basis in the old Common Law failed to impress the opponents of rent regulation.

They also contend that there was not a general public demand of sufficient strength to meet the requirements of the definition of "public interest" set up in the other cases. Proponents of rent regulation replied that there is never a universal public demand for anything. No matter how extensive in face the demand may be for any particular service or commodity, they pointed out, it is always limited to some definite fraction of the community. They observed that insurance was affected with a "public interest" but only a relatively few individuals availed themselves of it.

35 People v. Budd, 117 N. Y. 1, 27, 22 N. E. 670; Ratcliff v. Wichita Union Stockyards, supra; Webster Telephone Case, 17 Neb. 126, 22 N. W. 237.
The courts in determining whether or not the housing and rental situation existing in the various cities of the country showed the fundamental requirements of a "public interest" as set forth in other cases had to dispose of these contentions and determine from the previous decisions of the court the circumstances which give rise to a "public interest." These circumstances are widely different and perpetually changing. Though they are not easily fitted to a formula, they may nevertheless be said to have in all cases a common result—that is a condition of virtual monopoly, or to put it differently, an absence of effective competition in some field.

This condition may arise out of a franchise or a statutory privilege, but not necessarily. Neither are these circumstances the principal sources of monopoly. Where there is no franchise, or statutory grant, the absence of competition may be the result of an abnormal condition on the side of supply, or of abnormal conditions on the side of demand.

Control of the supply may be the determining factor. Negation of free competition may come from the natural monopoly, that is from limitations which are natural in the physical sense, as in the case of water and gas, or it may result from limitations which are natural only because of existing circumstances. The grain elevators enjoying an exclusive proximity to transportation facilities in Chicago are in point. Where the locations available for a particular purpose are necessarily few and cannot be enlarged, or multiplied, competition does not affectively regulate their use. In such cases while there is no fixed physical limitation as in the case of natural monopolies and the creation of new facilities is always theoretically possible, a virtual monopoly exists, and it becomes necessary to regulate the prices charged by those who control this virtual monopoly.

On the other hand, control of the supply may be relatively unimportant and the determining factor in suppressing the condition of free competition may come from the nature and scope of the demand. At times there are demands, powerful pressing demands for some human necessity which though not artificially or naturally limited, cannot be supplied adequately by normal economic processes. Here again a virtual monopoly exists, if the need is fundamental and pressing and there is no economic sub-
stitute. The public interest in such cases is given additional impetus in all periods of extraordinary economic stress.

Where a virtual monopoly exists, unless the public interest is recognized and protected, the whole body of the people, or important parts of that body will stand in a position of economic helplessness before those controlling the monopoly. The recognition of this condition of economic dependence is at the root of practically all of our social and industrial legislation. Regulation of price is the only effective corrective of such a condition. The exercise of the legislative power is justified by these conditions of social fact arising from emergency conditions, or these other monopoly conditions. Whether or not the stress of the situation has reached the proportions required to make regulation necessary is a question of social judgment which only the legislature is competent to make.

The housing situation in the cities of this country presented the following conditions. There was a shortage of houses amounting to a fixed limitation of the supply. There was a demand intensified by the cessation of building activities and the rapid concentration of population in cities. This demand was an emergency demand, not stable enough, or permanent enough to bring private enterprise into play with an increased construction, if that were possible. There was no competition between landlords controlling the available supply of habitable property. In short, free competition had broken down as far as the business of supplying homes was concerned. It was as non-existent as in the business of water or gas, or other services, generally considered proper objects of public regulation. A fixed limitation of the supply and a sudden, highly intensified demand being present—a condition of virtual monopoly resulted. The law-making bodies of several important states, as well as Congress, recognized this fact by the enactment of regulatory legislation.

The New York Court of Appeals and the Supreme Court of the United States confronted with these facts applied the principles of the Brass Case and the German Alliance Insurance Case to rented property in justifying legislation which restricted landlords to the receipts of a reasonable rental.37

CONCLUSION

In conclusion it may be said that the competency of the government to deal with extortion, oppression, and emergency has never been disputed at any stage in the development of Anglo-American law. Indeed it is recognized that a very important purpose of the government has been to prevent extortion and oppression and safeguard the public. We have noted that the law early recognized that there were many callings and businesses to which the public necessarily had to resent, and in which they had an interest. If undisturbed by law, extortion in many cases would follow. We have noted that whenever the public is subjected to such monopoly conditions, in law or in actual effect, the power of oppression inherent in monopoly is restricted by law. Whenever the peculiar economic and social condition governing the case permitted, a free competitive condition to exist, both in law and in fact, the government ceased to regulate as the need disappeared and public opinion ceased to demand such regulation.

