SUBSTANTIVE DUE PROCESS IN THE STATES REVISITED

> "When *I* use a word," Humpty Dumpty said in rather a scornful tone, "it means just what I choose it to mean—neither more nor less."
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> "The question is," said Alice, "whether you *can* make words mean so many different things."
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> "The question is," said Humpty Dumpty, "which is to be master—that's all."
>
> —Through the Looking Glass

There exists today, noticed by relatively few of the practicing bar, a basic dichotomy in the judicial interpretation of a constitutional tenet of great historical and contemporary importance. The term "due process of law" is generally considered by both laymen and members of the bar to be a fundamental, constitutional protection against arbitrary seizure of or interference with life, liberty or property. But that there are radically differing views as to the content of that term and as to the vitality and significance of its application in our present state of social, economic and political development is unfortunately not so well known.

The spirit and even the words of the due process clause are not indigenous to the Constitution of the United States. This idea has been known to civilized man since he first realized that his social welfare demanded the placing of some bounds upon the exercise of arbitrary power. It was the basis of the appeal of the Apostle Paul to his Roman captors in which as a Roman citizen he demanded to be tried according to Roman law.[1] Its Latin equivalent *per legem terrae,* appeared as a vital provision of the Magna Charta forced upon King John by the barons attempting to curtail the unlimited exercise of the King's sovereign power.[2] It first appeared formally in America in the Plymouth Colony Fundamentals of 1636 which, after prohibiting the deprivation of "Life, Limb, Liberty, Good Name or Estate," except by authority of some recognized law, concluded by stating:

> . . . And none shall suffer as aforesaid, without being brought to answer by due course and process of law.[3]

Almost these exact words were incorporated into our own federal Constitution one hundred and fifty years later.[4]

Like all effective, lasting measures for the circumscription of arbitrary power, the due process concept has always been cast in general terms, thus providing the elasticity necessary to adjust to changing political theories and social conditions. This essential generality also makes

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[1] XXII, The Aacts 25-29.

[2] Magna Charta

[3] MORISON, S.E., FREEDOM IN CONTEMPORARY SOCIETY, Little, Brown and Company, Toronto, 1956, pp. 15-17.

[4] U.S. CONST. amend. V.

possible, however, differing interpretations as to its meaning and requirements. These requirements of due process have varied greatly throughout the course of American constitutional history.[5] It is a fact that today there is not one due process concept but two. There is federal due process under the Fifth and Fourteenth Amendments; there is state due process as determined exclusively by the state courts in interpretation of such clauses in their own constitutions.[6]

In an article published in 1950, Professor Monrad G. Paulsen examined four fields of judicial review of legislation: price regulation, control of competition by licensing, prohibition of business methods, and the regulation of labor unions and labor practices.[7] From cases arising in these fields, Professor Paulsen concluded that the judiciaries of many states still clung fervently to the tool of substantive due process to upset regulatory legislation on the basis of an independent judicial determination of the statute's efficiency and desirability.[8] By 1937, however, the Supreme Court of the United States, which had once religiously followed the substantive approach, had discarded the application of due process in this way, retaining only vestiges of the former substantive content by requiring a showing of merely a rational relationship between means and ends of regulatory legislation.[9] This transition in the United States Supreme Court's interpretation of the due process clause was not emulated by all the state courts. These courts, being the supreme arbiters of their own constitutions, were free to retain the federally-abandoned concept of substantive due process and to continue to require a demonstration of a "real and substantial" relationship between the legislative means and ends.[10]

This bifurcated approach to the role of due process results in two

[5] Hamilton, *The Path of Due Process of Law,* in THE CONSTITUTION RECONSIDERED 167 (1938).

[6] See e.g. OHIO CONST. art. I, §16 (1912).

[7] Paulsen, *The Persistence of Substance Due Process In The States,* 34 MINN. L. REV. 91 (1950).

[8] *Id.* at 92-3.

[9] The turning point of the United States Supreme Court's interpretation of due process is generally considered to have been Nebbia v. New York 291 U.S. 502 (1934), although in the wage regulation field it did not come until West Coast Hotel v. Parrish, 300 U.S. 397 (1937). The pre-Nebbia doctrine is typified by the renowned decision of Lochner v. New York, 198 U.S. 45 (1905) invalidating wage and hour restrictions and which was overruled by the West Coast Hotel case. Post-Nebbia decisions are graphically exemplified by Daniels v. Family Security Life Insurance Co., 336 U.S. 220 (1949), which seemingly gave the states a carte blanche for economic experimentation.

[10] Some state courts did, however, follow the doctrine enunciated by the United States Supreme Court. The Vermont court in Anchor Hocking Glass Corp. v. Barber, 118 Vt. 206, 105 A. 2d 271 (1954), held that the due process test of its state constitution should be the same as that provided by the U.S. Supreme Court's interpretation of the Fourteenth Amendment. See also People v. Ryan, 101 Cal. App. 2d 927, 226 P. 2d 376 (1951); Dayton Co. v. Carpet,

very different treatments of economic regulatory legislation in the various courts of the nation. The effect of the policy of judicial self-abnegation in the review of legislation pursued by the United States Supreme Court and emulated by some state courts is to strengthen the Brandeis thesis that the states are "laboratories for social and economic experimentation." The Supreme Court has said, in essence, that the states are free to adopt through their legislatures any policy in the field of economic regulation which they may deem desirable. Statutes reflecting such public policy will only be upset by the Supreme Court as violative of federal due process if they are so unreasonable as to preclude the Court from ascertaining any rational connection between the permissive goal and the selected means to achieve it. The implications of this for constitutional decision are readily underlined by the fact that no economic regulatory legislation has been upset by the Supreme Court since 1937.[11]

Those state courts following the substantive due process approach have not, on the other hand, been inclined to follow the federal doctrine of self-abnegation in this field, an admittedly difficult psychological feat for any court. These state courts continue to insist, as did the pre-1934 federal judiciary, that legislative enactment of state public policy be tempered by what the state courts believe to be desirable, effective and proper. The final decision on what is to be public policy is by this view a result of judicial declaration, and not of the vote of the state's popularly-elected representatives.

