evident intent of the legislature was not to subject the property of wholly innocent persons to such a lien. He further contends that the words "under control of" cannot mean other people's property under the control of the guest, but rather property belonging to the guest under the control of the guest. The judge stresses the fact that the extraordinary protection afforded the innkeeper at common law is no longer necessary since his responsibility for a guest's goods has been greatly modified by other statutes. Ohio G.C. sections 5981, 5982, 5983. These specifically limit the innkeeper's responsibility. Thus, since the reason for the common law rule giving the innkeeper extraordinary protection has ceased to exist, it seems that the rule itself should be discarded. A more just rule would protect chattel mortgagees who have given constructive notice of their prior rights by filing as provided in the recording act.

PHILIP AULTMAN

CONSTITUTIONAL LAW

LEGISLATIVE SUCCOR FOR THE MOTOR CAR DEALER

Recent years have heard from all sides the cry of overcrowding in business, of unfair competitive practices, and of ruinous competition. The retail end of the motor car industry has been no exception. Conspicuous among its troubles have been the competition of the fly-by-night seller in the sale of new cars, and of the finance companies in the sale of repossessed and rebuilt cars, the junk dealers, the abuse of automobile financing, price cutting through the devices of dumping and excessive trade-in allowances, the traffic in stolen cars, and the bootlegging of cars from other states. But back of these tribulations lies the fact that various economic factors have spawned a host of automobile dealers, the consequences of which have been a large percentage of failures and a very low margin of net profit.[1] Studies of the Research Division of the N. R. A. reveal that at the end of 1934, there were 106,000 automobile retail outlets in the United States, with the average dealer grossing between $30,000 and $50,000 yearly.[2] Forty-two per cent of all dealers sold less than fifteen cars per year, forty per cent between fifteen and seventy-five and less than eighteen per cent over seventy-five.[3] The

[1] Clark, "Make Money Little Businessman or Else," *The Saturday Evening Post*, July 30, 1938, at 23.

[2] U. S. National Recovery Adm., Evidence Studies, 50 Preliminary Draft 21.

[3] *Ibid* at 23. It is very improbable that dealers selling less than fifteen cars annually will show a profit. Yet incidental and overhead expenses increase only slightly with the increase in the number of cars sold and by eliminating the sub-marginal dealer a substantial profit would be available to those remaining.

situation was revealed to be more acute in some states than in others; it is more than a coincidence that in Wisconsin, the first state to bring to the retailer of motor vehicles the legislative succor of the newer design, the average number of cars sold had hit a low of eighteen.[4]

Business men, instead of solving their troubles around a conference table and "putting their own house in order," have carried them to the legislature.[5] Cure-all legislation for the automobile dealers, as with many but not all industries and businesses, had its conception and early experience under the National Industrial Recovery Act. Retail automobile dealers were covered by a code.[6] Aside from the wages and hours provisions, significant features of this code were the comprehensive computation of maximum trade-in allowances, the restriction of a dealer to his own enfranchised territory, and the inclusion within the code of dealers in towns of less than 2,500 population. This last provision, contrasting with the general N. R. A. principle of excluding the smaller towns where business was confined to "local areas,"[7] attests the pungency of the price competition existing between the big city and the country village dealer. The evils aimed at were thus those competitive practices most immediately concerned with the ravages of price-cutting. Far from embracing any direct or indirect device for the limitation of numbers, the code carried the customary provisions against monopolistic tendencies.

Contemporaneous with the demise of the N. R. A. in 1935[8] came

[4] NUMBER OF RETAIL OUTLETS, NEW CAR PASSENGER REGISTRATION, AND AVERAGE NUMBER OF CARS SOLD PER DEALER IN FOUR STATES DURING 1934*

	Total Number of Retail Outlets	Number of Retail Outlets Primarily Selling Cars	Number of New Passenger Car Registrations	Average Number of Cars Sold by Each Dealer
Ohio	5730	2013	101,213	50
Wisconsin	3375	1620	28,308	18
Iowa	3290	1375	27,286	20
Nebraska	1873	870	16,393	19

* Source: U. S. National Recovery Adm., Evidence Studies, 1 Preliminary Draft 23, 25; 50 Preliminary Draft 21, 22, 23. The four states for which figures are here given are the four in which has taken place legislative action of the newer type discussed *infra.*

[5] For a discussion of legislation of similar import see Legis. (1937) 22 Iowa L. Rev. 736.

[6] Prentice-Hall, 2 Fed. Trade and Indus. Serv. sec. 13161.1 to 13161.46.

[7] *Ibid.* Sec. 8335. Application of the code to dealers in small towns was authorized by executive order.

