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STATE UTILITIES AND THE SUPREME COURT, 1922-1930

By THOMAS REED POWELL*

THIS is a review of Supreme Court decisions for the past eight years on the subject of the application of the Fourteenth Amendment to state regulation of property and business "devoted to a public use" or "affected with a public interest," if one may be allowed to endorse without recourse these amorphous phrases issued by the court.[1] The field covered is broader than that of strict public utilities which may be subjected to the duty to serve all. It includes all efforts on the part of the states to subject particular enterprises to price regulation. Rates of interest and charges for insurance may be regulated, but this does not mean that banks and insurers may be compelled to contract. Most of the cases deal with the power to fix prices and with restrictions on the exercise of this power. Some are concerned with special duties and obligations that may be imposed on those enterprises that come within the class of public callings. In the footnotes are given references to law-review articles and editorial notes from 1922 to 1930 which discuss the cases reported in the text or with cases presenting other problems of a similar character.

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[1]For similar reviews of Supreme Court decisions from 1919 to 1922 see 19 MICH. L. REV. 136-144; 20 MICH. L. REV. 273-287; and 21 MICH. L. REV. 307-316.

1. INCLUSION IN THE CLASS OF PROPERTY OR BUSINESS "AFFECTED WITH A PUBLIC INTEREST."[2]

An attempt by Michigan to make common carriers out of all persons transporting persons or property for hire by motor vehicle on the public highways over fixed routes or between fixed termini was declared unconstitutional in *Michigan Public Utilities Commission v. Duke*[3] in which Mr. Justice Butler declared that "it is beyond the power of the state by legislative fiat to convert property used exclusively in the business of a private carrier into a public utility, or to make the owner a public carrier, for that would be taking private property for public use without just compensation, which no state can do consistently with the due process of law clause of the Fourteenth Amendment."[4] The successful contestant operated 47 motor trucks and employed 75 men in carrying automobile bodies from three manufacturing plants to a fourth under express contracts with the manufacturers.[5]

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[2]For general discussion of the power over public utilities, see Harry Gunnison Brown, "Economic Basis and Limits of Public Utility Regulation," 53 REP. AM. BAR ASS'N. 717; Edward G. Jennings, "The Police Power as the Source of Public Utility Legislation," 3 DAK. L. REV. 91; and Nathaniel T. Guernsey, "The Regulation of Public Utilities," 13 MARQ. L. REV. 25.

[3]266 U. S. 570, 45 Sup. Ct. 191 (1925), discussed in 38 HARV. L. REV. 980 and 34 YALE L. J. 675.

[4]266 U. S. 570, 577-578.

[5]The regulation of motor vehicles on the public highways is treated in Richard Capel Beckett, "The Extent to Which Mississippi Railroad Commission May Regulate and Control the Operation of Busses," 2 MISS. L. REV. 416; William Chamberlain, "Motor Bus Regulation in Iowa," 9 IOWA L. REV. 26; John J. George, "Principles of Motor Carrier Regulation," 63 AM. L. REV. 72; John J. George, "Regulation of Motor Car Service and Rates," 3 U. CIN. L. REV. 269; John J. George, "Motor Carrier Regulation in Missouri," 40 LAW SERIES MO. BUL. 23; John J. George, "Factors in Granting Motor Carrier Certificates of Public Convenience and Necessity," 5 IND. L. J. 243; Ford P. Hall, "Certificates of Convenience and Necessity," 28 MICH. L. REV. 107, 276; W. S. Ingram and M. S. Breckenridge, "Motor Bus Competition with Established Service," 9 IOWA L. REV. 268; Charles P. Light, Jr., "The Supreme Court and Commerce by Motor Vehicle," 7 NO. CAR. L. REV. 268; David E. Lilienthal and Irwin S. Rosenbaum, "Motor Carrier Regulation in Illinois," 22 ILL. L. REV. 47; Irwin S. Rosenbaum and David E. Lilienthal, "Motor Carrier Regulation in Ohio," 1 U. CIN. L. REV. 288; Irwin S. Rosenbaum and David E. Lilienthal, "Motor Carrier Regulation; Federal, State and Municipal," 26 COL. L. REV. 854, reprinted in 62 AM. L. REV. 689; Irwin S. Rosenbaum and David E. Lilienthal, "The Regulation of Motor Car Vehicles