Professor Paulsen in his 1950 article condemned the refusal of the more conservative state courts to follow the lead of the Supreme Court and give freer and more effective voice to the desires of the electorate as reflected in the acts of their chosen representatives. It is the aim of this comment to re-examine Professor Paulsen's thesis in the light of post-1950 cases to determine whether this definite schism in the interpretation and application of the due process clause by the state and federal courts still exists. For the sake of continuity and greater clarity, this comment will be limited to the same field selected by Professor Paulsen, although many illuminating examples of this problem can be found in other areas of the law.[12]

Linoleum & Resilient Fl. D. Union, 229 Minn. 87, 39 N.W. 2d 183 (1949); dissenting opinion in Sperry & Hutchinson Co. v. Hoegh, 246 Iowa 9, 65 N.W. 2d 410 (1954).

[11] This approach has been adopted by the United States Supreme Court in reference only to economic matters. In the area of civil rights legislation, the Court has pursued the substantive approach, requiring a real and substantial nexus between means and permissible ends. Many of the state supreme courts are more prone to reverse this application, i.e., to use rational tests in civil rights cases and substantive tests in economic due process situations. For an example of this in a state court see the dissenting opinion of Mr. Justice Schaner in Sei Fujii v. State, 38 Cal. 2d 718, 242 P. 2d 617 (1952).

[12] See e.g. Heimgaertner v. Benjamin Electric Co., 6 Ill. 2d 152, 128 N.E.

PRICE REGULATION

Since the *West Coast Hotel* case in 1937,[13] the Federal Constitution has proven no bar to the states in fixing minimum wages. This decision reflected the drastic change, responding to the upsurge in the labor movement and the great depression, from the former attitude of the Supreme Court, which had been expressed in *Tyson & Bro. v. Banton*,[14] that the power to fix prices was an inherent attribute of property itself. It followed the new doctrine of the *Nebbia* case of 1934[15] which had held that the phrase "affected with the public interest" meant "no more than that an industry, for adequate reason, is subject to control for the public good."[16]

In 1941, *Olsen v. Nebraska*[17] declared that a state need not justify its actions merely because prices were being regulated. Post-1950 Supreme Court cases have adhered to the *West Coast Hotel* and *Olsen* reasoning, and are best evidenced by the type of reasoning found in *Day-Brite Lighting, Inc. v. Missouri*, even though it was not a case of price regulation.[18] Justice Douglas, speaking for the majority in that case, stated:

> Our recent decisions make plain that we do not sit as a superlegislature to weigh the wisdom of legislation nor to decide whether the policy which it expresses offends the public welfare. . . But the state legislatures have constitutional authority to experiment with new techniques; they are entitled to their own standard of public welfare; they may within extremely broad limits control practices in the business-labor field, so long as specific constitutional prohibitions are not violated and so long as conflicts with valid and controlling federal laws are avoided.[19]

Among other cases, Justice Douglas relied on and cited *West Coast Hotel, Nebbia* and *Olsen*.

State supreme courts have not, in many instances, been prone to follow the lead of the Supreme Court in this field. Instead, they have persisted in delving into the propounded legislative purpose of price fixing legislation, demanding a "real and substantial" connection between the permitted ends and the means utilized to achieve those ends. Especially vulnerable to this type of attack have been the "non-signer" provisions of the state Fair Trade Acts. Although many states have yet to pass on these provisions, among those which have approximately one-half have

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2d 691 (1955), 17 OHIO ST. L.J. 146.

[13] West Coast Hotel Co. v. Parrish, *supra* note 9.

[14] 273 U.S. 418 (1927).

[15] Nebbia v. New York, *supra* note 9.

[16] *Id.* at 536.

[17] 313 U.S. 236 (1941).

[18] 342 U.S. 421 (1952).

[19] *Id.* at 423. Accord, Berman v. Parker, 348, U.S. 32 (1954).

held them unconstitutional as violative of state due process.[20] A cursory examination of these cases clearly reveals a strong adherence to pre-*Olsen* doctrines. The Arkansas court affords a prime example. In *Union Carbide & Carbon Corp. v. White River Distributors*[21] the court refused to enjoin the defendant from selling the plaintiff's trademarked anti-freeze at less than Fair Trade prices. The court held the non-signer provision violative of the state and federal constitutions' due process, declaring its right to be the final arbiter despite the contentions of the state legislature. Demanding a "real and substantial" connection between means and ends, the court favorably cited and followed 11 Am. Jur. 1077:

> 'The mere assertion by the legislature that a statute relates to the public health, safety, or welfare does not itself bring that statute within the police power of a state, for there must always be an *obvious* and *real* connection between the actual provision of the police regulation and its avowed purpose and the regulation adopted must be reasonably adapted to accomplish the end sought to be attained . . .' (Emphasis added.)[22]

Also heavily relied upon was Justice McReynolds vigorous dissent in the *Nebbia* case.

