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The New Judicial Approach to Due Process and Price Fixing

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THE NEW JUDICIAL APPROACH TO DUE PROCESS AND PRICE FIXING

The distinction between the "business affected with a public interest," subject therefore to governmental regulation of its charges, and the ordinary "private" business,[1] not affected by such an interest and therefore protected against price regulation by judicial "interpretation" of the due process clauses in the Fifth and Fourteenth Amendments, dates from *Munn* v. *Illinois*.[2] By successive decisions the doctrine of that case was developed until in 1923 Chief Justice Taft felt able to announce the result in the following language:

"Businesses said to be clothed with a public interest justifying some public regulation may be divided into three classes.

"(1) Those which are carried on under the authority of a public grant of privileges which either expressly or impliedly imposes the affirmative duty of rendering a public service demanded by any member of the public. Such are the railroads, other common carriers and public utilities.[3]

"(2) Certain occupations, regarded as exceptional, the public interest attaching to which, recognized from earliest times, has survived the period of arbitrary laws by Parliament or Colonial legislatures for regulating all trades and callings. (Citing cases).

"(3) Businesses which, though not public at their inception, may be fairly said to have risen to be such and have become subject in consequence to some government regulation. They have come to hold such a peculiar relation to the public that this is superimposed upon them. In the language of the cases, the owner, by devoting his business to the public use, in effect grants the public an interest in that use, and subjects himself to public regulation to the extent of that interest, although the property continues to belong to its private

[1] "The distinction between the private callings—the rule—and the public callings—the exception—is the most consequential division in the law governing our business relations." Wyman, *The Law of the Public Callings as a Solution of the Trust Problem* (1904) 17 *Harv. L. Rev.* 151.

[2] 94 U. S. 113 (1877).

[3] Apparently the Chief Justice here uses the term, public utilities, in its narrow sense, referring to services such as the supply of gas, water, electricity and telephone and telegraph service, involving usually the use of eminent domain or franchise rights.

owner, and to be entitled to protection accordingly. [Citing *Munn* v. *Illinois* and other cases.]"[4]

Farther down in the opinion he added: "The circumstances which clothe a particular kind of business with a public interest, in the sense of *Munn* v. *Illinois* and the other cases, must be such as to create a peculiarly close relation between the public and those engaged in it, and raise implications of an affirmative obligation on their part to be reasonable in dealing with the public."[5]

There is a certain unfortunate ambiguity in the reference to "Businesses said to be clothed with a public interest justifying some public regulation." One might infer that the learned Chief Justice meant to suggest that no business could be regulated in any respect unless "clothed with a public interest." If interpreted to mean that the due process guaranty against arbitrary governmental acts precludes any regulation not reasonably related to advancing some public interest, the statement might command our assent. But if it means that a business must have the characteristics of those later enumerated as "clothed with a public interest" before it may be regulated at all, we must dissent. All the "police power" cases demonstrate the falsity of such a contention. It is clear, however, from the context that the Chief Justice is referring to the special type of regulation, looking to the enforcement of the duty to serve all without unjustifiable discrimination and at reasonable prices, which we associate with the control of the common callings or public utilities, using the latter term in its broad sense. So construed, we may accept the statement as an authoritative summary of the status of the law with respect to the permissible range of this type of regulation. The language of course is dictum in the sense that it was not necessary to the decision of the case. Regulation of wages, involved in the legislation there under examination, may implicate different factors from those affecting the constitutionality of a price fixing statute.[6] But

[4] *Charles Wolff Packing Co.* v. *Court of Industrial Relations*, 262 U. S. 522, 535, 43 Sup. Ct. 630, 632 (1923).

[5] 262 U. S. at 536, 43 Sup. Ct. at 633.

