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IT IS an interesting and perhaps important coincidence that only a year previous to the famous decision in *Nebbia v. New York*[1] there appeared two volumes which together constitute an equally notable landmark in the development of economic doctrine, Professor Edward Chamberlin's *Theory of Monopolistic Competition* and Mrs. Joan Robinson's *Economics of Imperfect Competition.* While there is no evidence that the latter works influenced the outcome of the *Nebbia* case, the writer is of the opinion that these studies not only afford a rationale of that decision but also make desirable a re-examination of the concept of "businesses affected with a public interest" in the light of the historical development of that doctrine and parallel developments in business organization and economic theory. More specifically, it is believed that the theory of monopolistic competition[2] affords a rational basis, and one which the Supreme Court was willing to accept in the latest leading case, for a much broader but more realistic and useful public interest concept than has hitherto prevailed.

I

THE ECONOMIC BASIS

Consider, first, the economic basis for some sort of a "public interest" doctrine.[3] There would be no occasion for such a concept if (a) condi-

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[1] 291 U. S. 502, 54 S. Ct. 504 (1934).

[2] The term monopolistic competition is used broadly to refer to all imperfections in competition of a monopolistic sort. It covers both monopolistic competition in the strict sense, arising from product differentiation, and oligopoly.

[3] The term public interest is used in this paper in the sense of the phrase "affected with a public interest," and not in the sense of referring to matters legally of common concern.

tions permitted the functioning of an individualistic economic system according to its underlying assumptions, and (b) if we were ready to accept the results of such a system without addition or modification. The fundamental condition required for the satisfactory functioning of individualism is that competition should be pervasive enough to prevent any individual from overreaching or exploiting his fellows and at the same time should stimulate individuals to make the most effective use of the factors of production. For competition, in turn, to function in this way it would be necessary not only that monopolistic influences be absent but also that everyone should know and follow his interests and be able to protect them by bargaining on equal terms with his fellows. Since, obviously, these conditions have not been, and cannot be, fulfilled, and since we would not be prepared to accept without modification the results of individualism even if the conditions necessary for its satisfactory functioning were present, there is ground for "public interest" and governmental interference in the conduct of business.

It will be unnecessary for the purposes of this paper to repeat the well-known story of the sins of omission and commission of an individualistic economic system or to attempt to catalog the measures which have been passed in an effort to cope with these shortcomings.[4] It will suffice here to note that legislation of the latter sort falls into three general classes. There are, first, measures which are directed toward protecting the public interest in prices, costs, and profits, either by attempting to preserve competition, or by appropriate regulation of industries where a more or less complete acceptance of monopoly has been found expedient, or by regulation of industries where competition does not function in such a way as to protect the consumers' interest in the concerns mentioned.[5] It is primarily this aspect of public interest in business which will be considered in the following pages. Second, there is legislation designed to protect those who are ignorant or indifferent concerning their interests or who are unable to protect themselves by effective bargaining. Under this head would come laws such as those regulating the hours, wages, and working conditions of labor and laws attempting to protect investors from fraud and consumers from adul-

[4] See, for example, CLARK, THE SOCIAL CONTROL OF BUSINESS (1926), and DAVIS, CAPITALISM AND ITS CULTURE (1935).

[5] Competition may fail to function satisfactorily either because of non-monopolistic imperfections, such as lack of knowledge or immobility of the factors of production, or because of unrecognized monopoly elements in a supposedly competitive industry. Price control is also justifiable in connection with the rationing of necessaries of life in emergencies.

terated or unsanitary food. In a third category fall measures designed to modify the results of individualism in such matters, for example, as the distribution of wealth and income and the conservation of natural resources. Legislation of the second and third types has very important effects on prices, costs, and profits and represents a significant aspect of public interest in business, but we shall be only incidentally concerned with it in this paper.

It is recognized also that direct price control constitutes one method, among others, of dealing with the objectives toward which the latter two types of legislation are directed. There is no suggestion that public interest in price is limited to the problem of securing the proper relation between prices and money costs, which is the aspect of the matter treated in this paper. Price control is simply one method of dealing with features of existing society regarded as undesirable, and its use implies some philosophy concerning the kind of society which is sought to be attained.[6]

It is well known that historically, except for the work of certain mathematical economists on duopoly, a sharp distinction has been maintained in economic theory between the concepts of competition and monopoly until very recent years. It is probably fair to say that, with the exception just noted, competition and monopoly were regarded as qualitatively separate and distinct and, further, that the price system in general was regarded as conforming to this theoretical division. There was *either* competition *or* monopoly. It was found at an early date that certain public utilities were "natural monopolies," in the sense that, for reasons connected with the technological conditions and financial structure of those industries, competition worked badly for all concerned, so that the acceptance of regulated monopoly or public ownership was desirable. The characteristics of public utilities which led to the acceptance of this policy were regarded as exceptional and peculiar to that field; other industries were regarded as essentially competitive, except where one firm happened to control a very large part of the output in its field.

In the field of competitive industry it was believed that there would be "no monopoly profits, no underinvestment, no continuous underutilization of what was considered the ideal amount of investment or of any greater amount."[7] Competition was regarded as con-

[6] Rottschaefer, "The Field of Governmental Price Control," 35 YALE L. J. 438 (1926).

[7] Wallace, "Monopolistic Competition and Public Policy," 26 AM. ECON. REV. (Supp.) 77 at 78 (1936).

sistent with an indefinite multiplication of varieties of products and with the maintenance of producing units of the most advantageous size. The role of government in protecting the public interest in matters of price and profits, outside the regulation or ownership of public utilities, was limited to the policing of competitive methods under the anti-trust laws. Since monopoly was regarded as abnormal and exceptional in "competitive" industry, this type of restraint was regarded as more appropriate than price regulation. As Professor Hamilton puts it:

> "The system of control may be set down as three presumptions, which are to be taken in order: price is to be left to free enterprise; the anti-trust laws are to be used, if need be, to keep enterprise free; and, if free enterprise cannot be made to work, resort is to be had to formal price-fixing."[8]

The unrealistic character of this view of the economic organization is clearly brought out by an examination of the requisites of pure monopoly and pure competition respectively. Pure monopoly, as the antithesis of pure competition, would involve control over the supply of all economic goods whatsoever by the same firm or agency. Competition of substitutes is thus excluded by definition. Obviously, monopoly in this sense does not exist. Even when the term is employed in a less accurate but more usual sense to refer to control over the supply of a commodity for which there are no close substitutes, the number of examples which can be found outside the public utility field is small. At the opposite extreme, for pure competition to prevail no buyer or seller could appreciably affect any of the fundamental relations of the market—the relations between price, output, earnings, investment, employment and demand.[9] Very few examples of pure competition can be found, the nearest approximation being in staple-crop agriculture and the organized security exchanges, and not even here at all times.

Clearly the vast majority of all prices are determined under conditions intermediate between the foregoing extremes; that is, they reflect the joint operation of monopolistic and competitive influences, both of which are present in varying degrees in each case. Marshall's famous emphasis on the fact of continuous graduations and the absence of sharp distinctions in the analysis of value is particularly applicable

[8] Hamilton, "Affectation with Public Interest," 39 YALE L. J. 1089 at 1107 (1930).