This was followed in *Frost v. Railroad Commission*[6] in which it was held that the right to get a certificate of convenience and necessity to operate motor trucks on the highway may not be conditioned on subjection to the public service commission under a statute which was deemed to have the necessary result of transforming a private carrier into a public carrier. Justices Holmes and Brandeis thought that the order complained of did not raise the issue of compelling a private carrier to don the mantle of a public carrier. Mr. Justice McReynolds went still further and insisted that it would violate no federal right for a legislature to say that "no intrastate carriers for hire, except public ones, shall be permitted to operate over the state roads."[7]

The issue in *Stimson Lumber Co. v. Kuykendall*[8] was whether certain tugboats were private carriers or common carriers. A lumber company whose logs were towed at a rate fixed by private contract objected to an order of the state commission subjecting it to tariff rates and insisted that "the business of towing logs was not affected with a public interest." Mr. Justice Butler answered that the company that did the towing held itself out to serve others and by a public tariff gave notice to that effect and so by its own choice

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in Pennsylvania," 75 U. PA. L. REV. 696; J. Morgan Stevens, "Regulation of Common Carriers of Passengers by Bus," 2 MISS. L. REV. 404; and Delos F. Wilcox, "Public Regulation of Motor Bus Service," 116 ANN. AM. ACAD. POL. SCI. (No. 205) 107.

[6]271 U. S. 583, 46 Sup. Ct. 605 (1926), discussed in David E. Lilienthal and Irwin S. Rosenbaum, "Motor Carrier Regulation by Certificates of Convenience and Necessity," 36 YALE L. J. 163; S. Chesterfield Oppenheim, "Unconstitutional Conditions and State Police Power," 26 MICH. L. REV. 176; and notes in 6 BOST. L. REV. 259; 40 HARV. L. REV. 131; 21 ILL. L. REV. 380; and 11 MINN. L. REV. 555.

[7]For other discussions of motor carriers see William A. Schnader, "The Taxicab—Its Service and Facilities," 116 ANN. AM. ACAD. POL. SCI. (No. 205) 292; and notes in 25 COL. L. REV. 1081 on holding one to be a common carrier who carries solely under contract with United States from wharf to bonded warehouse; in 32 YALE L. J. 841 on holding one who rents trucks to be a common carrier; in 23 MICH. L. REV. 424 on operator of motor vehicles as common carrier; in 14 GEORGETOWN L. J. 278, reprinted in 61 AM. L. REV. 112, on taxicabs; in 1 TEX. L. REV. 475 on power to regulate jitneys; and in 6 NO. CAR. L. REV. 347 and 34 W. VA. L. Q. 198 on giving preference to existing carriers in granting permits to operate motor busses.

[8]275 U. S. 207, 48 Sup. Ct. 41 (1927), commented on in 26 MICH. L. REV. 580, 691, and 76 U. OF PA. L. REV. 605.

had become a public carrier. The service was said to be in all essential respects like that of a carrier of freight in vessels. Special features of the towing business were dismissed by saying:

"The rule that towboats not having exclusive control of vessels towed are not to be held to the strict liability of common carriers does not affect the question under consideration. And the notice in the tariff that all tows are at owner's risk is immaterial. 'A common carrier is such by virtue of his occupation, not by virtue of the responsibilities under which he rests.' "[9]

Similarly, the contracts between an irrigation company and its consumers were held subject to abrogation by commission order in *Sutter Butte Canal Co. v. Railroad Commission.*[10] There seemed to be no dispute that the company was engaged in public service, though Mr. Chief Justice Taft recites at some length the provisions of the California constitution and statutes with regard to such supply of water. The contract rates had twice been raised by the commission without apparent objection on the part of the irrigation company, but it now resisted changes in the contracts which enabled contract consumers to escape from the obligation to pay for water which they did not use. The Chief Justice answered that "there is no such difference between the fixing of rates and the modification of the duration of a contract as would prevent the application of the police power to the one and not to the other."[11]

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[9]275 U. S. 207, 211-212. Aeroplanes and hydroplanes as common carriers are considered in Thomas H. Kennedy, "The Certificate of Convenience and Necessity Applied to Air Transportation," 1 J. AIR L. 761; Carl Zollman, "Aircraft as Common Carriers," 1 J. AIR. L. 190; and notes in 20 ILL. L. REV. 511, reprinted in 60 AM. L. REV. 928; and 4 TEX. L. REV. 527.

On logging railways, see 24 MICH. L. REV. 186 and 11 MINN. L. REV. 178; on passenger elevators, 9 BOST. L. REV. 162, 285; 5 NOTRE DAME LAW. 101; and 13 VA. L. REV. 651; on certificate of necessity and convenience for a ferry, 38 YALE L. J. 398.

[10]279 U. S. 125, 49 Sup. Ct. 325 (1929), considered in 3 So. CAL. L. REV. 620.