[8] *A. L. A. Schechter Poultry Corp.* v. *United States,* 295 U.S. 495, 79 L. Ed. 1570, 55 S. Ct. 837 (1935).

the pronounced advent of the Fair Trade Acts.[9] Sustainment of the California and Illinois Acts in 1936 by the Supreme Court of the United States[10] provided a final stimulant that has placed a Fair Trade Act on the statute books of all but a handful of states.[11] And this wave of legislation was closely followed by a significant, though less extensive wave of Unfair Trade Practices Acts.[12] Although designed primarily as an aid to the independent druggists and other groups in their struggle against the chain, this resale price maintenance and sale-below-cost legislation seemed to offer a potential haven to the harassed automobile dealers, stalked again by the spectre of price cutting. Fair Trade Acts, though operative only as to new-car prices, could be made applicable, it has been contended,[13] on the theory that an excessive trade-in allowance in effect constitutes a cutting of the price of the new automobile. With at least those Unfair Trade Practices Acts which comprehensively define sale-below-cost, applicability to the automobile market can argumentatively be spelled out on the proposition that the resale price of the used car would have to include not only the amount of the trade-in allowance but also all reconditioning, overhead and selling expenses, thus placing a strong indirect deterrent upon the practice of granting excessive allowances in the sale of new cars.[14] Efforts to put the statutes to work in the cause of a more rationalized marketing of cars have varied from state to state. Thus in Ohio, there has been no resort to the state fair trade act for this purpose; while in Montana dealer groups are said to be now engaged in trial litigation under the unfair trade practices act.[15]

In underlying spirit such legislation bears a close kinship to the Retail Autumobile Code of the N. R. A. days; there is the same reliance upon price control devices to cure the ills of depressed businesses. This identical philosophy again reasserted itself, this time in legislation addressed directly and exclusively to the motor car dealer, in a Pennsylvania enactment of 1937.[16] Fashioned after the automobile dealers' code it was

[9] California in 1931 adopted the first Fair Trade Act. In 1935 Illinois, Iowa, Maryland, New Jersey, New York, Oregon, Pennsylvania, Washington, and Wisconsin adopted similar acts.

[10] *Old Dearborn Dist. Co.* v. *Seagrams Dist. Corp.*, 299 U.S. 183, 81 L. Ed. 109 (1936); *Pep Boys* v. *Pyroil Sales*, 299 U.S. 198, 81 L. Ed. 122 (1936).

[11] Legis. (1937) 22 Corn. L. Q. 445; Oppenheim (1939 Supp.) RECENT PRICE CONTROL LAWS 13.

[12] Unfair Trade Practices acts of this type have been enacted in Arizona, Arkansas, California, Colorado, Connecticut, Kentucky, Louisiana, Maryland, Minnesota, Montana, Nebraska, Oregon, Pennsylvania, South Carolina, Tennessee, Utah, and Wyoming. For a summary of the state statutes see Oppenheim (1939 Supp.) RECENT PRICE CONTROL LAWS 63.

[13] Nat'l Automobile Dealers Assoc. Bulletin, Oct. 21, 1937.

[14] Nat'l Automobile Dealers Assoc., 8 Legis. Bull., Sept. 30, 1937.

[15] Personal interview with Mr. John Barton, Executive Secretary of the Columbus Automobile Dealers' Assoc., May 2, 1939.

[16] Purdon, 75 Penn. Stat. 1301 *et seq.* (1937).

essentially a price-fixing statute designed to put an end to "unfair" price practices through a requirement of adherence in all cases to a price set by a state appraiser of used cars. An early declaration of the invalidity of the law[17] effectively prevented proceedings to carry it into operation. The basis assigned for the act's constitutional infirmity, that the business was not one affected with a public interest, reflects the continued reluctance of the state courts to condone governmental price control, despite the Supreme Court's apparent change of heart.[18]

Meanwhile, other developments concerning car dealers were occurring on the legislative front. Introduction in numerous states of sales taxes as an antidote for Mother Hubbard state treasuries added the complaint of out-of-state competition to the list already confronting dealers located in the border cities where neighboring jurisdictions managed to do without this type of taxation. Use taxation, judicially affirmed in *Henneford* v. *Silas Mason Co.*[19] and capable of effective enforcement in the case of motor car purchases beyond state lines, offered a solution. Dealer groups have been active from the start in the furtherance of such a form of taxation and today thirteen states balance sales taxation with taxation of use.[20] Product of the same years, having originated in Wisconsin in 1935, but of much broader significance is legislation requiring the licensing of all dealers in motor cars. Sponsored in nearly every state at the instigation of dealer groups,[21] it has been adopted in four states[22] though definitely rejected in another six.[23] Under these acts there are a total of twenty-nine different causes for which a dealer's license may be denied, revoked or suspended. Denial upon proof of unfitness or bad business repute, a material misstatement in the application, a fraudulent sale, transaction or repossession, and non-compliance with the act or with administrative regulations are provisions common to all.[24] Wisconsin

[17] *Heinel Motors Inc.* v. *Teefy*, 295 Commonwealth Docket (1937), Dauphin County Court; noted (1939) 43 Dick. L. Rev. 127 at 136.