[9] Wallace, "Monopolistic Competition and Public Policy," 26 AM. ECON. REV. (Supp.) 77 (1936).

in this connection.[10] It is this situation which is described by the theory of monopolistic competition. Monopolistic influences are present whenever a buyer or seller is able to affect any of the fundamental relations of the market referred to above. This result is possible when the number of buyers or sellers is small or when "any significant basis exists for distinguishing the goods (or services) of one seller from those of another."[11] Frequently these situations are combined in a given case, but either one separately is sufficient to introduce monopolistic influences. Professor Chamberlin states that monopolistic competition concerns itself "not only with the problem of an *individual* equilibrium (the ordinary theory of monopoly), but also with that of a *group* equilibrium (the adjustment of economic forces within a group of competing monopolists, ordinarily regarded merely as a group of competitors). In this it differs both from the theory of competition and from the theory of monopoly."[12]

The dominance of a condition of monopolistic competition complicates the analysis of the basis of public interest in business by introducing into the price system influences which from the broadest public point of view are both favorable and unfavorable. On the one hand, it may be argued, first, that within limits, advertising expenditure and product differentiation increase the satisfaction of wants above what it would be under the standardization required for the existence of pure competition. Second, in many industries the attainment of producing units of the most advantageous size would be impossible if the number were large enough to permit pure competition to prevail. Third, it is possible that the existence of a fairly small number of sizeable firms might mitigate the persistent tendency to create excess productive capacity in some industries composed of a large number of small, ill-formed enterprises.

On the other hand, there is, first and obviously, the existence of monopoly profits scattered throughout the economic organization. Related to this situation is the facilitation of monopolistic agreements as the number of competitors declines. Second, under certain circumstances monopolistic competition results in persistent overinvestment and excess capacity through the failure of price competition to func-

[10] MARSHALL, PRINCIPLES OF ECONOMICS, 8th ed., Book V passim (1920).

[11] CHAMBERLIN, THEORY OF MONOPOLISTIC COMPETITION 56 (1933), same page, 2d ed. (1936). In order to have pure competition it is necessary for the sellers themselves, as well as the products sold, to be "standardized"; that is, there must be no basis for preference on the part of the buyers for dealing with any particular seller.

[12] Ibid., 69.

tion. Costs and prices under such conditions would be above the competitive level although profits might not be in excess of a competitive rate. Third, product differentiation in many cases has been carried beyond the point which would prevail if consumers acted rationally and with full knowledge, with a resultant adverse effect on the national income. Fourth, the presence of monopoly elements makes possible various forms of price discrimination wherever markets can be separated. And finally, these influences permit firms to plan for the future and to have a policy with respect to such matters as price, investment, output, and marketing arrangements. In many cases adverse results follow, as for example where the policy is to maintain rigid prices, which are recognized as aggravating business fluctuations.

Lack of space precludes further elaboration of the implications of monopolistic competition. Two points, however, stand out as a result of the foregoing brief survey. First, the protection of the public interest in matters of prices, costs, and profits requires some type of supervision or control over virtually the entire price system. Second, the market relations characteristic of pure competition cannot in every case be used as a norm for such controls as may be set up over the existing system. It has been pointed out that, in certain respects and subject to appropriate controls, some elements of monopoly may be advantageous.[13]

The circumstances which have been responsible for the evolution of the price system toward a condition of monopolistic competition have been treated at length by others and require only passing notice here.[14] The prevalent view is that fundamentally this development is the result of technological change at an accelerating rate during the past three-quarters of a century in this country. The concomitant of this development has been a striking increase in the relative importance of fixed and specialized capital in the productive process and in the most efficient size of plant, and a sharp reduction in the number of firms in

[13] The matter has been summed up thus: "Where substantial monopolistic elements are operative, competition does not automatically produce the ideal quantitative market relations contemplated by the theory upon which public policy has been based. That theory implied a very limited amount of governmental control of economic activity. The theory of monopolistic competition suggests that state interference, economically defensible upon either view whenever the net addition to income is likely to be greater than the cost of state action, may be required in a large number of markets, if maximization of national income is to be approached; and at the same time issues a warning that the use of monopoly power to add to the total income of satisfactions must be distinguished from its use to subtract." Wallace, "Monopolistic Competition and Public Policy," 26 AM. ECON. REV. (Supp.) 77 at 82 (1936).

[14] See especially BURNS, THE DECLINE OF COMPETITION (1936).

many industries. Hence the growing vulnerability of firms in the face of price competition, and the incentive and opportunity which they have to turn competition into non-price channels. In more recent years the development of systematic advertising techniques has resulted in turning a predominant number of entrepreneurs in many lines of activity into competing monopolists, each with a differentiated product and a distinct clientele of customers.

Unquestionably, important contributing influences to the decline of competition have been our protective tariffs and the nature of our incorporation, patent, trademark, and anti-trust laws. The most important of these influences is probably the inadequacy and indifferent enforcement of our anti-trust laws and the judicial interpretation which has been given to them. In a recent interesting and valuable article, Professor Mason has shown that the anti-trust laws as interpreted by the Supreme Court have been directed toward preserving not pure competition but the freedom to compete.[15] Monopolizing, to the Court, appears to mean primarily the exclusion of present and potential competitors by bludgeoning tactics of all sorts; and not monopoly in the sense of control of the market. Probably the root of this practice of testing the existence of monopoly by the presence or absence of exclusive tactics is to be found in the fact that in the early development of the law in the Elizabethan period in England monopoly came to be identified with an exclusive grant by the crown to individuals for the conduct of particular businesses.[16]

In any event, the upshot has been the well-known tendency of the Court to allow huge enterprises exercising important monopolistic influence to stand where the absence of unfair tactics could be shown, while on a number of occasions it has invalidated trade association activities imposing much weaker restraints on competition on the ground that they violated the prohibitions on restraint of trade.[17] The extent

[15] Mason, "Monopoly in Law and Economics," 47 YALE L. J. 34 (1937). The Court's treatment of monopoly in the anti-trust cases affords an interesting parallel to the notions of monopoly implicit in the decisions in the price control cases discussed in this paper.

[16] FETTER, THE MASQUERADE OF MONOPOLY 335 (1931).

[17] The leading examples of monopolistic combinations upheld are United States v. United States Steel Corp., 251 U. S. 417, 40 S. Ct. 293 (1920), and United States v. International Harvester Co., 274 U. S. 698, 47 S. Ct. 748 (1927). For trade association activities invalidated, see American Column and Lumber Co. v. United States, 257 U. S. 377, 42 S. Ct. 114 (1921); United States v. American Linseed Oil Co., 262 U. S. 371, 43 S. Ct. 607 (1923); United States v. Trenton Potteries, 273 U. S. 392, 47 S. Ct. 377 (1927); and Sugar Institute v. United States, 297 U. S. 553, 56 S. Ct. 629 (1936). For such activities upheld, see Maple Flooring Manu-

to which more adequate and more strictly enforced anti-trust laws, coupled with judicial adherence to the economic conception of monopoly, could have arrested the decline of competition in the past, and the extent to which this would now be possible, are highly controversial issues upon which it is unnecessary to express an opinion here.[18] This paper is concerned with the basis of public interest in business and not with the appropriateness or feasibility of particular methods of control.

II

THE LEGAL ASPECTS

The thesis of the foregoing pages has been that among the circumstances which give rise to public interest in business is the failure of competition to keep profits at a minimum level or to result in the production of the optimum variety of products or to keep expenses of production at the lowest possible point. It has been argued, further, that the older sharp qualitative distinction between monopoly and competition was unreal, and that by reason of the dominance of monopolistic competition, and by reason also of the limitations of even pure competition, there is public interest of some sort or in some degree in virtually every part of the price structure.[19] It remains to inquire into the legal treatment of this aspect of public interest as reflected in the pertinent decisions of the Supreme Court,[20] and to compare the legal viewpoint on the problem with the economic interpretation developed in the foregoing pages.