While many state courts have struck down the non-signer clauses of state Fair Trade Acts as either a violation of state due process or an unlawful delegation to private persons of price-fixing powers, the majority of states have upheld the remainder of these acts. This has been done for the avowed purpose of protecting the manufacturer's "property right" in the trademarked article. But in 1955 the Georgia Supreme Court nullified its act completely as a violation of due process.[23] The court tersely rejected the General Assembly's finding that the Act was to protect the property right of the trademark and held it was an illegal attempt to fix prices. Speaking as if *Nebbia* and *Olsen* had yet to be decided, the court confessed:

> We are convinced that any findings of fact in conflict with what has been held in this opinion would be an attempt by the General Assembly to find a fact that does not exist, and, of

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[20] McGraw Electric Co. v. Lewis & Smith Drug Co., 159 Neb. 703, 68 N.W. 2d 608 (1955); Union Carbide and Carbon Corp. v. White River Distributors, 224 Ark. 558, 275 S.W. 2d 455 (1955); Shakespeare Company v. Lippman's Tool Shop Sporting Goods Co., 334 Mich. 109, 54 N.W. 2d 268 (1952); Aegus Cameras, Inc. v. Hall of Distributors, Inc., 343 Mich. 54, 72 N.W. 2d 72 (1955); Olin Mathieson Chemical Corp. v. Francis, 301 P. 2d 139 (Colo. 1956); Miles Laboratories, Inc. v. Eckerd, 73 So. 2d 680 (Fla. 1954); Dr. G. H. Tichenor Antiseptic Co. v. Schwegman Bros. G.S. Mkts., 231 La. 51, 90 So. 2d 343 (1956); Grayson-Robinson Stores, Inc. v. Oneida, Ltd. 209 Ga. 613, 75 S.E. 2d 161 (1953).

[21] 224 Ark. 558, 275 S.W. 2d 455 (1955).

[22] *Id.* at 566.

[23] Cox v. General Electric Co., 211 Ga. 286, 85 S.E. 2d 514 (1955).

> course, no court is bound by that sort of finding of fact by a legislative body.[24]

Thus, the state courts continue their boycott of the United States Supreme Court doctrine in the field of economic due process. Their refusal to accept legislative declarations that the means used bear a rational relation to permissible ends—promotion of public welfare—creates a dilemma for the practicing attorney. Unless the content of state due process is carefully studied to determine which approach the courts of a particular state are prone to follow, predicting the outcome of litigation in the due process field becomes highly precarious.

But several states have followed the lead of the Supreme Court in demanding a demonstration of only a rational connection between means and ends. The Delaware court in *General Electric Co. v. Klein* upheld the non-signer provision as a reasonable exercise of the police power to protect the good will of the manufacturers.[25] The opinion expressly stated that the means will not be questioned if it is reasonably debatable that they bear a "reasonable relationship" to the ends sought.

The "fair trade" area with its minimum pricing difficulties has been the predominant post-1950 problem of state courts in the price regulation field. But barbering,[26] milk control,[27] rental control[28] and cigarette sales[29] have also been subject to "judicial legislation." The barbers have remained an invulnerable profession for price-fixing legislation.[30] The Arizona Supreme Court, citing *Lochner v. New York*[31] as controlling, stated:

> Our difficulty is in finding 'any reasonable relationship to the end sought,' that is the relationship between the minimum price for barbering services and sanitation in the barbering profession. Appellees have failed to indicate—to establish any logical relationship whatsoever—the basis for their assumption

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[24] *Id.* at 291.

[25] 106 A. 2d 205 (1954). Accord, Home Utilities Co. v. Revere Copper & Brass, Inc., 209 Md. 610, 122 A. 2d 109 (1956); General Electric Co. v. Kimball Jewelers, Inc., 1956 Mass. Advance Sheets 305, 132 N.E. 2d 652 (1956); Scovill Mfg. Co. v. Skaggs Pay Less Drug Stores, 45 Cal. 2d 881, 291 P. 2d 936 (1956).

[26] State Board of Barber Examiners v. Edwards, 72 Ariz. 108, 231 P. 2d 450 (1951), *aff'd.*, 76 Ariz. 27, 258 P. 2d 418 (1953); Haigh v. State Board of Hairdressing, 76 R.I. 512, 72 A. 2d 674 (1950); Christian v. La Forge, 110 Cal. App. 2d 738, 242 P. 2d 797 (1952).

[27] Harris v. Duncan, 208 Ga. 561, 67 S.E. 2d 692 (1951). *Contra,* Shiver v. Lee, 89 So. 2d 318 (Fla. 1956).

[28] Jamouneau v. Harner, 16 N.J. 500, 109 A. 2d 640 (1954); Wagner v. Mayor & Council of Newark, 42 N.J. Super. 193, 126 A. 2d 71 (1956).

[29] Williams v. Hirsch, 211 Ga. 534, 87 S.E. 2d 70 (1955). *Contra,* May's Drug Stores, Inc. v. State Tax Commissioner, 242 Iowa 319, 45 N.W. 2d 245 (1950).

[30] See *supra* note 26.

[31] 198 U.S. 45 (1905).

> that the acts in question are not 'arbitrary and wholly unwarranted' . . .[32]

In holding the New Jersey Rent Control Act constitutional, New Jersey's high court followed *Nebbia* reasoning and the majority opinion could well have been taken from Justice Douglas' opinion in the *Day-Brite* case:

> The finding of the Legislature is presumed to have the support of facts known to it 'unless facts judicially known or proved prelude that possibility'; generally, it is 'not the province of a court to hear and examine evidence for the purpose of deciding again a question which the legislature has already decided'; its function 'is only to determine whether it is possible to say that the legislative decision is without rational basis.' Clark v. Paul Gray, 306 U.S. 583, 59 S.Ct. 744, 83 L.Ed. 1001 (1939).[33]

The case can be explained on the basis that New Jersey courts have followed the Supreme Court in other fields also.[34] Many states have refused, however, to follow this view. Thus, Georgia has declared its Unfair Cigarette Sales Act unconstitutional price-fixing and a violation of due process since cigarette selling is not a "business affected with a public interest."[35] Indiana has held legislation controlling the price of retail installment sales contracts unconstitutional,[36] and California refused to permit regulation of dry cleaners' minimum prices.[37]

Although pre-1950 cases sustain the proposition that the fixing of milk prices will be upheld, the Georgia court, defying all precedent, struck down that state's Milk Control Act as a violation of state due process.[38] Prior cases in the jurisdiction upholding such legislation were distinguished by allusion to the fact that they were not decided by a "full bench" and thus the court did not feel bound by them. The case was highlighted by an express refusal to follow the *Nebbia* doctrine and a declaration that milk production was not a business affected with a public interest since it was not devoted to a public use!