[18] *Nebbia* v. *New York*, 291 U.S. 502, 78 L. Ed. 940 (1934); *West Coast Hotel Co.* v. *Parrish*, 300 U.S. 379, 81 L. Ed. 703, 57 S. Ct. 578 (1937).

[19] 300 U.S. 577, 81 L. Ed. 814 (1937).

[20] Arkansas, California, Colorado, Iowa, Kansas, Louisiana, Michigan, Mississippi, Ohio, Oklahoma, Utah, Washington, and Wyoming. For comment on use taxation see Note (1938) 6 Univ. of Chic. L. Rev. 125; Note (1937) 25 Geo. L. J. 714.

[21] (Oct. 1938) 4 Automobile Facts 3.

[22] Ohio G.C. sec. 6302-1 (1937); Wis. Stat. sec. 218.01 (1937); Neb. Sess. Laws 1937, c. 143; Iowa Reg. Sess. Acts, 47 G.A. 1937, c. 135. To these might be added the Texas statute which conferred upon the cities broad power to license motor vehicle dealers as to regulation, supervision and control. Harlow's Texas Sess. Laws 1937, Title 28 c. 6. According to the Automobile Manufacturers Assoc., General Statement, Nov. 15, 1938, Dallas and Houston are the only cities which have taken advantage of the enabling act and have adopted the same special control as provided for in the Wisconsin statute.

[23] Colorado, Illinois, Kentucky, Rhode Island, Vermont, and Washington.

[24] Automobile Manufacturers Assoc., Motor Vehicle Dealer Licensing Laws, Nov. 15, 1938.

specifically regulates the relation between the manufacturer and the dealer; Nebraska makes excessive trade-in allowances and a violation of the fair and unfair trade acts grounds for adverse action; Ohio requires a dealer to be solvent and able to meet potential judgments, and demands an established place of business which is used solely and exclusively in automobile selling.

Emphasis is clearly upon dealer interests; alone among the twenty-nine bases in emphasizing the interests of the buyer are the Wisconsin and Nebraska provisions relating to dishonest treatment of the retail customer. In this the newer legislation follows the earlier legislative efforts in aid of the distressed motor car dealer. But here the parallel ends. While price-cutting remains as a recognized problem, other undesired practices are likewise condemned. And more than this, definition of "unfair" practices is now not an end in itself but a means to an end, the restriction of numbers. This change in underlying approach remains beneath the surface, for the bases of denial, revocation, or suspension are formulated and expressed in terms of the trade practices regarded as most offensive. Yet there can be little question that in the background, actually or potentially, is a conception of control through limitation.

The most recent proposals for legislative succor of the motor car dealer reveal this tendency in bold relief. Nor does their rejection in the three states where they were but lately introduced[25] lessen their significance in the legislative history of efforts to aid the dealer in automobiles. Taking a cue from the public utility regulatory field, these proposals, identical in their basic import, contemplated that the right to engage in the retail automobile business should be conditioned upon a showing to state administrative officials of a "public convenience and necessity." Unlike the enactments now on the statute books of four states, this type of law looks, for the test of the right to enter, beyond the internal factors of the business itself to a general supply-and-demand formula; and by the same token it confirms the view that the movement for legislative aid to the motor car dealer has abandoned the N. R. A. model for one streamlined after the current fashion to solve the economic ills of particular businesses by restricting entry into them.

Legislative action looking to actual or potential limitations on those who may engage in private enterprise runs headon into the economic and legal philosophy that predicates the common good upon comparative freedom of individual action and proclaims the openness of a business to all who choose to enter. At the same time such legislation precipitates friction with the imbedded hostility to anything smacking of restraint

[25] Wisconsin (1937), Illinois (1938) and Washington (1938).

and monopoly. Out of these cross-currents there has arisen a judicial technique which strikes a balance among the clashing factors. It is the not uncommon technique, as its use on various constitutional fronts will attest, of sublimating the basic issue in terms of better accepted categories of constitutional theory, a method which permits of judicial relaxation, with seeming orthodoxy, and at the same time retains in the courts a control over the new economic currents. Thus here, the issue is not squarely met for what it is—rehabilitation of distressed enterprises through limitation of the number of business units—but is redefined as a problem in the preservation of the public safety, the public health, or what not. Provided only that the control sought can be related to some such public interest, the courts approve that which, if they were forced to meet it naked, they would very often deny.