All discussion of the legal treatment of this topic must begin with

facturers Assn. v. United States, 268 U. S. 563, 45 S. Ct. 578, 592 (1925); Cement Manufacturers Protective Assn. v. United States, 268 U. S. 588, 45 S. Ct. 586, 592 (1925); Appalachian Coals, Inc. v. United States, 288 U. S. 344, 53 S. Ct. 471 (1933).

[18] For interesting suggestions concerning the desirability of changes in the law of trademarks, see CHAMBERLIN, THEORY OF MONOPOLISTIC COMPETITION, Appendix E (1933), 2d ed., 1936. For arguments stressing the possibilities of the anti-trust laws, see FETTER, THE MASQUERADE OF MONOPOLY (1931), and Fetter, "Planning for Totalitarian Monopoly," 45 J. POL. ECON. 95 (1937).

[19] It should be recalled that there are non-monopolistic imperfections in competition, the persistence of which may justify governmental interference.

[20] See Finkelstein, "From Munn v. Illinois to Tyson v. Banton: A Study in the Judicial Process," 27 COL. L. REV. 769 (1927); Robinson, "The Public Utility Concept in American Law," 41 HARV. L. REV. 277 (1928); Robinson, "The Public Utility: A Problem in Social Engineering," 14 CORN. L. Q. 1 (1928); McAllister, "Lord Hale and Business Affected with a Public Interest," 43 HARV. L. REV. 759 (1930); Hamilton, "Affectation with Public Interest," 39 YALE L. J. 1089 (1930); Hale, "The Constitution and the Price System: Some Reflections on Nebbia v. New York," 34 COL. L. REV. 401 (1934). See also TUGWELL, THE ECONOMIC BASIS OF PUBLIC INTEREST (1922).

the famous case of *Munn v. Illinois*,[21] decided in 1877. The date is significant. It is at the height of the industrial revolution in this country, with its accompanying decline of competition. The case in question was one of the so-called Granger cases in which there was tested legislation designed to protect the public from the monopolistic rate policies of the railways,[22] the first industry to show those characteristics which were in time to become dominant in many lines of activity.

In the *Munn* case the Court upheld an Illinois law fixing maximum charges for the storage of grain in warehouses in cities of not less than one hundred thousand inhabitants. Munn and Scott owned a grain elevator in Chicago. It appeared that in 1874 there were in that city fourteen elevators owned by about thirty persons but controlled by nine firms, and that storage charges were fixed annually by agreement. This situation, coupled with the fact that it was advantageous to send most of the grain moving from the west to the seaboard through Chicago, led the Court to justify the regulation on the ground that the business was of great importance to the people of Illinois and to the country generally and that it was a "virtual monopoly."[23] There is some difference of opinion as to what the Court had in mind in adding this last phrase. It has usually been regarded as an essential part of the argument justifying price regulation. At least one commentator, however, contends that such is not the case, but that it was introduced merely to emphasize the magnitude and importance of the business;[24] and this view was also expressed by Justice Roberts in the *Nebbia* case.[25] A reasonable interpretation would seem to be that the Court was puzzled by a situation requiring public control of price because of the ineffectiveness of competitive restraints, yet not conforming to traditional notions of monopoly; but was able to sidestep the difficulty by simply accepting the regulation as a proper exercise of the police power. In modern economic theory the situation would be described as a case of oligopoly,[26] which would be sufficient occasion for some type of intervention or control in the public interest.

[21] 94 U. S. 113 (1877).

[22] Chicago, B. & Q. R. R. v. Iowa, 94 U. S. 155 (1877); Peik v. Chicago & N. W. Ry., 94 U. S. 164 (1877).

[23] Munn v. Illinois, 94 U. S. 113 at 131 (1877).

[24] McAllister, "Lord Hale and Business Affected with a Public Interest," 43 HARV. L. REV. 759 at 769-770 (1930).

[25] Nebbia v. New York, 291 U. S. 502 at 532, 54 S. Ct. 504 (1934).

[26] It is likely that an element of monopolistic competition based on differentiation of the sellers was also present.

Legally, however, interest centers in other aspects of the case. Counsel for the elevators had uncovered a treatise written by Lord Hale about 1670, entitled *De Portibus Maris,* in which there first appeared the now famous phrase "affected with a public interest." After stating that a man for his own private advantage may set up a wharf or crane and take what rates for wharfage, cranage, etc., as he and his customers could agree upon, Lord Hale continued as follows:

> "If the King or subject have a publick wharf, unto which all persons that come to that port must come and unlade or lade their goods as for the purpose, because they are the wharfs only licensed by the queen, according to the statute of I, El. cap. 11. or because there is no other wharf in that port, as it may fall out where a port is newly erected; in that case there cannot be taken arbitrary and excessive duties for cranage, wharfage, pesage, etc., neither can they be inhanced to an immoderate rate, but the duties must be reasonable and moderate, though settled by the king's license or charter. For now the wharf and crane and other conveniences are affected with a publick interest, and they cease to be *juris privati* only; as if a man set out a street in new building on his own land, it is now no longer bare private interest, but it is affected with a publick interest."[27]

Counsel for the elevators invoked the protection of the due process clause; insisted that the clause was to be interpreted in the light of the common law; cited the foregoing passage as constituting a limitation on legislative action controlling prices; and denied that grain elevators came within the class of businesses affected with a public interest, since they were not mentioned in the common law among the industries subjected to special regulation, such as carriers, innkeepers, wharfingers, ferrymen, and millers. It is strange that Lord Hale's phrase should have been cited as establishing a precedent for narrow limitation of the exercise of price control, and that the Court in later cases should have adopted a similar view, when it is remembered that in seventeenth century England all business was subject to control in matters of price and otherwise and that down to the present day the English Parliament has been free to decide how far it will go in the control of industry.

Chief Justice Waite, speaking for a majority of the Court, accepted the Illinois legislation as a valid exercise of the police power, espe-

[27] HARGRAVE, A COLLECTION OF TRACTS RELATIVE TO THE LAW OF ENGLAND 77-78 (1787), quoted by McAllister, "Lord Hale and Business Affected with a Public Interest," 43 HARV. L. REV. 759 at 764 (1930).

cially in view of the monopolistic influences present in the business regulated, and made no distinction between price control and other forms of regulation. So far as the argument based on Lord Hale's phrase was concerned, it would have been easy for the Court, in the light of the views concerning the police power which were held by the majority, to have shown that the test urged by counsel was not a necessary ingredient in due process. But by way of dictum the Chief Justice turned the tables on counsel for the plaintiffs in error by using the idea of affectation with a public interest as the equivalent of the police power. In order to accomplish this result he generalized on Lord Hale's statement; whereas the latter, in the passage quoted, had referred to the *wharf and crane* as affected with a public interest the Chief Justice said that "when *private property* is 'affected with a public interest, it ceases to be *juris privati only*.'"[28] He then continued:

> "Property does become clothed with a public interest when used in a manner to make it of public consequence, and affect the community at large. When, therefore, one devoted his property to a use in which the public has an interest, he, in effect, grants to the public an interest in that use, and must submit to be controlled by the public for the common good, to the extent of the interest he has thus created. He may withdraw his grant by discontinuing the use; but so long as he maintains the use, he must submit to the control."[29]

The decision in *Munn v. Illinois*, apart from this dictum, could not have been used as a precedent for the imposition of special limitations upon price control. But curiously enough, the actual holding in the case was neglected in several important later decisions dealing with this problem, and the foregoing dictum was used as the foundation of a constitutional principle serving to restrict narrowly the field of price regulation. Such a result was clearly out of harmony with the spirit of the writings of both Lord Hale and Chief Justice Waite.