[6] "The regulation of rates to avoid monopoly is one thing. The regulation of wages is another. A business may be of such a character that only the first is permissible, while another may involve such a possible danger of monopoly on the one hand, and such disaster from stoppage on the other, that both come within the public concern and power of regulation." *Charles Wolff Packing Co.* v. *Court of Industrial Relations, supra* note 4 at 539, 43 Sup. Ct. at 634.

the deliberate and considered dictum of the chief justice of the nation's highest court, when speaking for that court, is entitled to serious consideration as a statement of the law, and it has been accorded at least lip service in subsequent cases.[7]

The statement furnishes a reasonably definite and workable rationalization of the decisions as to the field for legislative extension of what has been termed the "public category"[8] of employments. The callings historically public (group two) presumably will continue to be regarded as legitimately subject to appropriate regulation. For further extension of the field we are referred to two possible avenues of development. The first is through the "public grant of privileges which either expressly or impliedly impose the affirmative duty of rendering a public service." Franchises and the right of eminent domain are quite evidently regarded by the court as grants which come within this description.[9] Others which may be included are the privilege of using the public highways as a carrier[10] and the regulated monopoly or partial monopoly created by the certificate of public convenience and necessity.[11] The mere licensing of a business, a recent case[12] makes clear, does not constitute such a grant as will justify public utility regulation.

The other avenue for extending the public category, the list of businesses "clothed with a public interest" named by the Chief Justice in his third classification, opens a wider vista.[13] Obviously no attempt is made here to fix a rule for the determination of public interest. Rather it is a method of approach to the problem that is suggested. We are told that "the owner by

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[7] See *Tyson* v. *Banton*, 273 U. S. 418, 431, 47 Sup. Ct. 426, 428 (1927); *Ribnik* v. *McBride*, 277 U. S. 350, 355, 48 Sup. Ct. 545 (1928).

[8] See *Robinson, Cases and Authorities on Public Utilities* (1926) 9, 43.

[9] See extract quoted *ante* p. ——

[10] This would seem beyond doubt but for the extremely questionable decision in *Frost & Frost Trucking Co.* v. *Railroad Commission*, 271 U. S. 583, 46 Sup. Ct. 605 (1926).

[11] *Frost & Frost Trucking Co.* v. *Railroad Commission, supra* note 10, threatens this view also. But *cf. The Slaughterhouse Cases*, 16 Wall. (U. S.) 36 (1873) and *Frost* v. *Corporation Commission*, — U. S. —, 49 Sup. Ct. 235 (1929).

[12] *Ribnik* v. *McBride, supra* note 7.

[13] "It is very difficult under the cases to lay down a working rule by which readily to determine when a business has become "clothed with a public interest." *Charles Wolff Packing Co.* v. *Court of Industrial Relations, supra* note 4 at 538, 43 Sup. Ct. at 634.

devoting his business to the public use, in effect grants the public an interest in that use, and subjects himself to public regulation to the extent of that interest, although the property continues to belong to its private owner, and to be entitled to protection accordingly."[14] Clearly this is the language of fiction. Very rarely does the owner of an unregulated business grant the public an interest therein in the sense of inviting or voluntarily submitting to public utility regulation. What is meant is that circumstances justify such regulation, make it reasonable in the eyes of the court and so enable it to escape the due process ban. The problem is to know what circumstances create a public interest sufficient to bring this fictitious grant into being. We are told that this interest is present when the business has come to hold "a peculiar relation to the public,"[15] when circumstances "create a peculiarly close relation between the public and those engaged" in the business,[16] "when the public becomes peculiarly dependent upon a particular business."[17] All this of course is vague and indefinite. The nearest approach to an authoritative statement of the circumstances justifying regulation is the sentence reading, "In nearly all the businesses included under the third head above, the thing which gave the public interest was the indispensable nature of the service and the exorbitant charges and arbitrary control to which the public might be subjected without regulation."[18] Otherwise we are referred to the empiricism of a "process of exclusion and inclusion, and to gradual establishment of a line of distinction."[19]

But precisely to its vagueness and its empiric attitude toward the problem this method of approach owes its usefulness. Certain definite datum points are given us. Ordinarily the service should be indispensable, i. e. a "necessity" of life as distinguished from a mere "luxury." The existing circumstances must be such as to expose the patrons to the danger of "exorbitant charges and arbitrary control." This may, in most cases perhaps does, spring from the existence of monopoly, legal

[14] *Ibid.* at 535, 43 Sup. Ct. at 633.
[15] *Ibid.*
[16] *Ibid.* at 536, 43 Sup. Ct. at 633.
[17] *Ibid,* at 538, 43 Sup. Ct. at 634.
[18] *Ibid.*
[19] *Ibid,* at 639, 43 Sup. Ct. at 634.