"Public health," even though the connection be vague, has supplied the magic necessary for favorable judicial reaction in many cases. Thus the requirement of a certificate or license has been sustained for the practice of medicine,[26] dentistry,[27] optometry,[28] chiropractic[29] and pharmaceutics,[30] undertaking,[31] barbering[32] and plumbing,[33] for the seller of medicine, poison and drugs,[34] liquors,[35] and for milk dealers[36] and vendors in open city markets.[37] "Profession" supplies a legalistic key that has been held to justify the licensing of lawyers,[38] bankers,[39] accountants,[40] stock brokers,[41] commission merchants[42] and wheat buyers[43] in agricultural states, where from the very nature of the business, fraud and imposition is likely or a high degree of integrity, training and capacity is essential. But that the courts are reluctant to extend the concept of "profession" to the more common callings, thus affording actual or

[26] *Dent* v. *West Virginia*, 129 U.S. 114, 32 L. Ed. 623 (1889).
[27] *Graves* v. *Minnesota*, 272 U.S. 425, 71 L. Ed. 331 (1926).
[28] *Commonwealth* v. *S. S. Kresge Co.*, 267 Mass. 145, 166 N.E. 558 (1929).
[29] *State Board* v. *Fife*, 162 La. 681, 111 So. 58 (1926). *Aff'd* 274 U.S. 720 (1927).
[30] *State* v. *Wood*, 51 S.D. 485, 215 N.W. 487 (1927).
[31] *State* v. *Rice*, 115 Md. 317, 80 Atl. 1026 (1911).
[32] *State* v. *Briggs*, 45 Ore. 366, 77 Pac. 750 (1904); *State* v. *Zeno*, 79 Minn. 80, 81 N.W. 748 (1900).
[33] *New Castle* v. *Withers*, 291 Pa. 216, 139 Atl. 860 (1927); *Douglas* v. *People*, 225 Ill. 536, 80 N.E. 341 (1907); *Replogle* v. *Little Rock*, 166 Ark. 617, 267 S.W. 353 (1924).
[34] *State Board of Pharmacy* v. *Matthews*, 197 N.Y. 353, 90 N.E. 966 (1910).
[35] *State* v. *Christie*, 103 Ga. 686, 30 S.E. 759 (1898); License cases, 5 How. (U.S.) 504, 12 L. Ed. 256 (1847).
[36] *People* v. *Dep't. of Health*, 189 N.Y. 187, 82 N.E. 187 (1907).
[37] *Ash* v. *People*, 11 Mich. 347 (1863); *White* v. *Kent*, 11 Ohio St. 550 (1860).
[38] *Bradwell* v. *State*, 16 Wall. (U.S.) 130, 21 L. Ed. 442 (1872).
[39] *Engle* v *O'Malley*, 219 U.S. 128 (1911).
[40] *State* v. *DeVerges*, 153 La. 349, 95 So. 805 (1923).
[41] *Hall* v. *Geiger-Jones*, 242 U.S. 539, 61 L. Ed. 480 (1917).
[42] *State* v. *Edwards*, 94 Minn. 225, 102 N.W. 697 (1905).
[43] *W. W. Cargill Co.* v. *Minnesota*, 180 U.S. 452, 45 L. Ed. 619 (1901).

potential means for limitation of numbers, is shown by judicial reaction to licensing and other restrictive legislation in the case of paper hangers, horseshoers, photographers, and insurance salesmen. With the first two, the decisions are unfavorable to restriction,[44] while a split in judicial attitude has appeared in the case both of photographers[45] and insurance agents.[46] No possible relationship can be shown to public health by licensing car dealers, nor is it likely that the "profession" concept will be extended to a calling where no specialized training or capacity is necessary. But through the concept of public safety, a reasonable connection to the police power can be demonstrated. Physical safety of the owner and travelers on the highways is improved by preventing the sale of unsafe second-hand cars, by requiring a dealer to inspect all cars before sale and making the necessary repairs on them.[47] Licensing of locomotive engineers,[48] stationary steam operators,[49] architects and electricians,[50] and regulation of dealers in dangerous commodities[51] has afforded sufficient physical safety to the public to justify licensing. Other statutory bases in the licensing of car dealers, such as fraudulent transactions and prohibiting such evils in car financing as the "pack,"[52] could be brought within the orbit of the "profession" category, yet they would seem to be classified more effectively as bearing a relation to the financial security of the general public and classed under the general head of safety.

If these considerations be not enough, there is now available to legislative enactments before the judicial bar, an emboldened presumption of constitutionality. Recent decisions of the United States Supreme Court have carried the presumption far beyond the *O'Gorman* rule,[53] under

[44] *Bessette v. People*, 193 Ill. 334, 62 N.E. 215 (1901) (horseshoers); *Dasch v. Jackson*, 170 Md. 251, 183 Atl. 534 (1936) (paperhangers).