The language of the Oregon Supreme Court in *General Electric Co. v. Whale* demonstrates the refusal of state courts to follow the "rational nexus" test of the Supreme Court:

> We can see no real and substantial connection between the

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[32] State Board of Barber Examiners v. Edwards, 72 Ariz. 108, 113, 231 P. 2d 450, 452 (1951).

[33] Jamouneau v. Harner, 16 N.J. 500, 515, 109 A. 2d 640, 648 (1954).

[34] Lane Distributors, Inc. v. Tilton, 7 N.J. Super. 349, 81 A. 2d 786 (1951); Sperry & Hutchinson Co. v. Margets, 25 N.J. Super. 568, 96 A. 2d 706 (1953).

[35] Williams v. Hirsch, *supra* note 28.

[36] Department of Financial Institutions v. Holt, 231 Ind. 293, 108 N.E. 2d 629 (1952).

[37] State Board of Dry Cleaners v. Thrift-D-Lux Cleaners, 40 Cal. 2d 436, 254 P. 2d 29 (1953).

[38] Harris v. Duncan, *supra* note 26.

> nebulous theory that fixed minimum resale prices are necessary to protect the goodwill of the trademark owner and the welfare of the public.[39]

Thus we see that many state courts still adhere to (1) pre-1934 conceptions of the public interest, and (2) substantial nexus tests of pre-*Olsen* federal cases in the price regulation area.

Control of Competition By Licensing

The persistence on the state level of an "anti-monopoly" core in regard to licensing statutes and ordinances perpetuates and emphasizes the basic dichotomy in due process. Although *New State Ice Company v. Liebmann*[40] has never been explicitly overruled, its content has been drained by *Nebbia* and subsequent federal economic due process cases. On the federal level, the general welfare as defined in *Nebbia,* has been given precedence over anti-monopoly fears. This idea is best expressed as the freedom of the state to choose among economic policies:

> So far as the requirement of due process is concerned, and in the absence of other constitutional restrictions, a state is free to adopt whatever economic policy may reasonably be deemed to promote public welfare, and to enforce that policy by legislation adapted to its purpose.[41]

It is readily observed that control of competition by licensing by state action is seldom objectionable under the Fourteenth Amendment. The litigant must raise the state constitution as a bulwark against such control. Licensing ordinances, permissible in general, are today being invalidated as anti-competitive or oppressive under authority of federally-defunct *Liebmann.*

The processions—law, medicine, optometry, dentistry and so forth —have been especially prone to licensing restrictions because of their evident close connection with the public welfare. But attempts to preserve this "quasi-monopolistic" status for other fields of endeavor have met with varied results. Barbering has been subject to licensing restrictions requiring training or experience before a license will be granted.[42] Although unsuccessful in attempting to regulate prices which the barber may charge[43] and the hours during which he may operate,[44] legislatures have been extremely successful in impressing the

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[39] General Electric Co. v. Whale, 207 Ore. 302, 321, 296 P. 2d 635 (1956), holding non-signer provision of Oregon Fair Trade Act unconstitutional.

[40] 285 U.S. 262 (1932). The Supreme Court declared unconstitutional a state statute which required the obtaining of a certificate of public convenience and necessity before persons could engage in the manufacture or distribution of ice in the state of Oklahoma.

[41] Nebbia v. New York, 291 U.S. 502, 537 (1934).

[42] Lee v. Delmont, 228 Minn. 101, 36 N.W. 2d 530 (1949); State v. Sullivan, 245 Minn. 103, 71 N.W. 2d 895 (1955).

[43] *Supra* note 25.

[44] City of Miami v. Shell's Super Store, 50 So. 2d 883 (Fla. 1951).

courts with the close connection between experienced barbers and public health and welfare.

Photographer licensing statutes, since *Harris v. State*,[45] have continued to meet with little success,[46] as have dry cleaning licensing requirements. In *Olan Mills, Inc. v. Sharon*, a city ordinance requiring a license tax of $200 per month upon transient retail businesses was held unduly oppressive and a hindrance upon lawful business operations.[47] A Missouri statute was likewise held invalid, but on the basis that it was discriminatory against non-resident photographers and a burden upon interstate commerce.[48] In both cases there was an evident intent to protect the public from unscrupulous "fly-by-nighters," but the statutes were strictly interpreted to satisfy the economic views of the courts. The most interesting of the recent photography cases is *State v. Gleason*.[49] The Montana court cited numerous pre-1950 cases holding photography licensing statutes unconstitutional, including *State v. Harris*, which relied heavily on the 1927 case of *Tyson & Bro. v. Banton*.[50] Control over photography was termed "arbitrary and capricious" as it is not a business "affected with a public interest." *Nebbia* was discussed at great length, distinguished, and its full impact rejected.