[11]The provision of water and light is treated in notes in 22 MICH. L. REV. 176 on when private supply of water becomes a public utility; in 71 U. PA. L. REV. 287 on a wholesale water company held not to be a public utility; in 14 ST. LOUIS L. REV. 206 on a realty company furnishing light to tenants; in 34 YALE L. J. 209 on a wholesaler of electricity; and in 9 VA. L. REV. 231 on a hydroelectric plant which possesses power of eminent domain.

The fact that the business of operating a cotton gin in Oklahoma is declared by statute to be a public utility and that a showing of public necessity may be required for a license to engage in it was the basis in *Frost v. Corporation Commission*[12] of the ruling that the recipient of a license acquires not merely a license but a franchise which is a property right. Therefore one who obtained such a license was held to be entitled to enjoin the grant of a license, without requiring any certificate of necessity, to a competing coöperative company which the majority of the court thought not a true coöperative. Mr. Justice Sutherland recognized that a true coöperative could be treated more favorably than the complainant without denying him the equal protection of the laws, but he refused to regard the restrictions on the use of the earnings of these semi-coöperatives as sufficient warrant to allow them to enter the business upon easier terms than those imposed on individuals. Justices Brandeis and Stone wrote dissenting opinions in which Mr. Justice Holmes joined. Had the business been an ordinary business, it would have been harder for one who had not been excluded to claim a denial of equal protection because others were let in more easily, and the issue might have had to wait until it was raised by some one who had been denied a license. As the case stands, it depends upon the fact that the enterprise of cotton ginning is a public utility in Oklahoma, though there was no contest whether it could constitutionally be declared so. This seemed to be assumed on all sides.[13]

The business of issuing hail insurance was declared to be one affected with a public interest in *National Union Fire Insurance Co.*

[12]278 U. S. 515, 49 Sup. Ct. 235 (1929), discussed in 9 Bost. L. Rev. 296; 29 Col. L. Rev. 833; 24 Ill. L. Rev. 812; 28 Mich. L. Rev. 179; and 8 No. Car. L. Rev. 87.

[13]Another phase of the struggle against these partial co-operatives in Oklahoma arose in Corporation Commission v. Lowe, 281 U. S. 431, 50 Sup. Ct. 397 (1930) in which an individual licensee complained that he was discriminated against because the co-operative would be allowed to operate more favorably than he because the excess of its earnings over certain dividends and reserves were to be paid to members and possibly non-members in proportion to the amounts of their products which they had sold to the gin. Mr. Chief Justice Hughes answered that under the laws of the state the individual licensee might also distribute some of his profits in the same fashion if he chose, and therefore he was not discriminated against. Thus he was comforted by finding that he enjoyed the same eleemosynary freedom as his competitor, even if he did not win his case.

v. Wanberg[14] which sustained a requirement that every company issuing hail insurance should be bound and the policy should take effect within twenty-four hours from the day and hour when the application therefor has been taken by an authorized local agent. Mr. Chief Justice Taft said that this did not force a contract on the company, since it need not accept an application at all and since it had twenty-four hours in which to decline to issue insurance in response to applications made to agents. He observed that an earlier insurance case had "settled the right of a state legislature to regulate the conduct by corporations, domestic and foreign, of insurance as a business affected with a public interest." He enumerated the various regulations previously sustained and described the situation producing the need for hasty action on applications for hail insurance. To the contention that North Dakota had gone too far he answered that "we agree that the legislation approaches closely the limit of legislative power, but not that it transcends it."[15]

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[14]260 U. S. 71, 43 Sup. Ct. 32 (1922). For notes on regulation of insurance rates see 41 HARV. L. REV. 532; 12 ST. LOUIS L. REV. 66; and 15 ST. LOUIS L. REV. 400. Statutory regulation of rating organizations is discussed in 10 CORN. L. Q. 520. On rates of surety companies see Earl C. Arnold, "The Power of the State to Regulate Rates Charged by Surety Companies," 28 MICH. L. REV. 530.

[15]The general power to fix the rates of insurance companies was not contested in Aetna Insurance Co. v. Hyde, 275 U. S. 440, 48 Sup. Ct. 174 (1928) in which it was held that no federal question was presented by a contention urged jointly by many insurance companies against the standard set for prescribing rates, but without a contention by any individual company that the reduced rates were too low to yield it a reasonable return.