The conditions existing during and after the war would certainly seem to justify some action by the government to relieve the existing distress. The shortage of houses would seem to bring the business of letting houses for hire within the principle of Munn v. Illinois. Unquestionably, the home is a fundamental necessary of social life. It would seem to be so, at least to the same degree if not to a greater one, than the railroad train, the warehouse, the telegraph, or the telephone. Every landlord offering a house to rent, is in the business of housing or rendering housing service. Just as the warehouseman in the Munn Case offered to the public a storage place for grain, so the landlord offers dwelling places to people. If the service of storing grain

38 Ancient English Statute, ascribed to both 51 Henry III and to 13 Edward I.

"Be it enacted that no forestaller be suffered to dwell in any town; a man who seeking his own evil gain, oppressing the poor and deceiving the rich goes to meet corn, fish, herring, or other articles for sale as they are being brought by land or water, carries them off, and contrives that they shall be sold at a dear rate—he that is convicted thereof, the first time shall be amerced and lose the things so bought, and that according to the custom and ordinance of the town; he that is convicted the second time shall have judgment of the pillory; at the third time he shall be imprisoned and make fine; the fourth time he shall adjure the town, etc."

39 See Wyman, Public Service Corporation, Chapter I.
is impressed with a public interest, it would seem that the service of housing people should be given equal consideration. If the service of housing is impressed with a public interest, the power of the legislature to regulate follows. This is the position taken by Dean Wigmore in his analysis of the rent regulation measures.\(^4\)

Henry H. Glassie of the Washington, D.C. Bar and Special Assistant to the Attorney General in the Block Case adopts much the same idea in an article in the Virginia Law Review\(^4\)1. His proposition is that the business of offering homes for hire is affected with a public interest and therefore subject to regulation.

Charles K. Burdick\(^4\)2 in discussing the basis of the power to regulate rents comes to the same conclusion.

War time conditions impressing the service of housing people with a public interest during the existence of such conditions it is difficult to see how the power to regulate may be rebutted. It is the extraordinary condition in effect that makes regulation necessary and valid. The point is repeatedly made by those urging the constitutionality of rent regulation measures that these measures are purely emergency measures, and if it were not for that fact their validity would be an altogether different matter. That does not mean, as Justice McKenna asserts, that constitutional limitations are lifted because of the emergency, or that some form of the European "state or siege" is in fact recognized. No such a thing. The constitution as stated in \textit{Ex parte Milligan} remains in force during war time emergency conditions just as in times of peace. It's force and effect is not suspended. The thing that is changed is the \textit{housing conditions} which because of the war time circumstances puts the renting public at a grave disadvantage, with serious hardships resulting to them, thereby impressing the service of housing with a public interest and bringing it within the limitations of the constitution.

Mr. Podell, of counsel for the tenants, says "both Mr. Guthrie and the writer who argued in support of these laws in


the United States Supreme Courts, made it clear that were it not for the pressing and prevailing emergency it would be difficult to sustain these laws as constitutional.\textsuperscript{44} In the Castleton Case,\textsuperscript{44} in 1924 as noted, the plaintiffs alleged that the emergency which originally justified the law no longer existed. Justice Holmes held this contention presumptively true and remanded the case back to the lower courts for appropriate action.

It is suggested by some that the difference between an emergency in fact and an emergency in fiction is but a meager one. A continued prolongation of the emergency period as the justification for exercising this power they looked upon as making the departure a permanent one. These observers pointed out that if the emergency was in effect in 1918 it was likewise in effect in 1924. There is to be sure, some basis for apprehension when such a prolongation takes place.