A Virginia statute regulating dry cleaning was invalidated on the basis of unconstitutional discrimination and the lack of sufficient standards to guide the agency controlling the subject of the legislation:

> The subject matter of this legislation, the dry cleaning business, requires no special skill or training. There is nothing peculiar in the business which distinguishes it from ordinary work and labor . . . It may have some indirect relation to public health and safety, but it is not a sufficient menace to either to require it to be controlled by an administrative agency with absolute and unlimited authority.[51]

State courts demonstrate a pronounced aversion to the protection of special interest groups where there is no evident corresponding advancement of the public welfare. To invalidating the Illinois Plumbing License Law, the Illinois Supreme Court declared:

> . . . it is very clear it has not been demonstrated that the bestowal of the special privilege rests upon material distinctions between the trade of plumbing and other trades

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[45] 216 N.C. 746, 6 S.E. 2d 854 (1940).

[46] Olan Mills, Inc. v. City of Cape Girardeau, 364 Mo. 1089, 272 S.W. 2d 244 (1954); Olan Mills, Inc. v. City of Sharon, 371 Pa. 609, 92 A. 2d 222 (1952); State v. Gleason, 128 Mont. 485, 277 P. 2d 530 (1954).

[47] *Supra* note 46.

[48] *Supra* note 46.

[49] *Supra* note 46.

[50] 273 U.S. 418 (1927).

[51] Chapel v. Commonwealth of Virginia, 197 Va. 406, 413, 89 S.E. 2d 337, 342 (1955).

> or vocations affecting the public health, safety or welfare; or that licensed master plumbers, as a class, are so circumstanced by the innate characteristics of their calling that the special privilege in their hands is necessary and will beneficially affect the public . . .[52]

The same basic philosophy of the *Harris* case runs through these recent state court cases. The fear of the courts lies in the creation of special interest groups with interests adverse to the general community.

To exclude persons from the opportunity to earn a living deprives them of a fundamental right. The Watchmaking Act of 1945 was declared unconstitutional by the Oklahoma court because:

> The Act vests in the Board powers to make rules and regulations which may deny some citizens their inherent right to earn their livelihood in a private field of work, thus depriving them of a valuable property right without due process of law.[53]

Watchmaking was distinguished from barbering by the court's declaration that for sanitary reasons licensing of barbers was justified.

Statutes and ordinances aiming at the destruction of existing businesses or prevention of new competition have been met with great opposition by the state courts. A Tennessee municipal ordinance prohibiting new gas storage tanks, thus effectively prohibiting construction of additional filling stations in the municipality and preserving a "monopoly" for existing stations, was declared void as discriminatory and unduly restrictive of competition.[54] An Oklahoma municipal ordinance requiring persons advertising the sale of distressed goods or damaged merchandise to obtain a license and pay a license fee, passed with the apparent intent to force the plaintiff out of business, was likewise invalidated.[55]

Prohibition of Business Methods

Since 1950 the regulation of business activity by legislatures has not appreciably decreased. In these times of business prosperity legislatures have deemed it proper to place many and varied limitations on the conduct of business activity. These limitations have met with little opposition from federal due process. The United States Supreme Court has not reverted to the days of *Adams v. Tanner*,[56] but has repeatedly declared that federal due process requires only the demonstration of a rational nexus between the legislative means and permissive goals. In

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[52] People v. Brown, 407 Ill. 565, 584, 95 N.E. 2d 888, 899 (1950).

[53] State *ex rel.* Whetsel v. Wood, 207 Okla. 193, 196, 248 P. 2d 612, 615 (1952).

[54] Consumer's Gasoline Stations v. City of Peelaski, 292 S.W. 2d 735 (Tenn. 1956).

[55] City of Guthrie v. Pike & Long, 206 Okla. 307, 243 P. 2d 697 (1952). *Cf.* Wilkins v. City of Harrison, 218 Ark. 316, 236 S.W. 2d 82 (1951).

[56] 244 U.S. 590 (1917).

Beard v. City of Alexandria[57] the court held a "Green River" ordinance prohibiting unsolicited, door-to-door selling of merchandise or photographs constitutional as not violative of the due process clause of the Fourteenth Amendment. Rejecting appellant's due process argument based on *Adam v. Tanner*[58] and *New State Ice Co. v. Liebmann*[59] the Court, speaking through Mr. Justice Reed, declared that improper methods of conducting a legitimate business may be restricted or prohibited in the public interest. The Court referred to *Nebbia* and the dissenting opinion in *Liebmann*, concluding that "the problem is legislative where there was reasonable bases for legislative action."[60]

But it becomes immediately apparent upon even a cursory inspection, that all state courts have not followed the United States Supreme Court's interpretation of due process requirements. Despite the well recognized presumption of validity of legislative acts, many state courts following the substantive due process doctrine have invalidated legislative acts on the grounds that the means selected by the legislature did not bear a real and substantial relationship to the professed legislative goal. These courts have consistently examined these statutes in the light of the judges' own economic and social theories, using these theories to pass on the statute's desirability and effectiveness. In many cases they have ignored the professed legislative purpose and declared the "real" purpose to be an improper one. The grounds for curtailment of legislative regulation expressed in *Adams v. Tanner*,[61] that the state legislature cannot unduly restrict the exercise of a private business, were followed in the "Good Humor" cases and upheld in *Frecker v. City of Dayton*.[62] In this decision, the Ohio Supreme Court invalidated an ordinance prohibiting the sale of ice cream on the city streets by stating that the ordinance provided "no real and substantial relation to public safety."[63]

This power assumed by the state courts to review the reasonableness of particular statutes independent of any legislative declaration has been reflected in many recent cases. In *City of Scottsbluff v. Winters Creek Canal Co.*[64] the Nebraska Supreme Court held unconstitutional a city ordinance requiring an irrigation company to transport all its water in closed pipes rather than in open ditches, at greatly increased cost to the company. The Court declared that police power actions of a municipality were subject to review by the court to insure reasonableness and

[57] 341 U.S. 622 (1951).