[45] *State v. Lawrence*, 213 N.C. 674, 197 S.E. 586 (1938), criticized in Note (1938) 25 Va. L. Rev. 219, held that licensing valid. *Terr. v. Fritz Kraft*, 33 Hawaii 397 (1935) held it to be an unconstitutional exercise of the police power in that it imposed an unwarranted restriction upon the rights of the citizen to engage in an innocent calling that bears no reasonable relation to the health, morals or safety of the public.

[46] *La Tourette v. McMaster*, 248 U.S. 465, 63 L. Ed. 362 (1919) held licensing based on residence constitutional. But *Northwestern Mutural Ins. Co. v. Fishback*, 130 Wash. 490, 228 Pac. 516 (1924) held invalid a regulation which prohibited fire insurance companies from having more than one agent in a city on the ground that it deprived citizens of the right to engage in a lawful calling without any relation to the police power of the state.

[47] Clark, note 2 *supra*; Barton, note 15 *supra*.

[48] *Nashville, C. & St. L. Ry. Co. v. Alabama*, 128 U.S. 96, 32 L. Ed. 352 (1888).

[49] *People v. Fournier*, 175 Mich. 364, 141 N.W. 689 (1913).

[50] *Klafter v. State Board of Examiners*, 259 Ill. 15, 102 N.E. 193 (1913); *Ex parte Cramer*, 62 Tex. Crim. Rep. 11, 136 S.W. 61 (1911).

[51] *Wadhams Oil Co. v. Tracy*, 141 Wis. 150, 123 N.W. 785 (1909).

[52] This is a common device used by dealers to add from five to seventy-five dollars on the finance charges without the knowledge of the purchaser.

[53] *O'Gorman & Young, Inc. v. Hartford Fire Ins. Co.*, 282 U.S. 251, 75 L. Ed. 324 (1931).

which, if no evidence is introduced to show the unreasonableness of the legislation, it is sustained. Today, the Court, analogizing to the reversal of a trial court by an appellate court on the weight of the evidence, employs the presumption to justify legislation if any substantial evidence whatsoever can be mustered in its support,[54] thus in substance returning to the judicial attitude which prevailed in the early days of due process.[55]

Establishment of the general power of the state to license or otherwise control those who engage in business enterprise does not, however, justify the manifold forms which limitation may take. Nowhere is the existence of this two-fold constitutional hurdle better revealed than in the decision of the Supreme Court of the United States in *New State Ice Co.* v. *Liebmann.*[56] Mr. Justice Sutherland for the Court "conceded that all businesses are subject to some measure of public regulation. And that the business of manufacturing, selling or distributing ice, like that of the grocer, the dairyman, the butcher or the baker may be subjected to appropriate regulations in the interest of the public health cannot be doubted; but the question here is whether the business is so charged with a public use as to justify the particular restriction above stated."[57] That particular restriction was the denial of the right to manufacture, sell or distribute ice where the existing licensed facilities adequately met the public convenience and necessity. The Court's condemnation of such a limitation, Justices Brandeis and Stone dissenting, was predicated largely upon the proposition that the ice business was not one affected with a public interest. Although this intermingling of the two concepts of public interest and public convenience and necessity has been criticized, it possibly holds the key to what has in the past been the prevailing judicial attitude. For the courts of yesteryear at least were firm believers in the efficacy of free competition as the guide to economic conduct and viewed with alarm any governmental repudiation of the principle of a competitively-determined market price. Only after extended experience with utility rate wars, poor service, and dual telephone systems would courts admit the inefficacy of the competitive principle in the utility field and allow to pass through the portals of due process an alien system combining restriction in units with governmental determination of price. Limitation through outright pegging of the number of units in a business, such as is involved in a measure adopted from the utility field, was

[54] *Kress & Co.* v. *Johnson,* 299 U.S. 511, 81 L. Ed. 378 (1936); see also the dissent of Mr. Justice Black in *Polk & Co.* v. *Glover,* 305 U.S. 5, 83 L. Ed. 73 (1938). The use of the presumption in the *Kress* case is discussed *infra.*

[55] It is significant that the Court in the *Kress* case and especially Mr. Justice Black in his dissent in the *Polk* case, placed reliance upon *Powell* v. *Pa.,* 127 U.S. 678, 32 L. Ed. 253 (1888).

[56] 285 U.S. 262, 52 S. Ct. 371 (1932).