The next important case is *Budd v. New York*,[30] decided in 1892. Here a New York law regulating the charges of grain elevators in Buffalo and New York City, similar to the Illinois measure, was upheld on the authority of the *Munn* case. No discussion of this decision

[28] Munn v. Illinois, 94 U. S. 113 at 126 (1877). Italics mine. See also McAllister, "Lord Hale and Business Affected with a Public Interest," 43 HARV. L. REV. 759 at 764 (1930).

[29] 94 U. S. 113 at 126.

[30] 143 U. S. 517, 12 S. Ct. 468 (1892).

from the economic side is required, since the facts were essentially similar to those of the preceding case.[31]

Two years later in *Brass v. North Dakota*,[32] the Court, by a five to four decision, upheld North Dakota legislation fixing charges for the storage of grain where the circumstances were quite different from those prevailing in Illinois and New York. The regulation applied to about 600 elevators scattered throughout the state and owned by 125 different persons. There were two other elevators in the village of Grand Harbor where Brass conducted his business. It was represented that these elevators ranged from 5,000 to 50,000 bushels capacity and cost from $500 to $5,000; and that land for the erection of elevators could be secured in bountiful quantities at from $1.25 to $40 per acre. In upholding the regulation, the Court ignored the question of monopoly and made a generous concession to legislative discretion in determining the need for the measure, in the following words:

> "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, whether carried on by individuals or associations, in cities of one size and in 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. It may be conceded that that would not be wise legislation which provided the same regulations in every case, and overlooked differences in the facts that called for regulations. But as we have no right to revise the wisdom or expediency of the law in question, so we would not be justified in imputing an improper exercise of discretion to the legislature of North Dakota."[33]

That such reasoning is open to both legal and economic objections may be readily granted, but it does not follow, as some commentators appear to assert,[34] that the *result* of the decision was unfortunate or that it was necessarily inconsistent with the *Munn* and *Budd* cases.

[31] Justice Brewer, dissenting, distinguished between a monopoly of law, created by a grant of an exclusive privilege, and a monopoly of fact, created by individuals supplying facilities for business which no one else had. The former, being a creature of law, could be regulated by law; the latter, being a creature of private enterprise, could be broken by private enterprise, and therefore did not need to be regulated by law. See McAllister, "Lord Hale and Business Affected with a Public Interest," 43 HARV. L. REV. 759 at 771 (1930).

[32] 153 U. S. 391, 14 S. Ct. 857 (1894).

[33] Ibid., 153 U. S. 391 at 403.

[34] McAllister, "Lord Hale and Business Affected with a Public Interest," 43 HARV. L. REV. 759 at 771 (1930); KEEZER and MAY, THE PUBLIC CONTROL OF BUSINESS 107 (1930); CHASE, GOVERNMENT IN BUSINESS 124 (1935).

Although the possible degree of monopolistic influence present in the case of the country elevators in North Dakota was obviously much less than that of the elevators in the great grain centers of New York and Illinois, it is quite possible that sufficient monopolistic influences were present to justify legislative action, and the Court could have upheld the measure on that ground.

There were only three elevators in the village where Brass did business and the farmers of the surrounding region were largely compelled to deal with this small number of sellers, since without the benefit of motor trucks it was impracticable for them to haul their grain to more distant points. Moreover, it appeared that the elevators throughout the state had charged uniform rates for storage for thirteen years previous to the litigation in question. Although the sum required for entering the elevator business seems small, it may have represented an appreciable investment in the North Dakota of 1894, and in any event freedom of entry into a business is not a guarantee of the maintenance of pure competition. A circumstance mitigating possible monopolistic influences was the fact that about fifty percent of the grain produced in the state in 1891 was shipped directly to Minneapolis and Duluth without passing through the local elevators.

It might be argued that the minority in the *Brass* case who dissented on the ground that there was no monopoly justifying regulation as in the preceding cases, and the commentators who regard the case as inconsistent with the earlier decisions, were confused by the older notion that business must be either monopolistic (or "virtually" so) or competitive. The same might be said of the reasoning, as distinct from the conclusion, of the majority. It is likely that the interpretation given above of the reference to virtual monopoly in the *Munn* case is applicable in this connection also.

In *German Alliance Insurance Co. v. Lewis*,[35] decided in 1914, the Court, in a five to three decision, upheld Kansas legislation controlling rates charged for fire insurance. This decision has been regarded as considerably broadening the scope of price regulation, and it is true that the opinion disentangles public use from public utilities, makes the concern of the business to the public the chief consideration, and is in harmony with the spirit of the decision in the *Munn* case and with earlier common-law principles of trade regulation.[36] Yet the existence of monopolistic competition constituted a factor common

[35] 233 U. S. 389, 34 S. Ct. 612 (1914).

[36] Hamilton, "Affectation with Public Interest," 39 YALE L. J. 1089 at 1099 (1930).

to this and the three earlier decisions and would have been sufficient to justify economically the Court's validation of the legislation involved in each of the cases. While Justice McKenna, speaking for the majority, referred to the *Brass* case as removing the necessity for a finding of monopoly in order to justify price regulation, he pointed out later in the course of his opinion that "the price of insurance is not fixed over the counters of the companies by what Adam Smith calls the higgling of the market, but formed in the councils of the underwriters, promulgated in schedules of practically controlling constancy which the applicant for insurance is powerless to oppose and which, therefore, has led to the assertion that the business of insurance is of monopolistic character and that 'it is illusory to speak of a liberty of contract.'"[37] As additional justification for regarding the insurance business as affected with a public interest, emphasis was laid on the fact that fire insurance was "practically a necessity to business activity and enterprise"[38] and on the importance of maintaining the solvency of companies which stand in a fiduciary relation to large numbers of people. The Court was influenced also by the fact that lawmaking bodies almost universally regarded the insurance business as justifying special regulation.

The next important case dealing with price control was *Block v. Hirsh*,[39] decided in 1921, in which the emergency rent law of the District of Columbia was upheld. An act of 1919 created a commission with power, after notice and hearing, to fix reasonable rentals and other terms of leases of rental property in the District. Tenants could continue occupancy of premises after the expiration of their leases if they paid the rentals and conformed to the terms of those leases, with such modifications of the terms as the commission might prescribe. Landlords could secure their premises for bona fide occupancy by their own families on thirty days' notice. The law was to run for two years. The announced reason for the legislation was the existence of an emergency created by the great influx of people into Washington during the war, which resulted in a housing shortage which was dangerous to health and which interfered with the normal conduct of governmental functions.

[37] German Alliance Ins. Co. v. Lewis, 233 U. S. 389 at 416-417, 34 S. Ct. 612 (1914).

[38] Ibid., 233 U. S. at 414.

[39] 256 U. S. 135, 41 S. Ct. 458 (1921). See also Marcus Brown Holding Co. v. Feldman, 256 U. S. 170, 41 S. Ct. 465 (1921), upholding a similar law applicable in New York City.