[58] *Supra* note 56.

[59] 285 U.S. 262 (1932).

[60] *Supra* note 57.

[61] *Supra* note 56.

[62] 153 Ohio St. 14, 90 N.E. 2d 851; see discussion of "Good Humor" cases in Paulsen, *supra* note 7, at 110.

[63] *Id.*, 20, 90 N.E. 2d at 854.

[64] 155 Neb. 723, 53 N.W. 2d 543 (1952).

stated that to conform to due process requirements the exercise of the police power must "be directed toward and have a rational relation to protection of a basic interest of society . . . [and must be] really designed to accomplish a legitimate public purpose."[65]

In the neighboring state of Iowa the supreme court invalidated a statute prohibiting the use of the much-litigated trading stamps as violative of—among other grounds—the due process clause.[66] The Court required a "substantial relation to the object of public or general welfare." A similar nexus was required by the Supreme Court of Pennsylvania in a 1955 decision holding invalid a statute prohibiting the manufacture of carbonated beverages with other than natural sweetening agents.[67] This court held that the exercise of police power was subject to judicial review and that the "means employed must have a real and substantial relation to the object to be attained . . . [and the] final determination [of the existence of the above relation] is for the courts."[68]

The tendency of some judges to substitute their own opinions as to the wisdom of the statute for that of the legislature may be seen in the decision of the Superior Court of New Jersey invalidating a statute prohibiting use of the corporate form by mortuaries in a legislative attempt to elevate that occupation to the level of a profession.[69] Here the court refused to permit the legislature to exercise its intent in this matter, because the court felt that the statute was so unreasonable as to be an undue restriction upon private enterprise and property.

Another facet of this application of the substantive due process concept to state regulatory actions is that the courts in applying this substantial nexus test will not allow themselves to be bound by the professed legislative intent but will attempt to discover the presence of any hidden motive behind the legislature's professed reasons for the act. Thus they are enabled to decide the issue of the statute's desirability themselves.

A good example of this is found in the opinion of the Illinois Supreme Court in *Figura v. Cummins*,[70] wherein the court held unconstitutional as violative of due process a statute prohibiting work in the home on the processing of metal springs. The court stated that any exercise of the police power must be reasonably adapted to obtain the objective sought, but that:

> The legislature cannot invoke police power on pretense of promoting public interests, where *actual* objective of statute is an interference with private business . . . it is the province

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[65] *Id.*, 731, 732, 53 N.W. 2d at 549.

[66] Sperry & Hutchinson Co. v. Hoegh, 246 Iowa 9, 65 N.W. 2d 410 (1954).

[67] Cott Beverage Corp v.. Horst, 380 Pa. 124, 110 A. 2d 405 (1955).

[68] *Id.*, 118, 110 A. 2d at 408.

[69] Trinka Services, Inc. v. State Board of Mortuary Science, 40 N.J. Super. 238, 122 A. 2d 668 (1956).

[70] 4 Ill. 2d 44, 122 N.E. 2d 162 (1954).

of the court to determine that (if police power properly exercised) issue.

Lower courts of New Jersey and New York in cases since 1950 have also stressed the duty of the courts to look through the professed motive of the legislature to the "real" purpose behind the statute.[71]

In a recent New York case the Court of Appeals held that a statute prohibiting sale of evaporated skimmed milk in containers holding less than ten pounds was unconstitutional as violative of due process.[72] Although the majority opinion impliedly followed the rational nexus (as opposed to substantial nexus) test by invalidating the statute only because no reasonable basis for its enactment was demonstrated, a vigorous dissent, quoting the *Nebbia* case and *Daniels v. Family Security Life Ins. Co.*, showed that here the court had deviated from the demanding logic of the rational nexus test as some reasonable (rational) relationship between the prohibition and public health and welfare could be readily shown to exist.

Barbershops have always proved a fruitful source of litigation. In *City of Miami v. Shell's Super Stores*, the Florida court invalidated municipal regulation of barbers' working hours by stating that, although barbershops were subject to reasonable regulation, this was unreasonable as an undue restriction on the right to do business.[73] By the use of analogous reasoning the Utah high court held invalid a city ordinance prohibiting advertising of prices for eyeglass prescriptions as not bearing "sufficient relationship" to the police power.[74] In the latter case the court went deeply into the effect, desirability and efficacy of the legislation and independently determined that the law was not a proper one.[75]

Regulation of Labor Unions and Union Practices

In cases dealing with the regulation of labor and the practice of unions, one might expect to find substantive due process a cogent force pressing for invalidation of labor legislation in those courts where the doctrine still flourishes. The history of due process in the labor field has been an active one, for it was on this principle that *Lochner v. New York*,[76] *Adair v. United States*[77] and their contemporaries were decided.

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[71] Germano v. Keenan 25 N.J. Super. 37, 95 A. 2d 439 (1953); Peoples Dairy v. City of Lackawanna, 149 N.Y.S. 2d 392 (1956).

[72] Defiance Milk Products Co. v. Du Mond, 309 N.Y. 537, 132 N.E. 2d 829 (1956).

[73] 50 So. 2d 883 (Fla. 1951).

[74] Ritholz v. City of Salt Lake, 3 Utah 2d 385, 284 P. 2d 702 (1955).

[75] Courts following such methods also insist on finding such a nexus whenever upholding regulatory legislation. Thus Idaho's high court in Rowe v. City of Pocatello 218 P. 2d 695 (Idaho 1950), upholding the validity of a Green River law, required, ". . . it must be reasonable and have some direct, real and substantial relation to the public object sought to be accomplished."