In the October Term of 1930, over the dissent of Justices Van Devanter, McReynolds, Sutherland and Butler, the newly constituted majority of the court decided in O'Gorman & Young v. Hartford Fire Insurance Co., 282 U. S. 251, 51 Sup. Ct. 130 (1931) that the compensation paid by insurance companies to their agents bears so direct a relation to the rates charged to the insured that the subject of the agent's commission falls clearly within the scope of the police power, and that the specific method of regulation chosen would not be declared void in the absence of any allegation of facts tending to show its unreasonableness. The case before the court involved the provision forbidding higher commissions to any local agent than that allowed to other local agents in the state on similar risks. Thus local agents with contracts for higher commissions were limited in their recovery against the insurance companies to the lowest rates allowed by the company to other agents. The case was first argued on April 30, 1930, restored to the docket for reargument on May 26, 1930, and reargued on October 30, 1930. The circumstances indicate that Mr. Justice Roberts was not unessential to the ultimate outcome of the decision.

In the course of sustaining a New York statute prohibiting private conduct of an instalment investment business akin to banking, Mr. Justice Holmes remarked in *Dillingham v. McLaughlin*[16] that the statute "is not aimed at gaming of any sort, but is a regulation of a business so far akin to banking as to be at least equally clothed with a public interest, and subject to regulation."

The issue of what businesses may constitutionally be declared by the legislature to be businesses "clothed with a public interest" arose in *Wolff Packing Co. v. Court of Industrial Relations*[17] because the Kansas statute declared that this class should include the manufacture or production of food, clothing and fuel, the transportation of the foregoing, and public utilities and common carriers. This declaration was merely prefatory to the plan of compelling parties to wage disputes in such enterprises to submit their differences to a so-

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[16]260 U. S. 370, 44 Sup. Ct. 362 (1924).

Issues of the interpretation and application of usury statutes are considered in 24 Col. L. Rev. 934; 25 Col. L. Rev. 801; 29 Col. L. Rev. 977; 41 Harv. L. Rev. 405; 18 Ky. L. J. 374, 401; 14 Minn. L. Rev. 195; 7 No. Car. L. Rev. 332; 1 So. Cal L. Rev. 304; 2 So. Cal. L. Rev. 195; 14 Va. L. Rev. 570; 34 W. Va. L. Q. 217; 37 Yale L. J. 829; and 39 Yale L. J. 408.

Injunctions by the state to stop repeated violations of usury statutes are noted in 30 Col. L. Rev. 125; 18 Cal. L. Rev. 328; 43 Harv. L. Rev. 499; 28 Mich. L. Rev. 939; 14 Minn. L. Rev. 690; and 39 Yale L. J. 590.

Small loan statutes are discussed in 23 Col. L. Rev. 484; 42 Harv. L. Rev. 689; and 4 Notre Dame Law. 130.

[17]262 U. S. 522, 43 Sup. Ct. 630 (1923), considered in Minor Bronaugh, "Business Clothed with a Public Interest Justifying State Regulation," 27 Law Notes 87; Minor Bronaugh, "Compulsory Arbitration of Wages and Hours of Labor—End of Kansas Industrial Relations Court," 29 Law Notes 28; William L. Huggins, "Just What Has the Supreme Court Done to the Kansas Industrial Act? Why Did It Do It?," 11 A. B. A. J. 363; Dexter Merriam Keezer, "Some Questions Involved in the Application of the 'Public Interest' Doctrine," 25 Mich. L. Rev. 596; C. Petrus Peterson, "Industrial Courts," 3 Neb. L. Bul. 487; Sidney Post Simpson, "Constitutional Limitations on Compulsory Industrial Arbitration," 38 Harv. L. Rev. 753; and notes in 96 Cent. L. J. 273; 22 Mich. L. Rev. 135; 33 Yale L. J. 196; and 34 Yale L. J. 909.

For discussions prior to the Supreme Court decisions, see John A. Fitch, "Government Coercion in Labor Disputes," 90 Ann. Am. Acad. Pol. Sci. (No. 179) 74; Herbert Rabinowitz, "The Kansas Industrial Court Act," 12 Cal. L. Rev. 1; F. Dumont Smith, "The Kansas Industrial Court," 47 Rep. Am. Bar Ass'n. 208; *id.*, "The Kansas Industrial Court," 95 Cent. L. J. 356; *id.*, "Practical Operation of Kansas Industrial Court Law," 8 A. B. A. J. 680; and notes in 20 Mich. L. Rev. 893 and 31 Yale L. J. 889.

called court and to abide by its decree. The case at bar involved a packing concern which refused to obey an order of the court to increase wages.[18] The court held that, even if such an enterprise could be put into the third class of businesses affected with a public interest, as listed below, it could not be required to pay wages fixed by the state or to continue operations if it chose not to do so. This seems to make *obiter* what Mr. Chief Justice Taft has to say about when a business is affected with a public interest, particularly since he declared that the court was relieved from saying whether packing houses could be so regarded, since the regulation in issue was improper even if it could. Nevertheless even as *obiter* it is worth quoting:

"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 and other common carriers and public utilities.