or virtual, but it need not do so.[20] The cases prior to the *Wolff* case show that application of this aproach to the problem in line with the datum posts set up in the opinion in that case. In all the cases the service involved has been one which may be termed a "necessity" in the sense of being in common use either for meeting the essential needs of life or for maintaining economic activity according to the standards of the time and place. In most of the cases virtual monopoly has been the factor which furnished the possibility of oppression and abuse in the supply of the necessity, justifying regulation,[21] but other circumstances, such as the existence of disparity in bargaining power between the business and its patrons,[22] concert of action among nominal competitors not amounting to mechanical monopoly,[23] the needs of government,[24] and even the fact that the business through past regulation under special circumstances has come to be regarded as a fit subject for regulation under all conditions[25] have also been relied upon.

The picture that we get, then, reading the opinion of the Chief Justice in the light of the cases preceding it with reference to which it is written, is of an intensely practical, empiric approach to the problem of deciding when regulation is permissible. Each case is to be decided upon its own circumstances. Refusal to permit regulation at one time does not necessarily preclude approval under changed conditions. Government is

[20] *Cf.* Rottschaefer, *The Field of Governmental Price Control*, (1926) 35 *Yale L. J.* 438, 451-456.

[21] *Munn* v. *Illinois*, *supra* note 2; *Budd* v. *New York*, 143 U. S. 517, 12 Sup. Ct. 468 (1891); The Pipe Line Cases, 234 U. S. 548, 34 Sup. Ct. 956 (1914); *Van Dyke* v. *Geary*, 244 U. S. 39, 27 Sup. Ct. 483 (1917).

[22] *Budd* v. *New York*, *supra* note 21; *German Alliance Ins. Co* v. *Lewis*, 233 U. S. 389, 34 Sup. Ct. 612 (1914); *Block* v. *Hirsh*, 256 U. S. 135, 41 Sup. Ct. 458 (1921); *Marcus Brown Holding Co.* v. *Feldman*, 256 U. S. 170, 41 Sup. Ct. 465 (1921); *Stafford* v. *Wallace*, 258 U. S. 495, 42 Sup. Ct. 397 (1922); possibly also *Brass* v. *North Dakota*, 153 U. S. 391, 14 Sup. Ct. 857 (1893) though point is not discussed.

[23] *German Alliance Ins. Co.* v. *Lewis*, *supra* note 22; *Stafford* v. *Wallace*, *supra* note 22.

[24] *Block v. Hirsh*, *supra* note 22.

[25] *Brass* v. *North Dakota*, *supra* note 22, in which the court said: "When it is once admitted, as it is admitted here, that it is competent for the legislative power to control the business of elevating and storing grain, . . . in cities of one size and under some circumstances, it follows that such power may be legally exerted over the same business when carried on in smaller cities and in other circumstances." 153 U. S. at 403, 14 Sup. Ct. at 862.

accorded freedom to deal with new problems and to have its solutions reviewed by the court in the light of the existing situation and of current political thought. Effective action today is not prohibited because statesmen and judges of the past were not confronted with the present problem or did not recognize its importance. "New occasions teach new duties; time makes ancient good uncouth." The court gives full recognition to this changing power of the years. Each age may apply its own solution to its own problems. The only limitation which the due process clauses impose is that the solution be reasonable under contemporary conditions and the burden of proof is upon him who claims it to be unreasonable. This is the judicial process at its best in the realm of constitutional law.

Three recent decisions seem to involve, at least on the part of the writer of the opinions therein, a radical departure from this realistic method. Because of this apparent break with the established technique in dealing with questions of this sort, some examination of these opinions seems in order.

Tyson v. *Banton*[26] comes first in point of time. It involved the validity of a New York statute limiting the price of theater tickets, on resale by licensed brokers, to a maximum of fifty cents in excess of the price printed on the tickets. The fact situation back of the statute as disclosed by the record was that the New York City theaters habitually sold to the brokers, in advance of the production of their plays, the best seats, "usually the first 15 rows," for a period of eight weeks. The resultant virtual monopoly of the best seats allowed the brokers to command extortionate prices and to realize exorbitant profits.[27] There was no contention that the limitation of fifty cents profit would render the business unremunerative. The Supreme Court, by five votes to four, held the act invalid.