1937 appears, however, to have been the turning point in the views of the United States Supreme Court, regarding labor regulation connection between means and ends. The famous case of *West Coast Hotel v. Parrish*, decided in that year, was the first of a still continuing line of labor regulation cases in which the United States Supreme Court refused to use the due process clause to curb the effectiveness of legislative proposals.[78] This has been true regardless of the nature of the legislation, i.e. whether it was to organized labor's gain or detriment.

But in the state courts there was a different development. Although the doctrine of substantive due process, abandoned on the federal level, is still very much in operation in the courts of many states, this does not appear to be true in labor and union regulation litigation. In the labor field after World War II, most state legislation was directed toward curtailing union power by limiting the right to strike and by protecting the "right to work." The judicial reasoning behind the due process concept has been utilized here to insure the validity of such restrictive legislation and no occasion appears where organized labor has successfully used state substantive due process in attacking anti-union legislation. This is in startling contrast to its application in business regulation cases.

One of the most effective anti-union devices utilized by legislatures and upheld over due process objections has been the "right to work" laws in the form of either statutes, provisions of the state constitution or judicially-declared public policy. These enactments typically prohibit membership in any union as a prerequisite to employment and correspondingly ban any union shop agreements. In *Local Union No. 519 v. Robertson*[79] the Supreme Court of Florida upheld an injunction order prohibiting picketing, the purpose of which was to force an employer into a union shop agreement which would be violative of the public policy of Florida, as the constitution and statute forbade any attempt to force anyone to join a union. Of course, where the "right to work" provision is embodied in the state constitution the state due process argument is unavailable and the only recourse is to the Fourteenth Amendment. But the United States Supreme Court applying its rational nexus test of federal due process has cut off even this method of attacking such "right to work" provisions by its decision in the *Lincoln Federal Union* case, in which the Court in upholding "right to work" statutes declared that the Fourteenth Amendment due process did not bar a state from following whatever public policy it desired, so long as its acts fulfilled the relatively simple requirement of a rational nexus.[80] Where the "right to work" is incorporated into a statute without an analogous constitutional amendment, state substantive due process would be available to labor to attack the statute, but to date no such attack has ever prevailed.[81]

[76] 198 U.S. 45 (1905). See *supra* note 9.

[77] 208 U.S. 161 (1908).

[78] 300 U.S. 397 (1937). See *supra* note 9.

It would seem that any legislature which wished to enact anti-union legislation in the form of a "right to work" statute need fear no due process barrier. The only possible threat to such a statute lies not in due process but in the possibility of federal supersedure by federal legislation permitting union shop agreements in particular industries. The recent case of *Railway Employees v. Hansen*,[82] where the permissive union shop provisions of the Railway Labor Act were held by the Court to supersede the Nebraska "right to work" law, demonstrates the effectiveness though limited application of this principle.

Short of actual prohibition of strikes, which in the usual case would be clearly unconstitutional, many legislatures have restricted the lawful exercise of the right to strike and the right to picket. Although here labor has tried unavailingly to use state due process, it has found a more valuable defense in the free speech guarantee of the First Amendment as incorporated into the Fourteenth Amendment and in similar provisions of state constitutions. In *Gilbertson v. Culinary Alliance and Bartender's Union*[83] the Supreme Court of Oregon invalidated a statute prohibiting picketing unless those who were picketing had been previously certified or recognized as the bargaining representatives in the picketed business. The decision was based, however, on the free speech requirement of the First Amendment and not on either state or Fourteenth Amendment due process. In *Construction and General Labor Union v. Stephenson*[84] the Texas court invalidated, on the same grounds as in the Oregon case, legislation prohibiting picketing except between employee and employer over a valid labor dispute. In these picketing limitation cases where invalidity of the statute is based on the violation of free speech, citation is repeatedly made to the United States Supreme Court's decisions in *Thornhill v. Alabama* and the *Swing* case, both of which upheld the right of peaceful picketing.[85]

Although these two cases have been the basis of labor's attack on statutes and judicial decisions restricting picketing, their impact has been considerably diminished by two subsequent United States Supreme Court decisions. In *Building Service Employers International Union v. Gazzam*[86] and *International Brotherhood of Teamsters v. Hanke*[87] the Court consistently applied its rational nexus-due process concept and

[79] 44 So. 2d 899 (Fla. 1950).

[80] Lincoln Federal Labor Union v. Northwestern Iron & Metal Co., 335 U.S. 525, 537 (1949).

[81] See Paulsen, *supra* note 7, at 114-5.

[82] 351 U.S. 225 (1956).

[83] 282 P. 2d 632 (Ore. 1955).

[84] 225 S.W. 2d 958 (Tex. 1950).

[85] Thornhill v. Alabama, 310 U.S. 88 (1940); American Federation of Labor v. Swing, 312 U.S. 321 (1941).

[86] 339 U.S. 532 (1950).

[87] 339 U.S. 470 (1950).

held that a state could ban peaceful picketing, either by statute or by judicial decision reflecting the state's public policy, if the purpose of that picketing were to compel employees to accept union membership in violation of the state's "right to work" laws. These decisions weakened the force of the *Thornhill* and *Swing* cases in those states where "right to work" laws are in effect, in the face of the continued unwillingness of the courts of those states to apply to labor regulation the substantive due process applied to business regulation measures. An example of this may be seen in the recent decision of the Ohio Supreme Court in *Chucales v. Royalty*.[88] In that case the court upheld an injunction against peaceful picketing conducted by non-employees to compel an employer to force the employees into the union, even though the court felt it unnecessary to determine whether there existed in Ohio any common law "right to work." The dissenting opinion of Judge Zimmerman vainly attempted to instill life into the now by-passed *Thornhill* and *Swing* cases.[89]