(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. Such are those of the keepers of inns, cabs and gristmills. * * *

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[18]The Kansas plan of compulsory arbitration was held constitutionally inapplicable to the enterprise of coal mining in Dorchy v. Kansas, 264 U. S. 286, 44 Sup. Ct. 323 (1924). This was a prosecution for disobeying an order to call a strike. In later proceedings the state court held that the anti-strike provision of the statute was separable from its compulsory-arbitration features. The Supreme Court in Dorchy v. Kansas, 272 U. S. 306, 47 Sup. Ct. 86 (1926), thereupon sustained the conviction when the strike was called for the purpose of compelling the employer to pay a stale disputed claim to a former employee.

Though the state court held that the provisions of the Act with regard to hours of labor were separable from those relating to wages, the Supreme Court found in Wolff Packing Co. v. Court of Industrial Relations, 267 U. S. 552, 45 Sup. Ct. 441 (1926) that the power to prescribe hours of labor was part and parcel of the plan of compulsory arbitration and held that an order as to hours of labor was unconstitutional when predicated upon a plan to impose compulsory arbitration.

(3) Businesses which, though not public at their inception, may fairly have been 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 owner, and to be entitled to protection accordingly."[19]

Then are cited cases sanctioning regulation of grain elevators; insurance companies; banks; a well, serving a few neighbors; and rents of dwelling houses in an emergency due to shortage.[20] In nearly all of these businesses in this third class, says the Chief Jus-

[19] 262 U. S. 522, 535.

[20] The question whether the regulation of rents was still constitutional in the District of Columbia was declared in Chastleton Corporation v. Sinclair, 264 U. S. 54, 44 Sup. Ct. 405 (1924), to be dependent upon the facts as to the shortage of buildings. Mr. Justice Holmes pointed out that the Supreme Court might, if it chose, ascertain the facts for itself as it sees fit, but that it seemed advisable to send the case back to the supreme court of the District for that discovery, particularly since the litigation made it necessary to know the condition of Washington at different dates in the past. He observed that "upon the facts that we judicially know, we should be compelled to say that the law has ceased to operate." The law in question was the third one passed by Congress and was to continue in force until May 22, 1924. The order of the Rent Commission in issue was passed on August 7, 1922. Mr. Justice Holmes referred to the exodus from Washington since the war and to the extensive activity in building and declared that "if about all that remains of war conditions is the increased cost of living, that is not, in itself, a justification of the Act." Mr. Justice Brandeis thought that the complainants had valid procedural objections to the order and that the case should have been decided on this ground without entering into consideration of the constitutional question.

For discussion of rent regulation see Anonymous, "Due Process and the Housing Problem," 5 CONST. REV. 101; F. R. Aumann, "Some Constitutional Aspects of War Rent Measures," 18 KY. L. J. 355; and notes in 23 COL. L. REV. 309 on the application of the New York rent law to tenant taking possession after its enactment; in 23 COL. L. REV. 583 on statutes relating to the housing shortage; in 26 COL. L. REV. 1015 on the extension of the New York emergency rent laws; and in 20 ILL. L. REV. 96 on a case holding that the constitutionality of the District of Columbia law had evaporated with change in conditions.

For a list of articles and notes on earlier cases sustaining rent regulation see 20 MICH. L. REV. 274 n. 25 and 21 MICH. L. REV. 307 n. 3.

tice, "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." The question where each business belongs is a judicial one and the standards of classification for police regulation are not the same as those of what is a "public use" for takings by eminent domain or what is a "public purpose" from the standpoint of taxation. "In the former, the private owner is fully compensated for his property. In the latter, the use for which the tax is laid may be any purpose in which the state may engage, and this covers almost any private business if the legislature thinks the state's engagement in it will help the general public, and is willing to pay the cost of the plant and incur the expense of operation." Explicit decision as to the status of food preparation is rendered unnecessary by the ruling that the finding that a business is clothed with a public interest does not "determine what regulation may be permissible in view of the private rights of the owner," for "the extent to which regulation may reasonably go varies with different kinds of business." Nevertheless it would not take an unusually acute mind-reader to get some clue to the Chief Justice's leanings on the unresolved issue from the following:

"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 and 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.