The majority opinion, written by Mr. Justice Sutherland, after stating the orthodox doctrine as to businesses "affected with a public use" and reviewing the past decisions upon the subject, says "each of the decisions of this court upholding governmental price regulation, aside from cases involving legislation to tide over temporary emergencies, has turned upon the existence of

[26] *Supra* note 7.

[27] See dissenting opinion of Stone, J. 273 U. S. at 450, 47 Sup. Ct. at 435.

conditions, peculiar to the business under consideration, which bore such a substantial and definite relation to the public interest as to justify an indulgence of the legal fiction of a grant by the owner to the public of an interest in the use." Barring the rather unfortunate reference to "the legal fiction of a grant . . . . to the public of an interest in the use" in place of straight out recognition that the existence of circumstances creating sufficient "public interest" in the business justifies regulation regardless of any "grant by the owner," real or fictitious,[28] this seems a fair enough statement of the orthodox position. But the opinion goes on in its application of the principle in a manner that seems highly unorthodox Lord Hale, it is said, in first using the phrase "affected with a public interest" clearly did not have theaters in mind. This is indicated by the illustrations which he used. Moreover, theaters are not like the businesses in which regulation of charges heretofore has been upheld, such as grain elevators, stockyards, insurance companies or orthodox "public utilities." Nor can attendance thereat "be regarded under any conditions from the point of view of an emergency."[29] In addition, theaters never have been subject to price regulation.[30] All this is stated solemnly as matter of great significance in the face of the fact that nothing in any prior opinion of the Supreme Court indicates that either Lord Hale's conception of what specific businesses were "affected with a public interest" in his day, likeness to already recognized public utilities, freedom from regulation in the past or all of these combined constitute a limitation on the constitutional power of legislatures to extend the public utility concept. But finally, after it has been sufficiently demonstrated that theaters are not like the businesses subjected to price regulation in the past, and have not themselves been regulated, nor, apparently, regarded as fit subjcts for such regulation, brief attention is paid to the particular fact situation dealt with by the legislature in this case in the statement that if evils, such as "fraud, extortion, collusive arrangements between the management and those engaged in reselling tickets, and the like," exist they "are to be suppressed

[28] C. Robinson, *The Public Utility Concept in American Law*, (1928) 41 *Harv. L. Rev.* 277, 294.

[29] 273 U. S. at 440, 47 Sup. Ct. at 431.

[30] 273 U. S. at 441, 47 Sup. Ct. at 431.

or prevented by legislation which comports with the Constitution, and not by such as strikes down the essential rights of private property protected by that instrument against undue governmental interference."[31] This begs the question whether the statute violates the Constitution. Seemingly there is no recognition whatever that the constitutional validity of the regulation depends upon the existence of the evils enumerated and the reasonableness of price regulation as a remedy.

The objection is not so much to the result as to the method by which it is reached. The actual decision is one which can be arrived at with entire propriety under the method heretofore in vogue for dealing with price fixing statutes. While a clear case of virtual monopoly and of extortionate charges against which the patron may not protect himself save by abstinence from attendance at the theater seems made out,[32] one may agree that the service probably is not "indispensable." Granting that the decision does give "free rein to shear all the fleece from the theatre going lambs of greater New York,"[33] and places the rather sordid shearing process under the sacred aegis of the Constitution, there may be good reason to feel that those lambs who cannot protect themselves by avoiding the shearing pens are not sufficiently numerous nor are they of sufficient importance to the commonweal to warrant classifying the service in the ranks of those which are "indispensable" to the general welfare.[34] But the method by which the decision is reached seems indefensible. The majority opinion, boiled down, may be rendered thus: "Theaters never have been subjected to price regulation. They are different from the businesses that have been subjected to price regulation. It never occurred to Lord Hale that they could be subjected to price regulation. Therefore government may not regulate their prices, no matter what evils exist with reference to charges and even though such evils are peculiarly amenable to cure by price regulation and by no other form of control."[35] This is a complete abandonment of the em-

[31] 273 U. S. at 442, 47 Sup. Ct. at 431.