[57] *New State Ice Co.* v. *Liebmann, supra* at 273, 52 S. Ct. at 372.

thus unlikely to obtain judicial affirmation unless the business involved could be demonstrated to be within the charmed circle of "affectation." Citation is unnecessary to support the statement that this judicial complex is on the wane; yet sufficient of it remains to cast a cloud of doubt upon the validity of the proposals to condition entry into the business of vending motor cars upon an admitted formula of necessity and desirability.[58]

Unlike these most recent proposals, the statutes now in effect in the four states of Iowa, Nebraska, Ohio and Wisconsin find their formulae for limitation in trade practices and problems of business ethics which beset the industry. While this approach, by making possible a defense of the legislation in terms more acceptable than that of naked economic limitation, in general sets the stage for a more favorable judicial reaction than that likely in the case of a frontal attack on excessive competition, some of the conditions imposed raise special questions of constitutionality. As earlier pointed out, all four statutes specify as one condition precedent a demonstration of ethical fitness. Ohio and Iowa deny a license to a dealer of "bad business repute;" Nebraska and Wisconsin withhold the right to deal in motor cars upon "proof of unfitness of the applicant." The uncertainty of meaning implicit in the use of such phrases raises a question as to the reconciliation of such statutory guides for administrative conduct with judicial notions of the limits within which the delegation of legislative and judicial power must be canalized. Sustainment by the Supreme Court, in *Hall* v. *Geiger-Jones Co.*,[59] of the "bad business repute" phraseology of the Ohio Blue Sky Law, together with the court's earlier approval of a standard sounding in terms of "good character and reputation,"[60] makes a strong *prima facie* case for validity. The issue is not, however, entirely free from doubt. There are state decisions rejecting the standards of "unprofessional conduct,"[61] "experience, ability, and general reputation for integrity,"[62] and "competent and trustworthy."[63] Competency and especially trustworthiness would seem to be component elements in the make-up of business fitness and business repute, yet the Ohio Supreme Court, followed later by an inferior Ohio court, declared such a test of qualifications so indefinite as to involve an unwarranted delegation of power. The United States Supreme Court in constitutionally affirming the Ohio censorship statute distinguished the Ohio decision on the grounds that the legislative power

[58] See note 25, *supra*.
[59] 242 U.S. 539, 61 L. Ed. 480 (1917).
[60] *Gundling* v. *Chicago*, 177 U.S. 183, 44 L. Ed. 725 (1900).
[61] *Mathews* v. *Murphy*, 23 Ky. L. Rep. 750, 63 S.W. 785 (1901).
[62] *People* v. *Beckman & Co.*, 347 Ill. 92, 179 N.E. 435 (1932).
[63] *Harmon* v. *State*, 66 Ohio St. 249, 64 N.E. 117 (1902); *Toledo* v. *Winters*, 21 Ohio Dec. 171, 11 Ohio C.C. (N.S.) 577 (1910).

was completely exercised and the law was "perfect, final and decisive in all of its parts, and the discretion given only relates to its execution," leaving intact the judicial disaffirmance by the Ohio court as to competency and trustworthiness.[64] This was clearly recognized by a recent decision in Ohio following the *Harmon* case.[65] The two phrases cannot boast the common law background that gives to such standards as "good moral character,"[66] "gross immorality,"[67] and "unfair competition"[68] a definitive content despite their seeming generality. More than this, present usage is caught up in the moralistic revulsion which is wont to ascribe every economic ill to the "chiseler," the "unfair" competitor, and the "price cutter," and to sublimate the desire for greater profits into a demand for morality in business. Under these circumstances, such phrases cannot avoid a state of flux which spells the very negation of a settled standard.

Of all the twenty-nine bases controlling the denial, revocation, and suspension of licenses to deal in motor cars, limitation of numbers is most overtly and at the same time most effectively realized through the provision, peculiar to Ohio, that every dealer have "an established place of business used solely and exclusively for the sale of motor vehicles."[69] Restriction of numbers by means of elimination of what might be called marginal units has the seeming merit of keeping the business for those who claim to be in "good standing." That elimination may take various forms. Where a business is harassed by the competition of a substitute product, the drive is apt to be against the producers of this effective substitute. The oleomargarine-butter clash provides the classic example of success in this method of pruning.[70] In other areas different economic factors will mark for extinction a certain mode of producing or selling which threatens the older or more orthodox form. Legislative efforts to ban the competition of second-hand materials in the manufacture of articles of bedding have been unsuccessful.[71] But on the distribution

[64] *Mutual Film Corp.* v. *Ohio Industrial Commission*, 236 U.S. 230, 59 L. Ed. 552 (1915).

[65] *State, ex rel., Squire* v. *National City Bank*, 56 Ohio App. 401, 11 N.E. (2d) 93 (1936). See note 63 *supra* for the Harmon case.

[66] *Raabe* v. *State*, 7 Ohio App. 119, 28 Ohio C.C. (N.S.) 169 (1917); *Myer* v. *O'Dwyer*, 15 Ohio N.P. (N.S.) 129, 24 Ohio Dec. 134 (1913), *aff'd* 90 Ohio St. 341, 107 N.E. 759 (1914).

[67] *Rose* v. *Baxter*, 18 Ohio Dec. 658, 8 Ohio C.C. (N.S.) 550 (1908).