"An ordinary producer, manufacturer, or shopkeeper may sell or not sell, as he likes * * *; and while this feature does not necessarily exclude businesses from the class clothed with a public interest * * *, it usually distinguishes private from quasi-public occupations. * * *

"In the preparation of food, the changed conditions have greatly increased the capacity for treating the raw product, and transferred the work from the shop with few employees to the plant with many. Such regulation of it as there has been, has been directed toward the health of the workers in congested masses, or has consisted of inspection and supervision with a view to the health of the public. But never has the 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. Food is now produced in greater volume and variety than ever before. Given uninterrupted interstate commerce, the sources of the food supply in Kansas are countrywide, a short supply is not likely, and the danger from local monopolistic control less than ever.

"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.' All business is subject to some kinds of public regulation, but when the public becomes so peculiarly dependent upon a particular business that one engaging therein subjects himself to a more intimate public regulation is only to be determined by the process of exclusion and inclusion, and to gradual establishment of a line of distinction."[21]

All of which goes to show that classifiers put the cart before the horse when they strive to create a class of businesses clothed with a public interest as a basis for justifying some regulation on some member thereof. The constitutional issue is the more particular one of whether this or that regulation may be imposed on this or that enterprise, and any really useful classification of businesses clothed with a public interest will be the product of sanctions accorded to various regulations rather than the inducing reasons for those sanctions.[22]

[21]262 U. S. 522, 537-539.

[22]The inclusion of a Board of Trade, which furnishes a medium for sales of grain, in the general class of business affected with a public interest was sustained in Board of Trade v. Olsen, 262 U. S. 1, 43 Sup. Ct. 470 (1923), on which there are comments in 12 CAL. L. REV. 132; 37 HARV. L. REV. 136, 157; and 33 YALE L. J. 105. Mr. Chief Justice Taft declared that "the Board of

The question of what enterprises may be regarded as "affected with a public interest" so as to justify legislative price-fixing was considered by the court again in *Tyson & Brother v. Banton*[23] which involved the constitutionality of a New York statute forbidding brokers of theatre tickets to resell the tickets for an advance of more than fifty cents on the box-office price charged by the theatres. The price that might be charged by the theatres was not restricted, yet Mr. Justice Sutherland for the majority of the court insisted that the issue was whether the box-office price could be regulated. The excuse for this was that an earlier preambular section of the statute contained an essay declaring that the price or charge for admission to theatres and other designated entertainments is a matter affected with a public interest and subject to state supervision in order to guard against fraud and extortion. As put by Mr. Justice Sutherland:

"Strictly, the question for determination relates only to the maximum price for which an entrance ticket to a theatre, etc., may be resold. But the answer necessarily must be to a question of greater breadth. The statutory declaration (section 167) is that the price

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Trade conducts a business which is affected with a public interest and is, therefore, subject to a reasonable regulation in the public interest." One of the regulations required the Board to admit as members the representatives of lawfully formed coöperative associations of grain producers and to permit them to return to the associations the profit derived from the use of the facilities of the Board of Trade. This meant that a group of brokers had to admit representatives of vendors and to let the vendors reap benefit from the sales commissions. Subject to some exceptions, the Act forbade sales except on a so-called "contract market," duly designated as such by the Secretary of Agriculture, and subject to supervision by a commission consisting of the Secretary of Agriculture, the Secretary of Commerce, and the Attorney-General. These various restrictions were sanctioned as appropriate regulations of a "business affected with a national public interest."

[23] 273 U. S. 418, 47 Sup. Ct. 426 (1927), considered in Maurice Finkelstein, "From Munn v. Illinois to Tyson v. Banton," 27 Col. L. Rev. 769; and notes in 7 Bost. L. Rev. 208; 40 Harv. L. Rev. 1009; 22 Ill. L. Rev. 192; 3 Ind. L. J. 384; 13 Iowa L. Rev. 99; 31 Law Notes 104; 25 Mich. L. Rev. 880, reprinted in 61 Am. L. Rev. 607; 11 Minn. L. Rev. 656; 1 St. Johns L. Rev. 213; 3 St. Johns L. Rev. 244; 2 U. Cin. L. Rev. 80; 75 U. Pa. L. Rev. 778; 13 Va. L. Rev. 554; and 36 Yale L. J. 985. The case in the court below is discussed in 24 Col. L. Rev. 203; 9 Corn. L. Q. 321; 37 Harv. L. Rev. 1125, 1135; and 33 Yale L. J. 434.