[32] This is strongly demonstrated in the dissenting opinion of Stone, J. 273 U. S. at 450, 47 Sup. Ct. at 435.

[33] See (1927) 25 *Mich L. Rev.* 880.

[34] See (1927) 13 *Ia. L. Rev.* 99; (1927) 13 *Va. L. Rev.* 554. See also Stone, J. dissenting in *Ribnik* v. *McBride*, *supra* note 7 at 362, 48 Sup. Ct. at 548.

[35] *Supra* note 1.

pirical, practical, open minded attitude prevalent from *Munn* v. *Illinois* to *Charles Wolff Packing Co.* v. *Court of Industrial Relations.*[36]

Next in order comes *Ribnik* v. *McBride.*[37] The law there under fire was a New Jersey statute providing for the licensing of employment agencies and requiring, as a prerequisite to the issuance of a license, the filing of a schedule of fees with the commissioner of labor, to be approved by that officer. Adherence to the schedule so approved was commanded. The statute was struck down by a six to three vote, Mr. Justice Sanford, who had dissented in the *Tyson* case, concurring solely on the ground of his inability to distinguish between the two cases.[38]

The prevailing opinion again is by Mr. Justice Sutherland. He declares that the crucial point is whether the business falls within the third category of the *Wolff* case[39] and then proceeds to depart completely from the method approved in that case for the solution of the problem. After quoting extracts from the *Wolff* case, from *Tyson* v. *Banton* and from his own opinion in *Adkins* v. *Children's Hospital,*[40] he comes definitely to the disposition of the case by the statement that *Tyson* v. *Banton* held it unconstitutional to regulate the charges of a theater ticket broker and that he can see no difference between the business of an employment broker and that of "a real estate broker, ship broker, merchandise broker, or ticket broker."[41] Automatically the result follows that the act is invalid. The general rule is laid down that "Under the decisions of this court it is no longer fairly open to question that, at least in the absence of a grave emergency,[42] the fixing of prices for food or clothing, of house rental or of wages to be paid, whether maximum or minimum, is beyond the legislative power."[43] This statement is, to say the least, astounding. Its vice is that, save with respect to wages,[44]

[36] *Supra* note 4.
[37] *Supra* note 7.
[38] See concurring opinion of Sanford, J. 277 U. S. at 359; 48 Sup. Ct. at 547.
[39] *Supra* note 4.
[40] 261 U. S. 525, 43 Sup. Ct. 394 (1923).
[41] 277 U. S. at 356, 48 Sup. Ct. at 546.
[42] Citing *Tyson* v. *Banton, supra* note 7.
[43] 277 U. S. at 357, 48 Sup. Ct. at 546.
[44] *Adkins* v. *Children's Hospital, supra* note 40; *Murphy* v. *Sardell,* 269 U. S. 530, 46 Sup. Ct. 22 (1925) *Donham v. West-Nelson Mfg. Co.,* 273 U. S. 657, 47 Sup. Ct. 343 (1927); *Charles Wolff Packing Co.* v. *Court of Industrial Relations, supra* note 4.

it is, to use the mildest term that is adequately descriptive, utterly inaccurate. No case decided by the Supreme Court has ever held generally that price fixing in respect to food, clothing or house rent is invalid. The only cases which have directly involved governmental regulation of such charges resulted in decisions sustaining the regulation.[45] It is true that in the *Wolff* case. Chief Justice Taft did say: "It has never been supposed, since the adoption of the Constitution, that the business of the butcher, or the baker, the tailor, the wood chopper, the mining operator or the miner was clothed with such a public interest that the price of his product or his wages could be fixed by State regulation. It is true that in the days of the early common law an omnipotent Parliament did regulate prices and wages as it chose, and occasionally a Colonial legislature sought to exercise the same power; but nowadays one does not devote one's property or business to the public use or clothe it with a public interest merely because one makes commodities for, and sells to, the public in the common callings of which those above mentioned are instances."[46] But the statement was made by way of illustrating the normal situation where competitive conditions afford adequate protection to the public against the rapacity of the proprietor. When read in connection with the entire opinion of the Chief Justice in the light of the course of decisions upon which that opinion is founded, it clearly indicates that he was not undertaking to lay down an absolute constitutional immunity of these activities from price regulation. His dictum was merely that circumstances justifying regulation thereof had not yet arisen. Mr. Justice Sutherland's position is quite different. He says:

"To urge that extortion, fraud, imposition, discrimination, and the like have been practiced to some, or to a great, extent in connection with the business here under consideration, or that the business is one lending itself peculiarly to such evils, is simply to restate grounds already fully considered by this court. These are grounds for regulation, but not for price fixing as we have already definitely decided."[47]

[45] *Block* v. *Hirsh*, *supra* note 22; *Marcus Brown Holding Co.* v. *Feldman*, *supra* note 22.

[46] 262 U. S. at 537, 43 Sup. Ct. at 633.

[47] 277 U. S. at 358, 48 Sup. Ct. at 547.

This again completely repudiates the prior method of dealing with rate fixing statutes. Specific evils, the conditions prevailing in the particular business, "the indispensable nature of the service and the exorbitant charges and arbitrary control to which the public might be subjected without regulation,"[48] are all of absolutely no significance. If the business has not been regulated as to prices in the past, or is not completely analogous to one which has been thus regulated, it is immune, regardless of fraud, discrimination, oppression, extortion, rapacity or outright robbery under the guise of legitimate economic activity. "These are grounds for regulation, but not for price fixing. . . ." Just how evils which find their root in the prices charged are to be eliminated other than by price fixing the learned justice does not inform us.

Last in this trilogy is *Williams* v. *Standard Oil Co.*,[49] involving a Tennessee statute authorizing an administrative tribunal to fix prices to be charged for gasoline and prohibiting rebates, price concessions, and price discrimination between persons or localities. The act of course was overturned. Mr. Justice Sutherland for the third successive time in cases of this character spoke for the court. The opinion adds little to the two preceding; its significance lies in the emphasis that is placed upon them as authoritative statements of the law. A short quotation will suffice to indicate its character.

"It is settled by recent decisions of this court that a state Legislature is without constitutional power to fix prices at which commodities may be sold, services rendered, or property used, unless the business is 'affected with a public interest.'[50] Nothing is gained by reiterating the statement that the phrase is indefinite. By repeated decisions of this court, beginning with *Munn* v. *Illinois*,[51] that phrase, however it may be characterized, has become the essential test by which the legislative power to fix prices of commodities, use of property, or services, must be measured. . . . The meaning and application of the phrase are examined at length in the *Tyson Case* and we see no reason for restating what is there said.

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[48] *Supra* note 18.

[49] —— U. S. ——, 49 Sup. Ct. 115 (1929).

[50] Citing *Charles Wolff Packing Co.* v. *Court of Industrial Relations*, *supra* note 4; *Tyson* v. *Banton*, *supra* note 7; *Fairmont Creamery Co.* v. *Minnesota*, 274 U. S. 1, 47 Sup. Ct. 506 (1927); *Ribnik* v. *McBride*, *supra* note 7.

[51] *Supra* note 1.

"In support of the act under review it is urged that gasoline is of widespread use; that enormous quantities of it are sold in the state of Tennessee; and that it has become necessary and indispensable in carrying on commercial and other activities within the state. But we are here concerned with the character of the business, not with its size or the extent to which the commodity is used. Gasoline is one of the ordinary commodities of trade, differing, so far as the question here is affected, in no essential respect from a great variety of other articles commonly bought and sold by merchants and private dealers in the country. The decisions referred to above make it perfectly clear that the business of dealing in such articles, irrespective of its extent, does not come within the phrase 'affected with a public interest.' Those decisions control the present case."[52]

Comment seems superfluous. The mere fact that "Gasoline is one of the ordinary commodities of trade" is sufficient to condemn the legislation. "Dealing in such articles, irrespective of its extent," cannot be the subject of price control. Once more we have the enunciation of an absolute constitutional prohibition against governmental price fixing except in those fields where it gains sanction from past practice.