Justice Holmes, delivering the opinion of the majority in a five to four decision, accepted the legislative declaration that there existed an acute housing shortage with attendant injurious consequences, and held that under these circumstances housing, as a necessary of life, was affected with a public interest and rentals could be fixed by law, while under ordinary conditions such would not be the case. He emphasized that the legislation protected the landlords in the receipt of reasonable profits and merely prevented them from profiting by the emergency created through the wartime influx of population into Washington. He also stated that "The space in Washington is necessarily monopolized in comparatively few hands."[40] It does not appear what Justice Holmes had in mind by this statement. Such monopoly elements as are present in the urban real estate market arise from spatial differentiation in the use of the property sold or leased (based upon the preference of buyers for a given commodity or service supplied at one location rather than another) and not from the existence of a small number of sellers. This situation has not been regarded as calling for price control and was not the occasion for the District of Columbia legislation. The occasion for that legislation was the need for rationing a necessary of life under conditions of acute and abnormal scarcity. Preventing landlords from reaping the full gains which they would have secured in the absence of control may be justified, economically and socially, on much the same grounds as the heavy taxation (or even confiscation) of excess war-time profits, windfall gains, or unearned increments.

The foregoing decision represented the high-water mark in the extension of price control for a period of thirteen years. Between June, 1921 and January, 1923, four new justices were appointed to the Court—Taft, Sutherland, Butler, and Sanford. The changed personnel of the Court was soon reflected in a series of important decisions invalidating legislative efforts at price regulation. The case of *Charles Wolff Packing Co. v. Court of Industrial Relations*,[41] decided in 1923, while not involving price regulation, is important because of dicta which presaged the approach which the Court was to take in the subsequent decisions. The Court unanimously invalidated a Kansas statute which declared that industries producing food, clothing, fuel and public utility services were affected with a public interest, and provided for compulsory arbitration and the determination of wages and other terms of employment in those industries by an Industrial Court.

[40] Block v. Hirsh, 256 U. S. 135 at 156, 41 S. Ct. 458 (1921).
[41] 262 U. S. 522, 43 S. Ct. 630 (1923).

Chief Justice Taft, speaking for the Court, stated that even if the industries mentioned be regarded as coming within the class of business affected with a public interest, the proposed regulation would be invalid. Nevertheless, by way of dictum he undertook a classification of businesses of the latter sort into three groups:

> "(1) Those which are carried on under the authority of a public grant of privileges . . . [such as] railroads, other common carriers, and public utilities.
>
> "(2) Certain occupations regarded as exceptional, the public interest attaching to which . . . has survived . . . [such as] keepers of inns, cabs, and grist mills.
>
> "(3) Businesses which though not public in their inception may be fairly said to have arisen to be such and have become subject in consequence to some government regulation. They have come to hold a peculiar relation to the public that this is superimposed upon them."[42]

This statement is not helpful because it obviously poses merely a series of questions; why are certain industries carried on under a public grant of privileges, why has public interest in some businesses survived from early days, when does a business not originally affected with a public interest become so? The Chief Justice suggested a partial answer to the last question by saying that in most cases "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."[43] But it is clear from subsequent statements that he was thinking in terms of the older notion of a sharp division of industries into monopolistic and competitive, with the implication that in "competitive" industries—by far the majority—price regulation would be unnecessary and an unwarranted restriction on property rights. For example, he says:

> "But never has regulation of food preparation been extended to fixing wages or the prices to the public, as in the cases cited above where fear of monopoly prompted, and was held to justify, regulation of rates. There is no monopoly in the preparation of foods. The prices charged by plaintiff in error, are, it is conceded, fixed by competition throughout the country at large."[44]

The point of view implied in the foregoing prevailed in the next four opinions of the Court. In *Tyson v. Banton*,[45] decided in 1927, the

[42] Ibid., 262 U. S. at 535.
[43] Ibid., 262 U. S. at 538.
[44] Ibid., 262 U. S. at 538.
[45] 273 U. S. 418, 47 S. Ct. 426 (1927).

Court invalidated a New York law which forbade the resale of theatre tickets at prices in excess of fifty cents in advance of the prices printed on the face of the tickets. Justice Sutherland, speaking for a majority of five, held that "the ticket broker is a mere appendage of the theatre" and that "the real inquiry is whether every public exhibition, game, contest or performance, to which an admission charge is made, is clothed with a public interest, so as to authorize a law-making body to fix the maximum amount of charge, which its patrons may be required to pay."[46] After reviewing the leading cases he concluded that "a theatre is a private enterprise," differing widely from grain elevators and insurance companies and "in no legal sense a public utility"; that "there is no legislative power to fix the prices of provisions or clothing or the rental charges for houses, in the absence of some controlling emergency"; and that he was "unable to perceive any dissimilarities of such quality or degree as to justify a different rule in respect of amusements and entertainments."[47] Relying on Lord Hale's statement as setting forth the permissible limits of price control, he stated that the rule therein contained was "confined to conveniences made public because the privilege of maintaining them has been *granted* by government or because there has arisen what may be termed a *constructive grant* of the use of the public."[48]

Of course the initial statement that theatres were a private business begs the question, and it is significant that Justice Sutherland did not refer to the monopolistic elements justifying the decisions in the *Munn* and *German Alliance* cases; nor did he explain when there was a "constructive grant of the use to the public." Moreover, by reason of the manner in which he framed the issue in the case he was able to dismiss the monopolistic control exercised by the ticket brokers. His argument was that although such evils as fraud, extortion, and the like, existed in the theatre business as in others, they could not be met by legislation which "strikes down those essential rights of private property" protected by the Constitution against "undue governmental interference."[49] Here there reappears the idea expressed by Chief Justice Taft in the *Wolff* case; however else "private" business might be regulated, it could not be subjected to price regulation, inasmuch as "competition" (presumably kept free by the application of the anti-trust laws) there protected both public and private interests in the matter of price, and the restriction of property rights represented by direct price control

[46] Ibid., 273 U. S. at 429.
[47] Ibid., 273 U. S. at 439-440.
[48] Ibid., 273 U. S. at 439. Italics in original.
[49] Ibid., 273 U. S. at 442-443.

would be unwarranted. The logic is clear, granted the correctness of the major premise concerning the efficacy of competition.

The minority contended that the real issue in the case was not whether the price of admission to theatres could be regulated but whether the fees charged by the ticket brokers could be limited. Justice Holmes expressed the opinion that "the notion that a business is clothed with a public interest and has been devoted to the public use is little more than a fiction intended to beautify what is disagreeable to the sufferers"; and that, subject to compensation where compensation is due, the legislature may forbid or restrict any business when it has a sufficient force of public opinion behind it."[50] Justice Stone felt that, "The phrase 'business affected with a public interest' . . . tends in use to become only a convenient expression for describing those businesses, regulation of which has been permitted in the past."[51] He pointed out that the statutes involved in both the *Munn* case and the case at bar were "designed in part to protect a large class of customers from exorbitant prices made possible by the strategic position of a group of intermediaries in the distribution of a product from producer to consumer."[52] He declared that an examination of the cases in which price regulation had been upheld would 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."[53] This viewpoint is clearly consistent with the economic interpretation of public interest developed in this paper.