Whatever course is followed in the future in outlining and determining the respective rights of landlord and tenant, we may safely presume that where the express will of the people through their representatives is neither arbitrary nor unreasonable, but has for its purpose the protection of the public, or a large body of the public, the legislation resulting will have to be very clearly in conflict with the constitution to effect its nullification.\textsuperscript{45} We may further safely presume that a very liberal interpretation will be given to the application of the police power and that the novelty of the form of this application will be no effective defense to such application by those opposing the law.\textsuperscript{46}

\textsuperscript{44} New York Times, March 2, 1921.


\textsuperscript{44} Samuel Williston in discussing freedom of contract (Samuel Williston, Freedom of Contract, Cornell Law Quarterly, Volume 6, 1920-1921, at p. 379) comments on the gradual narrowing of the scope of the Fourteenth Amendment and similar constitutional limitations and decides that, “It is no longer possible for those who would like to decide such questions by a mere appeal to liberty and freedom of contract to avert what Huxley called ‘the tragedy of a fact killing a thought’ by putting a constitutional sanction behind a cherished dogma.” Undoubtedly the burden rests on one who proposes a limitation to prove that it is needed or desirable, but no more can be said.”

\textsuperscript{46} Mr. John B. Cheadle in an article on “Government Control of Business,” Columbia Law Review, volume 20, 1920, pp. 438-450, advances the idea that the extent of the government’s legislative power over private business is not fixed or limited by the Federal Constitution
Dean Roscoe Pound in speaking of the state of the common law today, said:

"There are many signs that our law is entering upon a new stage of development. Already there is a call for juristic-creative activity and for the same judicial resourcefulness and legislative inventive capacity that marked the formative period of our institutions."

After considering that fact with satisfaction, he added:

"If we do our duty by the common law of the Twentieth Century, we must make it a living system of doing justice for the society of today and tomorrow, as the formers of our policy made of the traditional materials of their generation an instrument of justice for that time and for ours."

Public opinion cannot make unconstitutional legislation valid. If a proposed measure contravenes our fundamental law, the strength or pressure of public opinion can have no possible effect, save by changing such fundamental law. Ours is a limited government. The makers of the Constitution would have nothing of a government with unlimited power. To them, government was an evil thing at the best, with carefully prescribed powers and duties, outlined in the organic law set up by the sovereign people.

These men feared above all things the tyranny of the temporary majority or "multiplied tyranny" as Burke called it. Neither would they permit individual liberty to depend on the good disposition of the government. Accordingly they set up a constitution containing fundamental immunities against governmental power, protecting all persons in certain spheres. The minority was especially in need of such protection. To insure necessary changes the amending process was set up. The amending process is the one and the only legal method of changing our constitution. The courts can not by interpretation, so twist or distort the language of the constitution so as to give it a new meaning.\footnote{See article by Forrest R. Black, \textit{The Vanishing Bill of Rights}, American Law Review, 1927, Volume 61, pp. 227-245.}
On the other hand, it becomes the duties of our courts in the exercise of their office, to interpret our written constitutions, not in a manner inconsistent with their language and purpose, but at least in somewhat the same spirit as Dean Pound would have our common law treated. If we are to put faith in Dean Pound such a spirit becomes of more than passing importance in the light of the awakening, which he reads into the law of our day. As remarked by Judge Pound in *People Ex Rel Durham Realty Company v. La Fetra.* 48 "The law of each age is ultimately what that age thinks should be the law." This would seem to apply when attempting to determine the law regulating the relationships existing between landlord and tenant 49 in times when the whole national life is disorganized by war.

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49 Note Mr. Black's statement concerning the several schools of constitutional interpretation. To one of them he says "a written Constitution containing 'parchment banners' is a futile thing." The evolving sense of right of the community is the only source and sanction of law. All is flux and "with every breath of the American people there is born a new Constitution." "This group," Mr. Black says, "are so completely under the spell of the idea that we are living in a dynamic world that they deny the practicality of formulating any principles whatsoever, for words uttered yesterday could not have the same meaning today." This position he believed to be a protest against the canonization of our Constitution which has so long dominated our political and legal thought. The adherents of this "Static conception of the Constitution" attribute to the founding fathers of the Constitution the political wisdom of the ages. To them their achievements were a little more than human and in their handicraft the Constitution something that anticipated each and every situation that might possibly arise in the future. Mr. Black suggests that between these two positions there may be found a more substantial method of viewing the Constitution which will recognize both its utility and its limitations.