The actual decision may be justified. It appears that no showing of the monopoly was made, and perhaps it is too much to urge that the Supreme Court, merely because practically all filling stations in the same trade territory display an identical schedule of prices, should judicially notice that competition does not materially control the price of gasoline. At any rate, Justices Stone and Brandeis, who have manfully insisted upon the application of the traditional technique in the two prior cases,[53] concur in the result here, leaving only Justice Holmes

[52] 49 Sup. Ct. at 116.

[53] "Statutory regulation of price is commonly directed toward the prevention of exorbitant demands of buyers or sellers. An examination of the decisions of this court in which price regulation has been upheld will disclose that the element common to all is the existence of a situation or a combination of circumstances materially restricting the regulative force of competition, so that buyers or sellers are placed at such a disadvantage in the bargaining struggle that serious economic consequences result to a very large number of members of the community. Whether this situation arises from the monopoly conferred upon public service companies or from the circumstances that the strategical position of a group is such as to enable it to impose its will in matters of price upon those who sell, buy or consume, . . . or from the predetermination of prices in the councils of those who sell, promulgated in schedules of practically controlling constancy, . . . or from a housing shortage growing out of a public emergency, . . . the result is the same. Self-interest is not permitted to invoke constitutional protection at the expense of the public interest and reason-

to hold out for the freedom of the legislature as distinguished from the freedom of the gasoline vender. But, as has been suggested heretofore, the alarming thing about these cases is not the character of the results reached. Only *Ribnik* v. *McBride*[54] seems utterly unjustifiable under the standards heretofore applied in cases of this nature. The sinister aspect of the situation lies in the apparent abandonment of the fruitful practicality of the method of approach to which expression was given in the *Wolff* case in favor of a rigidly unyielding judicial prohibition against further extension of the public utility concept.

For it is difficult to see how under the method employed by Mr. Justice Sutherland in these cases there can be any broadening of that concept. To him, the list of businesses already included therein constitutes a closed category. And the disquieting thing is that he carries with him in silent acquiescence the majority of the court, including the author of the opinion in the *Wolff* case.[55] In a day when consolidation and merger are prevalent in all businesses, when commerce and industry of every sort tend to consolidate into a comparatively few large units organized upon a national scale, when the common man is more and more often faced with the alternative of "take it or leave it" both as to what he receives for his property or his labor and as to what he pays for the necessities of life, it is a grave matter to be told that government may be without cap-

able regulation of price is upheld." Stone, J. dissenting in *Tyson* v. *Banton*, *supra* note 7 at 451, 47 Sup. Ct. at 435, Holmes and Brandeis, JJ. concurring.

"Under the decisions of this court not all price regulation, as distinguished from other forms of regulation, is forbidden. As those decisions have been explained, price regulation is within the constitutional power of a state Legislature when the business is 'affected with a public interest.' That phrase is not to be found in the Constitution. Concededly it is incapable of any precise definition. It has and can have only such meaning as may be given to it by the decisions of this court. As I read those decisions, such regulation is within a state's power whenever any combination of circumstances seriously curtails the regulative force of competition, so that buyers or sellers are placed at such a disadvantage in the bargaining struggle that a Legislature might reasonably anticipate serious consequences to the community as a whole." Stone, J. dissenting in *Ribnik* v. *McBride*, *supra* note 7 at 359, 48 Sup. Ct. at 547, Holmes and Brandeis, JJ. concurring.

[54] *Supra* note 7.

[55] Mr. Justice Sutherland's own position is not surprising in view of the sentiments expressed in his presidential address to the American Bar Association in 1917. See Sutherland, *Private Rights and Government Control*, (1917) 85 *Cent. L. J.* 168.

acity to curb abuses by the lords of industry and of commerce of the absolute power which their position may give them in the not far distant future.