The same clash of opinions appeared even more sharply in *Ribnik v. McBride*,[54] decided the following year. By a six to three decision the Court invalidated the fee-fixing provision of the New Jersey employment agency law. Justice Sutherland, speaking for the majority, reiterated his argument in the previous decision. Citing the *Wolff* and *Tyson* cases, he declared 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 . . . the fixing of prices for food or clothing, of house rental or of wages to be paid, whether minimum or maximum, is beyond the legislative power. And we perceive no reason for applying a

[50] Ibid., 273 U. S. at 446.
[51] Ibid., 273 U. S. at 451.
[52] Ibid., 273 U. S. at 449-450.
[53] Ibid., 273 U. S. at 451-452.
[54] 277 U. S. 350, 48 S. Ct. 545 (1928).

different rule in the case of legislation controlling prices to be paid for services rendered in securing a place for an employee or an employee for a place." [55]

Justice Stone, dissenting, summed up the case for the measure in question by referring to the vast amount of evidence which showed that the agencies charged extortionate and discriminatory fees, were guilty of fee-splitting, raised their fees in times of widespread unemployment "out of all proportion to the reasonable value of their services," [56] and charged employees but not employers for a service rendered to both. Further, he stated that the agencies dealt with "a necessitous class, the members of which . . . are not free to move from place to place, and are often under exceptional economic compulsion to accept such terms as the agencies offer. We are not judicially ignorant of what all human experience teaches, that those so situated are peculiarly the prey of the unscrupulous and designing." [57] On the basis of these facts he concluded that "Certainly it would be difficult to show a greater necessity for price regulation." [58] Once more Justice Stone expressed a doctrine of public interest consistent with economic realities. In a notable passage he expressed his dissent from the limitation imposed upon the police power by the interpretation placed upon the public interest doctrine by the majority:

"I cannot accept as valid the distinction on which the opinion of the majority seems to me necessarily to depend, that granted constitutional power to regulate there is any controlling difference between reasonable regulation of price, if appropriate to the evil to be remedied, and other forms of appropriate regulation which curtail liberty of contract or the use and enjoyment of property. Obviously, even in the case of business affected with a public interest, other control than price regulation may be appropriate, and price regulation may be so inappropriate as to be arbitrary or unreasonable, and hence unconstitutional. *To me it seems equally obvious that the Constitution does not require us to hold that a business, subject to every other form of reasonable regulation, is immune from the requirement of reasonable prices, where that requirement is the only remedy appropriate to the evils encountered.* In this respect I can see no difference between a reasonable regulation of price and a reasonable regulation of the use of property, which affects its price or economic return. The

[55] Ibid., 277 U. S. at 357.
[56] Ibid., 277 U. S. at 368.
[57] Ibid., 277 U. S. at 361.
[58] Ibid., 277 U. S. at 373.

privilege of contract and the free use of property are as seriously cut down in the one case as in the other."[59]

In *Williams v. Standard Oil Co.*,[60] decided in 1929, the Court by an eight to one decision invalidated a Tennessee statute which gave the state commissioner of finance and taxation power to determine reasonable wholesale and retail prices for gasoline and to enforce them through a system of permits which distributors were required to secure. Justice Sutherland held that gasoline was "one of the ordinary commodities of trade"[61] the production and sale of which was a "private" business and therefore under the rule of the preceding cases not properly subject to price regulation. He emphasized further that the record before the lower court had failed to show the existence of monopoly. According to the economic interpretation of public interest advanced in this paper, based on the prevalence of a condition of monopolistic competition, one might imagine that the Tennessee statute was an appropriate measure designed to meet material evils, but doubt is thrown on the validity of such an interpretation by the fact that Justices Brandeis and Stone stated that they concurred in the result of the decision, though presumably not in its reasoning.[62]

The next important case was *New State Ice Co. v. Liebmann*,[63] decided in 1932. An Oklahoma law of 1908 gave the corporation commission power to regulate the rates, practices and service of ice com-

[59] Ibid., 277 U. S. at 373-374. Italics mine. In Tagg Brothers & Moorhead v. United States, 280 U. S. 420, 50 S. Ct. 220 (1930), the Court rejected the contention that personal services were constitutionally immune from price regulation and upheld the regulation of charges made by stockyard brokers.

[60] 278 U. S. 235, 49 S. Ct. 115 (1929).

[61] Ibid., 278 U. S. at 240.

[62] The rebating and discrimination provisions of the Tennessee law were dismissed on the authority of Fairmont Creamery Co. v. Minnesota, 274 U. S. 1, 47 S. Ct. 506 (1927). In this decision the Court invalidated a Minnesota law prohibiting local price discrimination irrespective of any motive to monopolize or to destroy competitors. In the case in question a centralized creamery in Sioux City, Iowa, had been purchasing milk, cream and butter fat at various villages in Minnesota and had been accustomed to paying higher prices at points where the local creameries (chiefly cooperatives) existed than at points where no such competition existed. The Court held that the law had "no reasonable relation to the anticipated evil—high bidding by some with purpose to monopolize or destroy competition." 274 U. S. at 9. It was admitted that the discrimination in question "may tend to monopoly," but it was held that in this particular case it was "not shown now to be accompanied by evil results as ordinary incidents," 274 U. S. at 9. The economist would presumably treat this as a case of monopsony and would regard the Minnesota law as reasonably appropriate in the public interest, as a preventive measure or otherwise.

[63] 285 U. S. 262, 52 S. Ct. 371 (1932).

panies where conditions of "virtual monopoly" could be shown. In 1925 the requirement of a finding of virtual monopoly was dropped, and the commission was authorized to compel adequate service by ice companies as in the case of public utilities and to require as a condition of entry into the ice business a license equivalent to a certificate of convenience and necessity. It was the constitutionality of this latter power which was at issue in the present case. Justice Sutherland, speaking for a majority of five, held that the requirement of the license was unconstitutional. The reasoning with which he supported this conclusion was essentially the same as in his opinions in the three preceding cases. The ice business, he held, was "an ordinary business" not a "paramount industry, upon which the prosperity of the entire state in large measure depends. It is a business as essentially private in its nature as the business of the grocer, the dairyman, the butcher, the baker, the shoemaker, or the tailor," and therefore under the rule of the preceding cases not properly subject to price regulation.[64]

To Justice Sutherland there was nothing "peculiar in the business here in question which distinguishes it from ordinary manufacture and production"; there was no "natural monopoly" or grant of public privileges, no question of protecting natural resources, and "nothing in the product that we can perceive on which to rest a distinction, in respect of this attempted control, from other products in common use which enter into free competition." [65] The possibility of using mechanical refrigeration in the home appeared to him sufficient to guarantee the absence of monopoly prices for ice, and in any case the statute in question tended to promote monopoly rather than competition. Here there appears once more the notion of "private" business, in which competition served as a sufficient safeguard of the public interest in matters of price and profit, and where, therefore, price control would be an unwarranted restriction on property rights.

Justice Brandeis, dissenting, explained that the occasion for certificates of convenience and necessity was the public interest in preventing the waste involved in unnecessary duplication of facilities; that in business where interest and depreciation charges constitute a large element in the cost of production "cost is usually dependent, among other things, upon volume; and division of possible patronage among

[64] Ibid., 285 U. S. at 277. Compare Frost v. Corporation Commission, 278 U. S. 515, 49 S. Ct. 235 (1929). While this case turned on another point, the Court stated that it was conceded that the operation of cotton gins was a public business and that the state could properly require a certificate of convenience and necessity as a condition of entering it. Cotton gins have been held to be "public," by analogy to grist mills.