The decision of the Supreme Court is also treated in a number of the article and notes listed in notes 37, 40, and 42 infra.

of or charge for admission to a theatre, place of amusement or entertainment or other place where public exhibitions, games, contests or performances are held, is a matter affected with a public interest. To affirm the validity of section 172 is to affirm this declaration completely since appellant's business embraces the resale of entrance tickets to all forms of entertainment therein enumerated. And since the ticket broker is a mere appendage of the theatre, etc., and the *price of* or *charge for* admission is the essential element in the statutory declaration, it results 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 lawmaking body to fix the maximum amount of the charge, which its patrons may be required to pay."[24]

As against this declaration of the necessity of deciding another case than the one before the court, Mr. Justice Stone in dissenting says:

"The question with which we are here concerned is much narrower than the one which has been principally discussed by the court. It is not whether there is constitutional power to fix the price which theatre owners and producers may charge for admission. Although the statute in question declares that the price of tickets for admission to places of amusement is affected with a public interest, it does not purport to fix prices of admission. The producer or theatre proprietor is free to charge any price he chooses. The statute requires only that the sale price, whatever it is, be printed on the face of the ticket, and prohibits the licensed ticket broker, an intermediary in the marketing process, from reselling the ticket at an advance of more than 50 cents above the printed price. Nor is it contended that this limit on the profit is unreasonable. * * * In these respects, the case resembles *Munn v. Illinois*, supra, where the attempt was not to fix the price of grain but to fix the price for the service rendered by the proprietors of grain elevators in connection with the transportation and distribution of grain, the cost of which entered into the price ultimately paid by the consumer. The statute there, as the statute here, was designed in part to protect a large class of consumers from exorbitant prices made possible by the strategic posi-

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[24]273 U. S. 418, 429.

tion of a group of intermediaries in the distribution of a product from producer to consumers."[25]

In a separate dissent, Mr. Justice Sanford makes the same point and summarizes the facts stated by Mr. Justice Stone which show that the ticket brokers by agreements with the purchasers acquire a monopoly of the best seats and are thus enabled to demand extortionate prices from the theatre-goers. The majority opinion does not touch on these facts, except obliquely, when Mr. Justice Sutherland says that the evils of collusive arrangements between broker and producer may be dealt with by specific legislation aimed at the specific abuses and can not justify a statute which applies where fraud and collusion are wholly absent. This does not mention explicitly the evil of monopoly control secured without collusion. Mr. Justice Sutherland thinks that it should not be difficult "to define and penalize in specific terms * * * practices of a frauduent character," but he points out that, even if this is not the case, the legislature can not constitutionally do what it can not constitutionally do:

"But the difficulty or even the impossibility of thus dealing with the evils, if that should be conceded, constitutes no warrant for suppressing them by methods precluded by the Constitution. Such subversions are not only illegitimate but are fraught with the danger that, having begun on the ground of necessity, they will continue on the score of expediency, and, finally, as a mere matter of course. Constitutional principles, applied as they are written, it must be assumed, operate justly and wisely as a general thing, and they may not be remolded by lawmakers and judges to save exceptional cases of inconvenience, hardship or injustice."[26]

This conclusion of Mr. Justice Sutherland's opinion prompts Mr. Justice Stone to begin his dissent by saying:

"I can agree with the majority that 'constitutional principles, applied as they are written, it must be assumed, operate justly and wisely as a general thing, and they may not be remolded by lawmakers or judges to save exceptional cases of inconvenience, hardship, or injustice.' But I find nothing written in the Constitution, and nothing in the case or common law development of the Four-

[25] 273 U. S. 418, 448-449.
[26] 273 U. S. 418, 445.

teenth Amendment, which would lead me to conclude that the type of legislation attempted by the state of New York is prohibited."[27]

The constitutional principle relied on by Mr. Justice Sutherland is that "the power to fix prices * * *, ordinarily, does not exist in respect of merely private property or business * * * but exists only where the business or the property involved has become 'affected with a public interest.'" Of this formulation, Mr. Justice Stone says:

"The phrase 'Business affected with a public interest' seems to me to be too vague and illusory to carry us very far on the way to a solution. It tends in use to become only a convenient expression for describing those businesses, regulation of which has been permitted in the past. To say that only those businesses affected with a public interest may be regulated is but another way of stating that all those businesses which may be regulated are affected with a public interest. It is difficult to use the phrase free of its connotation of legal consequences, and hence when used as a basis of judicial decision, to avoid begging the question to be decided. The very fact that it has been applied to businesses unknown to Lord Hale, who gave sanction to its use, should caution us against the assumption that the category has now become complete or fixed and that there may not be brought into it new classes of business or transactions not hitherto included, in consequence of newly devised methods of extortionate price exaction."[28]