[68] *Federal Trade Commission* v. *Klesner*, 280 U.S. 19, 74 L. Ed. 138 (1929).

[69] Ohio G.C. sec. 6302-3 (9).

[70] *Powell v. Pennsylvania*, 127 U.S. 678, 32 L. Ed. 253 (1888); *McCray* v. *United States*, 195 U.S. 27, 49 L. Ed. 78 (1904); *Magnano & Co.* v. *Hamilton*, 292 U.S. 40, 78 L. Ed. 1109 (1934).

[71] *Weaver* v. *Palmer Bros. Co.*, 270 U.S. 402, 70 L. Ed. 654 (1926); *Lisichin* v. *Andrews*, 26 F. Supp. 882 (S.D.N.Y. 1938).

side relative success has attended such purging in the case of auction[72] and trading stamp[73] selling, while chain store taxation has at least postponed the demise of the corner merchant.[74]

The Ohio statutory provision is directed at the rough counterpart to these "alien" competitors in the automobile business—the fly-by-night seller of an occasional car, the small-town dealer who must sell other articles to carry his overhead, the junk dealer who offers to the market a rebuilt car, and the finance company which employs the market to absorb the cars it has repossessed. The statute carries, however, no outright prohibition against any of these marginal dealers; the requirement is only that they have an "established place of business" "used solely and exclusively" for the merchandising of motor cars.[75] In the comparatively early case of *Chicago* v. *Netcher*,[76] this lesser degree of restriction did not save a statute which sought to break the financial back of department stores by prohibiting the sale of goods, clothing, jewelry, and drugs in the same building with meats, butter, and cheese. More recently, however, the Colorado Act,[77] requiring the partitioning of drug and other stores engaged in the serving of food as well as the vending of merchandise, successfully ran the gamut of judicial scrutiny. Both the federal and state courts in upholding that act based their opinion substantially on the ground that "while there was a sharp conflict in the opinion of experts in the field on health . . . , there is substantial evidence that the requirement as to a separate room will tend to promote and protect public health."[78] The Supreme Court of the United States in a *per curiam* opinion[79] affirmed the lower federal court on the strength of

[72] Most but not all courts have sustained various types of restrictions designed to take the profit out of auction selling. *Holsman* v. *Thomas*, 112 Ohio St. 397, 147 N.E. 750 (1925) (requirement of permanency in ownership and business activity); *Gordon* v. *City of Indianapolis*, 204 Ind. 79, 183 N.E. 124 (1932) (sales limited to 30 days per year); *Mogul* v. *Gaither*, 142 Md. 380, 121 Atl. 32 (1923) (combining both of the above); *Biddles* v. *Enright*, 239 N.Y. 354, 146 N.E. 625 (1925) (prohibiting sales under artificial light). *Contra: People* v. *Gibbs*, 186 Mich. 127, 152 N.W. 1053 (1915) (prohibiting all but daytime sales); *Commonwealth* v. *Loeb*, 245 Ky. 843, 54 S.W. (2d) 373 (1932) (permanency requirements). In *Meyers* v. *Copelan*, 117 Ohio St. 622, 160 N.E. 855 (1927), complete prohibition was sustained 3 to 4 in a peculiar situation arising out of the interpretation of Ohio Const. Art. IV, sec. 2.

[73] *Rast* v. *Van Deman & Lewis Co.*, 240 U.S. 342, 60 L. Ed. 679 (1916); *State* v *Wilson*, 101 Kan. 789, 168 Pac. 679 (1917). The earlier state decisions, unfavorable for the most part are collected in Notes (1916) 29 Harv. L. Rev. 779; (1916) 64 U. of Pa. L. Rev. 734.

[74] *State Board of Tax Comm.* v. *Jackson*, 283 U.S. 527, 75 L. Ed. 1248 (1931); *Fox* v. *Standard Oil Co.*, 294 U.S. 87, 79 L. Ed. 780 (1935); *Great Atlantic & Pacific Tea Co.* v. *Grosjean*, 301 U.S. 412, 81 L. Ed. 1193 (1937).

[75] Opinions of the Attorney General, 3131 (1938).

[76] 183 Ill. 104, 55 N.E. 707 (1899) .

[77] Colo. Laws 1935, c. 118.

[78] Opinion of the Justices, 97 Colo. 587, 597 (1935); *Kress & Co.* v. *Johnson*, 16 F. Supp. 5 (1936); Noted (1937) 22 Iowa L. Rev. 736.

[79] *Kress & Co.* v. *Johnson*, 299 U.S. 511, 81 L. Ed. 378 (1936).