[65] New State Ice Co. v. Liebmann, 285 U. S. 262 at 279, 52 S. Ct. 371 (1932).

competing concerns may so raise the unit cost of operation as to make it impossible to provide adequate service at reasonable rates"; and that, therefore, "under certain circumstances free competition might be harmful to the community and that, when it was so, absolute freedom to enter the business of one's choice should be denied."[66] Next he stated the case for the use of this device in the situation which gave rise to the case at bar. The business was one which "lends itself peculiarly to monopoly,"[67] since it is conducted in local plants serving a limited market area and ice manufactured at a distance cannot compete with a plant on the ground; and further:

> "In small towns and rural communities the duplication of plants, and in larger communities the duplication of delivery service, is wasteful and ultimately burdensome to consumers. At the same time the relative ease and cheapness with which an ice plant may be constructed exposes the industry to destructive and frequently ruinous competition. Competition in the industry tends to be destructive because ice plants have a determinate capacity, and inflexible fixed charges and operating costs, and because in a market of limited area the volume of sales is not readily expanded. Thus, the erection of a new plant in a locality already adequately served often causes managers to go to extremes in cutting prices in order to secure business. Trade journals and reports of association meetings of ice manufacturers bear ample witness to the hostility of the industry to such competition, and to its unremitting efforts, through trade associations, informal agreements, combination of delivery systems, and in particular through the consolidation of plants, to protect markets and prices against competition of any character."[68]

Justice Brandeis felt that in the showing of the foregoing facts there was need for public control of the ice business, and that the Oklahoma law "bore a substantial relation to the evils found to exist" and was therefore consistent with due process of law.[69] He reiterated the thought of Justice Stone in his dissenting opinion in the *Ribnik* case that "so far as concerns the power to regulate, there is no difference in essence, between a business called private and one called a public utility or said to be 'affected with a public interest' "; that the police power applies in the case of both; that the limitation imposed by the due process clause requires only "that regulation shall be not unreasonable, arbitrary, or capricious; and that the means of regulation selected

[66] Ibid., 285 U. S. at 282.
[67] Ibid., 285 U. S. at 291.
[68] Ibid., 285 U. S. at 292-293.
[69] Ibid., 285 U. S. at 300.

shall have a real or substantial relation to the object sought to be attained."[70] The climax of his argument is his assertion that "the notion of a distinct category of business 'affected with a public interest,' employing property 'devoted to a public use,' rests upon historical error"; and that in his opinion "the true principle is that the State's power extends to every regulation of any business reasonably required and appropriate for the public protection."[71]

On the economic side the case is interesting because the facts given by Justice Brandeis concerning the workings of the ice industry reveal with unusual clarity a condition of monopolistic competition and consequently afford an opportunity to the investigator to determine the exact nature of the Court's notions concerning the interrelations of competition and monopoly in the realm of business. The majority, as already indicated, seemingly held the traditional notion that business must be *either* monopolistic *or* competitive, with by far the bulk of all business falling in the latter category; whence their attitude toward price control logically followed. Justice Brandeis, on the other hand, was aware that "competition" in "private" business does not necessarily protect the public interest in matters of price and profit; that competition may be "destructive" and "excessive," justifying such measures as the one involved in the present case; and that there were elements of monopoly present alongside the "destructive competition" to which the ice business was subject. Yet he did not recognize that, apart from imperfections of a non-monopolistic sort, the "wastes of competition" which the Oklahoma statute was designed to prevent could never persist under pure competition, and that they were the "wastes of monopoly—of the monopoly elements in monopolistic competition."[72]

We come, finally, to the famous case of *Nebbia v. New York*,[73] decided in 1934, a case which reversed the trend of the foregoing decisions dealing with price control, and which in terms of its economic implications is entitled to rank with the great cases in American constitutional law. By a five to four decision the Court upheld the right of the Milk Control Board, set up by the New York Agriculture and Markets Law of 1933, to set minimum retail prices for milk. The contention was squarely made that the milk business was not a public

[70] Ibid., 285 U. S. at 302.

[71] Ibid., 285 U. S. at 302-303.

[72] CHAMBERLIN, THEORY OF MONOPOLISTIC COMPETITION 109 (1933), same page, 2d ed. (1936). These comments apply also to the dissenting opinions of Justice Stone in the Tyson and Ribnik cases.

[73] 291 U. S. 502, 54 S. Ct. 504 (1934).

utility and did not have the characteristics of those businesses which had previously been regarded by the Court as affected with a public interest; that, on the contrary, it was a "private" business and, therefore, while subject to regulation in the public interest, could not constitutionally be made subject to price control.

Justice Roberts, speaking for the majority, after reviewing the economic problems and difficulties of the dairy industry, dismissed the foregoing contention by pointing out that if, as conceded, the industry was subject to regulation in the public interest, he could find no constitutional principle barring the state "from correcting existing maladjustments by legislation touching prices."[74] He declared also that there was "no closed class or category of businesses affected with a public interest";[75] that that phrase meant "no more than that an industry, for adequate reason, is subject to control for the public good";[76] and that the phrase was the "equivalent of 'subject to the exercise of the police power'; and it is plain that nothing more was intended by the expression."[77] The states, in his view, were free to adopt whatever economic policy might reasonably be deemed to promote public welfare, and the courts could not properly interfere on the ground of violation of due process so long as the laws had "a reasonable relation to a proper legislative purpose, and are neither arbitrary nor discriminatory."[78] Probably the most significant passage in his opinion, and one of the most significant in recent decisions of the Court, is the following:

> "The law-making bodies have in the past endeavored to promote free competition by laws aimed at trusts and monopolies. The consequent interference with private property and freedom of contract has not availed with the courts to set these enactments aside as denying due process. Where the public interest was deemed to require the fixing of minimum prices, that expedient has been sustained. If the lawmaking body within its sphere of government concludes that the conditions or practices in an industry make unrestricted competition an inadequate safeguard of the consumer's interests, produce waste harmful to the public, threaten ultimately to cut off the supply of a commodity needed by the public, or portend the destruction of the industry itself, appropriate statutes passed in an honest effort to correct the threatened consequences may not be set aside because the regulation adopted fixes prices reasonably deemed by the legislature to be fair to

[74] Ibid., 291 U. S. at 531-532.
[75] Ibid., 291 U. S. at 536.
[76] Ibid., 291 U. S. at 536.
[77] Ibid., 291 U. S. at 533.
[78] Ibid., 291 U. S. at 537.

those engaged in the industry and to the consuming public. And this is especially so where, as here, the economic maladjustment is one of price, which threatens harm to the producer at one end of the series and the consumer at the other. The Constitution does not secure to any one liberty to conduct his business in such fashion as to inflict injury upon the public at large, or upon any substantial group of people. Price control, like any other form of regulation is unconstitutional only if arbitrary, discriminatory, or demonstrably irrelevant to the policy the legislature is free to adopt, and hence an unnecessary and unwarranted interference with individual liberty." [79]

Thus controlling effect is given to the spirit of Lord Hale's statement and of Chief Justice Waite's opinion in the *Munn* case, and to dissenting opinions of Justice Stone in the *Tyson* and *Ribnik* cases and of Justice Brandeis in the *New State Ice* case. Justice McReynolds, speaking for the minority, in addition to repeating the argument of Justice Sutherland in the previous cases, doubted that the law in question bore a reasonable relation to the end it was intended to serve, namely, the improvement of the economic condition of the dairy industry.