But it seems clear that government will not be so fettered. The almost universal dissent which the appearance of this new doctrine has evoked[56] demonstrates its untenable nature. Judicial statesmanship, unafraid to abandon prior positions when their erroneous character becomes apparent, has ever marked the course of the Supreme Court in the field of constitutional law. The due process clauses constitute the only barrier to government price fixing, as such. Due process on its substantive side protects against arbitrary and oppressive governmental action only. When freedom of the entrepeneur in respect to prices becomes the source of abuse in any enterprise, effective control must depend upon state price regulation. Under such circumstances,

[56] But two comments have been found approving *Tyson* v. *Banton*, both on the ground that theaters do not furnish indispensable service. See (1927) 13 *Ia. L. Rev.* 99; (1927) 13 *Va. L. Rev.* 554. The others are purely expository: see (1927) 7 *Boston U. L. Rev.* 208; (1927) 11 *Minn. L. Rev.* 656; 1 *St. John's L. Rev.* 212; or vehement in disapproval; see Kinkelstein, from *Munn* v. *Illinois* to *Tyson* v. *Banton* (1927) 27 *Col. L. Rev.* 769; Handler, *Constitutionality of Investigations by the Federal Trade Commission* (1928) 28 *Col. L. Rev.* 708, 711; Robinson, *The Public Utility Concept in American Law* (1928) 41 *Harv. L. Rev.* 277, 289-293; (1927) 40 *Harv. L. Rev.* 1009; (1927) 22 *Ill. L. Rev.* 192; (1927) 25 *Mich. L. Rev.* 880; (1927) 2 *U. Cinn. L. Rev.* 80; (1927) 75 *U. Pa. L. Rev.* 778; (1927) 36 *Yale L. J.* 985. Nobody loves *Ribnik* v. *McBride*. Nobody could. The following comments are purely expository: (1928) 8 *Boston U. L. Rev.* 292; (1929) 2 *Marq. L. Rev.* 114; (1929) 7 *Tex. L. Rev.* 307; (1929) 14 *St. Louis L. Rev.* 83. All others disapprove. See Hamilton, *Price Fixing by State Legislatures*, (1928) 3 *Temple L. Q.* 28; (1928) 17 *Calif. L. Rev.* 55; (1928) 14 *Corn. L. Q.* 75; (1928) 42 *Harv. L. Rev.* 126; (1929) 23 *Ill. L. Rev.* 611; (1928) 7 *N. C. L. Rev.* 81; (1928) 3 *St. John's L. Rev.* 104; (1929) 2 *So. Calif. L. Rev.* 277; (1929) 3 *U. Cinn. L. Rev.* 69; (1928) 38 *Yale L. J.* 225. *Williams* v. *Standard Oil Co.* is too recent to have evoked much comment. (1929) 38 *Yale L. J.* 674 approves on the ground that "it is not clear that the competitive system has failed to perform its regulatory function in the gasoline industry." (1929) 13 *Minn. L. Rev.* 378 disapproves. (1929) 17 *Calif. L. Rev.* 309 regards the case as "sound on authority" since the abuses present are not so serious as in *Ribnik* v. *McBride*, but deplores the existing state of authority; (1929) 3 *Temp. L. Q.* 321 approves on the basis of past decisions. (1929) 4 *Ala. L. J.* 214 is expository and mildly approving. (1929) 3 *St. John's L. Rev.* 244 disapproves. Two recent articles dealing with the case are Witham, *State Regulation of Business*, (1929) 7 *Tenn. L. Rev.* 177, chiefly expository and taking the view that the case does not for all time close the door against fixing the price of gasoline, Kefauver, *Legislative Price Control*, (1929) 7 *Tenn. L. Rev.* 193, deploring the court's failure to approach the question of constitutionality from the factual point of view.

that regulation is not unreasonable and hence is not under the due process ban. That has been the technique which the Supreme Court has applied to this problem in the past. It is the only method that affords adequate protection to the public interest in a dynamic, growing, expanding social order. To it we may be sure that the court will return eventually. Already a federal district court has applied it, undeterred by the new doctrine, in an opinion which deserves to be ranked with the able dissents of Mr. Justice Stone in the *Tyson* and the *Ribnik* cases.[57] The new method, sterile, barren, blighting, cannot survive.[58] It deserves our profession's most deadly phrase of disapproval, "it is not the law."

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[57] *Tagg Bros. & Moorhead* v. *U. S.* 29 F. (2d) 750 (D. Neb. 1928).

[58] See also on this point Haugan, *Vicissitudes of the Price Fixing Doctrine*, (1929) 2 *Dak. L. Rev.* 430, in which the new approach is criticized.