Another aspect of legislative limitation on the right to strike is the total abolition of that right in certain industries and institutions which are considered by the legislature to be peculiarly responsible for the public welfare. In *Detroit v. Division 26 of Amalgamated Ass'n*,[90] the Supreme Court of Michigan upheld a statute prohibiting strikes by public employees as not violative of either state or Fourteenth Amendment due process. The court reasoned that the right to strike was not absolute and universal and that, as these employees held a public trust, they had no right to strike. In a similar Minnesota case the court held constitutional a statute prohibiting strikes and lockouts in charitable hospitals and substituting therefor compulsory arbitration.[91] This court seemed to be applying the federal due process rational nexus rule when it quoted with approval the words of a Michigan court:

> We cannot pass on the soundness of social or economic theories in the legislative mind when statutes of this kind are enacted in the exercise of the police power. We cannot substitute our judgment or opinions for those of the legislature as to the expediency thereof.

It may be seen by these examples from the field of labor regulation litigation, that the state courts have not exercised their doctrine of substantive due process to upset what the legislatures have believed to be desirable labor restrictions. Such legislation has on occasion been upset

[88] 164 Ohio St. 214, 129 N.E. 2d 823 (1955).

[89] In non-picketing labor regulation cases where *Thornhill* and *Swing* are not authorities, even the free speech contention will not necessarily be effective to invalidate restrictive statutes. See e.g., Contlakis v. State, 268 S.W. 2d 192 (Texas 1954).

[90] 332 Mich. 237, 51 N.W. 2d 228 (1952).

[91] Fairview Hosp. Assn. v. Public Bldg. Serv. Union, 241 Minn. 523, 64 N.W. 2d 16 (1954).

but then only by invocation of the freedom of speech guarantees of the First and Fourteenth Amendments.

Conclusion

The police power is the state's most potent device for safeguarding the public good and protecting the liberty and opportunity of the individual. By means of enactments designed to advance public health, safety, morals and the general welfare the legislatures of our country, as the governmental bodies most directly responsive to public sentiments, have been able to preserve fully the benefits of our great social and economic expansion. The legislative body is uniquely designed to inquire into the desirability and practicability of proposed legislation. Responding to the public need, it can hold open hearings, require committee reports and otherwise investigate the attributes of proposals, activity which no other governmental body is similarly or as effectively equipped to do. Once such investigation has been made, a statute is passed only by votes of at least a majority of the people's elected representatives, thus insuring the expression of the public will.

The courts have an important role to play in the fulfillment of legislation. It is the duty of the judiciary to protect the liberties of our society from the license of those who would encroach upon them. It is a vital role, but it is a role misconceived when the high courts of the states abdicate this judicial function and wrongfully assume the place of legislators, making independent decisions on desirability and feasibility of legislation without open hearings, without committee and expert reports and without all the other fact-finding devices of the legislature. In 1934, an enlightened United States Supreme Court recognized the evils inherent in this system of judicial review of the merits of legislation under the guise of due process and began to withdraw from that position until today it requires only the establishment of a rational or reasonable nexus or connection between the means adopted by the legislature and the announced, permissible legislative goal. If this rational connection is found, the statute will be upheld regardless of considerations of the legislation's efficacy or desirability. Some state courts have followed the Federal Supreme Court's reinterpretation of the content of the due process clause in interpreting similar clauses in their own state constitutions, of which they are the final arbiters. But in other states where more conservative social and economic theories still hold sway, the courts have refused to follow the federal due process doctrine and have clung to the older concept of substantive due process. A most graphic illustration of this may be found in comparing the treatment of state legislation compelling employers to allow reasonable time-off pay for employees to cast their ballots on election day. The United States Supreme Court found no difficulty in establishing a rational nexus between the so-called "pay while voting" statute enacted

by the Missouri legislature and the legislative goal of encouraging greater use of the right of suffrage.[92] But in Illinois, conversely, the high court of that state in invalidating a statute almost identical with that of Missouri was unable to find a "real and substantial relationship" between the legislation means and ends and held, therefore, that the due process guarantee of Illinois had been violated.[93] Here the two counts interpreting similar statutes reached radically divergent results. State due process is patently dissimilar to federal due process. Such terms as "rational relationship" and "real and substantial relationship" are the touchstones of difference.

Substantive due process is as alive and vigorous in state courts today as it was in the federal courts thirty years ago. Many of our state courts seem unwilling to abandon their stranglehold of power over legislation for the less extreme but more reasonable position adopted by the Federal Supreme Court. These courts have failed or are unwilling to adopt the compelling logic of Mr. Justice Murphy in *Daniels v. Family Life Insurance Co.*:

> We cannot fail to recognize the requirement [of substantive due process] as an argument for invalidity because this court disagrees with the desirability of the legislation . . . We are not equipped to decide desirability . . . The forum for the correction of ill-considered legislation is a response legislature.[94]

If the goal of a democratic form of government is the effective realization of the popular will, then the legislative body of that government is the part functionally best equipped to give voice to that will. The United States Supreme Court has concluded that states should be free to formulate whatever economic regulatory policies they desire but should be curtailed in any attempt to deprive the individual of his essential liberties. This would seem to be the essence of democracy and its promotion the proper role of the judiciary in a democratic society. The closer state courts co-ordinate their due process concepts with those of the United States Supreme Court, the closer our nation will come to the realization of the democratic ideal.

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[92] Day-Brite Lighting Co., Inc. v. State of Missouri 342 U.S. 421 (1951). See *supra* note 12.

[93] Heimgaertner v. Benjamin Electric Manufacturing Co. 6 Ill. 2d 152, 128 N.E. 2d 691 (1955).

[94] 336 U.S. 220, 224 (1949).