On the economic side, Justice Roberts' opinion is of interest because of the views there expressed to the effect that a finding of monopoly was not essential to the justification of price control. In his view, the reference to "virtual monopoly" in the *Munn* case meant only that the elevator of Munn and Scott was "strategically situated and that a large portion of the public found it highly inconvenient to deal with others" and that their enterprise "could not fairly be called a monopoly." [80] In the *Brass* case, the business regulated was "keenly competitive throughout the state." [81] In the *German Alliance* case "there was no threat of monopoly," yet the occasion for regulation was said to be the fact that insurance was universally needed and "while the insurers competed for the business, they all fixed their premiums for similar risks according to an agreed schedule of rates." [82] Finally, in the case at bar there was "no suggestion of any monopoly or monopolistic practice." [83] The economic view concerning the situation in the earlier cases has been explained at length in the foregoing pages. So far as the *Nebbia* case is concerned, the economic view of the occasion for price control would be the persistence of non-monopolistic imperfections in

[79] Ibid., 291 U. S. at 538-539.
[80] Ibid., 291 U. S. at 532.
[81] Ibid., 291 U. S. at 535.
[82] Ibid., 291 U. S. at 535.
[83] Ibid., 291 U. S. at 531.

competition in the production of milk and monopolistic imperfections in competition, extending to bilateral monopoly in some cases, in its distribution.

It would seem fair to conclude that the same comment is applicable to Justice Roberts' opinion as might be applied to the majority opinion in the *Munn* case and the dissenting opinions in the *Tyson*, *Ribnik*, and *New State Ice* cases; namely, that he was aware that there was occasion for price control because of the ineffectiveness of competition in protecting the interests of the parties concerned in the dairy industry, was unable to discover a situation conforming to the traditional notion of monopoly, and yet did not grasp the significance of the monopoly elements in competition which, together with non-monopolistic imperfections, were responsible for its ineffectiveness in protecting the interests of those concerned.[84] But whatever the inadequacies of reasoning, so long as the *Nebbia* case is accepted as the controlling precedent, the legal doctrine of businesses affected with a public interest will not stand as a barrier to such price control as may seem desirable according to the economic interpretation of public interest developed in this paper.[85]

In the foregoing pages an attempt has been made to contrast a

[84] It is significant to note in this connection that in Borden's Farm Products Co. v. Ten Eyck, 297 U. S. 251, 56 S. Ct. 453 (1936), the Supreme Court upheld the section of the New York law which provided for a one-cent differential between advertised and unadvertised milk of virtually identical quality. It appeared that the law merely sanctioned a differential which had existed more or less generally for some time. Although there could not be a clearer example of monopolistic competition, the Court upheld the arrangement as promotive of "competition" and found no monopolistic features present. It has been aptly said that in this case "the majority of the Court were in the peculiar position of defending an anomaly in classical economics in the name of classical competition. Their decision stamped with legal approval a dual price for identical units of a commodity sold for the same use in a single market." W. H. HAMILTON, AND ASSOCIATES, PRICE AND PRICE POLICIES 504 (1938). An attempt to make the differential applicable only to dealers who had been in business prior to April 10, 1933, was invalidated in Mayflower Farms v. Ten Eyck, 297 U. S. 266, 56 S. Ct. 457 (1936).

[85] A group of cases related to those discussed in this paper are those dealing with the regulation of contract motor carriers. It appears that such regulation will be upheld provided that the statute carefully distinguishes between common and contract carriers and does not attempt to convert contract carriers into common carriers for purposes of regulation. The actual regulatory provisions applying to the two types of carriers, however, may be very similar without being invalid. In the leading case, Stephenson v. Binford, 287 U. S. 251, 53 S. Ct. 181 (1932), the Supreme Court did not decide whether the business of contract carriers was affected with a public interest, but upheld the Texas regulation in question on the ground of the state's power to protect and to regulate the use of public highways.

public interest doctrine based upon the implications of the theory of monopolistic competition with the public interest doctrine developed by the Supreme Court. Those members of the Court who opposed the extension of price control in the recent cases hold views concerning the efficacy of competition as a regulator of business and as a harness for self-interest which have apparently been untouched by the findings of modern economic theory. Nor did those justices who accepted the extension of price control, although they reached conclusions in harmony with an economic interpretation of public interest, seem any more aware of the underlying source of the difficulties which called forth the efforts at price regulation in the various cases. Any other result, however, would have been surprising, in view of the long lag of economic theory behind the realities of the economic organization. The Supreme Court could scarcely be expected to be in advance of economists in matters of economic theory.

The contrast between the reluctance of the Court to sanction direct price control and its greater willingness to accept measures which, in part at least, achieve similar results by indirection has often been noted. Business profits are greatly affected in the aggregate by labor legislation, inspection laws, various forms of taxation, anti-trust legislation, and other measures, some of which have been accepted without question.[86] Profits are even more affected, potentially at least, by governmental participation in business, which has been upheld by the Court four times in the last twenty years.[87] The opposition of some members of the Court to the extension of direct price control reflects the persistence of the older individualistic viewpoint on economic matters. These justices apparently believe (or wish to believe) that the spheres

[86] See the list of such measures given by Justice Stone in the Tyson case, 273 U. S. 418 at 452-453.

[87] Jones v. City of Portland, 245 U. S. 217, 38 S. Ct. 112 (1917) (municipal fuel yard); Green v. Frazier, 253 U. S. 233, 40 S. Ct. 499 (1920) (the Non-Partisan League program in North Dakota); Standard Oil Co. v. City of Lincoln, 275 U. S. 504, 48 S. Ct. 155 (1929) (municipal gasoline and oil distribution); Ashwander v. Tennessee Valley Authority, 297 U. S. 288, 56 S. Ct. 466 (1936) (disposal of power generated at Wilson Dam). See also the recent decision in Alabama Power Co. v. Ickes, 302 U. S. 464, 58 S. Ct. 300 (1938), in which loans and grants by the Public Works Administration to municipalities for the construction of electric plants competing with privately owned facilities were upheld. In Tennessee Electric Power Co. v. Tennessee Valley Authority, (D. C. Tenn. 1938) 21 F. Supp. 947, a three-judge Federal District Court at Chattanooga upheld the constitutionality of the Tennessee Valley Authority Act. Power production was held to be incidental to the navigation and flood control functions of the Authority. The case is now before the Supreme Court—cert. granted, 58 S. Ct. 1042 (1938)—and may afford the most decisive test of the constitutionality of governmental competition with private business.

of monopoly and competition are sharply demarcated, and that since monopoly is abnormal and exceptional in "competitive," "private," industry the appropriate means of protecting the public from exorbitant profits in that field is the application of the anti-trust laws rather than price regulation.

It is especially emphasized that nothing has been implied in the foregoing pages concerning the practical merits of direct price control. The extent to which, and the manner in which, such control should be exercised is an extremely intricate and difficult question to which no certain answer can be given, and which in any event lies outside the scope of this paper. The development of the theory of monopolistic competition has brought the realization that public interest in business extends to virtually every part of the price structure, but there remains the task of formulating tests which can be applied by administrative commissions and courts in distinguishing between those situations and practices which are in the public interest and those which are not. The implication of the foregoing pages is merely that the government should have a choice of methods, including resort to price regulation, where that seems preferable, in attempting to protect the public interest in matters of price and profit.

The ubiquity of monopolistic competition implies a degree of public control of business which democratic government is ill-equipped to undertake. Men of such diverse views and temperament as Justices McReynolds and Brandeis unite in expressing misgivings as to the outcome of the trend toward increasing state intervention in economic processes. The protection of many common interests will (and should) doubtless continue to be left to individualistic restraints as a lesser evil so long as we are unable to formulate and to agree upon the ends of social control or to devise means of attaining those ends. To contribute to the alleviation of these difficulties should be a major concern of all students of the social sciences in the present generation.