Powell v. *Pennsylvania*,[80] *Price* v. *Illinois*,[81] *Standard Oil Co.* v. *City of Marysville*,[82] and *Nebbia* v. *New York*.[83] A summary of the four cases shows very well the Supreme Court's attitude toward legislative discretion in the matter of police regulation. In the *Price* and *Standard Oil Co.* cases the Court said that it was plainly not enough in demonstrating the invalidity of legislation that the subject matter should be debatable. If debatable, the legislature is entitled to its own judgment, and it is enough that the statute has some evidence to support its declaration that the public health and safety will be promoted. The *Powell* and *Nebbia* cases are rested upon the premise that every possible presumption is in favor of the validity of a statute, a presumption which continues until the contrary is shown beyond a reasonable doubt, and that if some evidence is presented favorable to the legislative action a declaration of unconstitutionality is impossible. But it must be borne in mind that the sale of food and merchandise in close proximity can raise some question of contamination, and no proof is needed that the courts are zealous guardians of the public health. Against this is to be set the extreme difficulty of demonstrating any kind of danger resulting from the sale of automobiles in the same establishment with refrigerators, automobile finance loans, or junk, although something of a case can perhaps be made out for the requirement of a principal place of business. Even under the *Kress* view, then, the quantum of governmental power exerted may be condemned as wanting in any support save from the unacceptable thesis that public welfare justifies a limitation on the number who engage in ordinary callings.

More than this, however, while the Ohio statutory provision on its face does not prevent one from dealing in both automobiles and other articles, realism compels the conclusion that such must be the practical consequence of its enforcement. For the requirement of a principal place of business devoted solely to the separate business of car-selling, is sufficient to sever the thread of profit by which the marginal dealer hangs and consequently to blot him out of the competitive picture. By both federal and state statutes, various business activities under the same common ownership have been expressly prohibited and the courts have received these statutes favorably where it was shown that the effect of the statute was to prevent monopolistic tendencies.[84] Even where the

[80] 127 U.S. 678, 32 L. Ed. 253 (1888).

[81] 238 U.S. 446, 59 L. Ed. 1400 (1915).

[82] 279 U.S. 582, 73 L. Ed. 856 (1929).

[83] 291 U.S. 502, 78 L. Ed. 940 (1934).

[84] *Hammond Packing Co.* v. *Arkansas*, 212 U.S. 322, 53 L. Ed. 530 (1909); *United States* v. *Delaware & Hudson Co.*, 213 U.S. 367, 53 L. Ed. 836 (1909); *Crescent Cotton Oil Co.* v. *Mississippi*, 257 U.S. 129, 66 L. Ed. 166 (1921); *Federal Trade Commission* v. *Western Meat Co.*, 272 U.S. 554, 71 L. Ed. 405 (1926).

evidence showed no attempt to monopolize in fact, the possibility of it was sufficient to sustain a statute requiring ownership of theaters to be separated from the production of the films.[85] But this has been the limit of judicial tolerance; where the possibility of a monopoly was wholly lacking, a statute prohibiting a public utility from selling gas and electrical appliances has been held unconstitutional.[86] The Ohio provision thus necessarily falls without the area of judicial approbation, for its very purpose is to restrict rather than to enlarge the group engaged in selling motor cars. So long as courts continue to nurture the monopoly complex and to determine constitutionality in terms of the perspective it affords, so long will limitation formulae of the Ohio type, like those most recently proposed on analogy to utility control, remain in the shadow of the judges' guillotine.

HENRY M. THULLEN

CORPORATIONS

CORPORATIONS — AMENDMENTS TO ARTICLES — ABOLISHING ACCRUED DIVIDENDS — A POSSIBLE SOLUTION

In the unanimous opinion of the board of directors of the National Refining Company, payment in cash of the accrued dividends on its preferred stock would seriously impair the company's working capital. The board, therefore, submitted to its stockholders for approval an amendment providing for the issuance of a prior preferred stock with an option in the present preferred stockholders to exchange each share of their stock for one and one-third shares of the new prior preferred stock and three-fourths of a share of common stock. The amendment was approved by more than the required two-thirds vote of each class of the outstanding stock.

An action was brought by the dissenting minority holders of the preferred stock to enjoin the board of directors from putting into operation this amendment. The Court refused to grant the injunction. *Johnson* v. *Lamprecht*, 133 Ohio St. 567, 15 N.E. (2d) 127 (1938).

By this decision the Supreme Court of Ohio has not only adopted the progressive view but has forged ahead on the trail that other states have solicitously tried to clear since the famous case of *Trustees of Dart-*

[85] *Paramount Pictures Inv.* v. *Langer*, 23 F. Supp. 890 (1938).

[86] *Capital Gas & Electric Co.* v. *Boynton*, 137 Kan. 717, 22 Pac. (2d) 958 (1933). Petition for certiorari was granted by the Supreme Court of the United States but later dismissed because of a procedural defect. *Boynton* v. *Hutchinson Gas Co.*, 292 U.S. 601, 78 L. Ed. 1464 (1934).