Mr. Justice Sutherland recognizes that the phrase "furnishes at best an indefinite standard and attempts to define it have resulted, generally, in producing little more than paraphrases, which themselves require elucidation." Whether by design or unconsciously, this is illustrated by later paragraphs scattered through his opinion:

"The significant requirement is that the property shall be devoted to a use in which the public has an interest, which simply means, as in terms it is expressed at page 130 [*Munn v. Illinois,* 94 U. S. 113, 130] that it shall be devoted to 'a public use.' Stated in another form, a business or property in order to be affected with a public interest, must be such or be so employed as to justify the conclusion

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[27] 273 U. S. 418, 447.
[28] 273 U. S. 418, 451.

that it has been *devoted* to a public use and its use thereby, in effect, *granted* to the public."[29]

"From the foregoing review it will be seen that 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 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."[30]

"It is clear that, as there [by Lord Hale] announced, the rule is 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 to the public. That this is what Lord Hale had in mind is borne out, and the question now under consideration is illuminated, by the illustration, which he evidently conceived to be pertinent, of a street opened to the public, in which case the assumed grant and resulting public right of use is very apparent."[31]

This grant of a street could not of course afford an analogy for the regulation of insurance rates and the charges of grain elevators which had been sustained in decisions reviewed by Mr. Justice Sutherland. The analogy does not touch the economic considerations which have been found sufficient to justify price regulation. These considerations lie at the basis of Mr. Justice Stone's dissent:

"The constitutional theory that prices normally may not be regulated rests upon the assumption that the public interest and private right are both adequately protected when there is 'free' competition among buyers and sellers, and that in such a state of economic society, the interference with so important an incident of ownership of private property as price fixing is not justified and hence is a taking of property wthout due process of law.

"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

[29] 273 U. S. 418, 433-434.
[30] 273 U. S. 418, 438.
[31] 273 U. S. 418, 439.

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 circumstance 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 reasonable regulation of price is upheld."[32]

Thus Mr. Justice Stone gets himself free from uninforming labels and plants himself on the practical considerations which have been present in the price regulation that has been sustained. Price regulation to him is not some ogre that can be made constitutionally personable only by incantation of the magic phrase "affected with a public interest." It is a practical way of remedying practical evils. Its constitutionality is to be determined by the same process of comparing benefits and detriments that is applied to test the propriety of other police measures. This assimilation of the particular problem to other police-power problems leads Mr. Justice Stone to a wider range of comparison when he continues:

"The economic consequences of this regulation upon individual ownership is no greater, nor is it essentially different from that inflicted by regulating rates to be charged by laundries * * *, by anti-monopoly laws, Sunday laws, usury statutes * * *; the zoning ordinance upheld in *Euclid v. Ambler Realty Co.*, 272 U. S. 365, or state statutes restraining the owner of land from leasing it to Japanese or Chinese aliens, * * * or state prohibition laws * * *; or legislation prohibiting option contracts for future sales of grain * * *; or invalidating sales of stock on margin or for 'futures' * * *, or statutes preventing the maintenance of pool parlors * * *,

[32] 273 U. S. 418, 451-452.

or in numerous other cases in which the exercise of private rights has been restrained in the public interest. * * * Nor is the exercise of the power less reasonable because the interests protected are in some degree less essential to life than some others. Laws against monopoly which aim at the same evil and accomplish their end by interference with private rights quite as much as the present law are not regarded as arbitrary or unreasonable or unconstitutional because they are not limited in their application to dealings in the bare necessities of life."[38]

Mr. Justice Sutherland does not consider the alleged monopoly position of the ticket brokers and compare it with other situations in which traders have been restrained, but confines himself to a comparison of play-producing with other enterprises. After his reference to Lord Hale's illustration of the opening of a street to the public, he continues:

"A theatre or other place of entertainment does not meet this conception of Lord Hale's aphorism or fall within the reasons of the decisions of this court based upon it. A theatre is a private enterprise, which, in its relation to the public, differs obviously and widely, both in character and degree, from a grain elevator, standing at the gateway of commerce and exacting toll, amounting to a common charge, for every bushel of grain which passes on its way among the states; or stock yards, standing in like relation to the commerce in live stock; or an insurance company, engaged as a sort of common agency, in collecting and holding a guaranty fund in which definite and substantial rights are enjoyed by a considerable portion of the public sustaining interdependent relations in respect of their interests in the fund. Sales of theatre tickets bear no relation to the commerce of the country; and they are not interdependent transactions, but stand, both in form and effect, separate and apart from each other, 'terminating in their effect with the instances.' And, certainly a place of entertainment is in no legal sense a public utility; and, quite as certainly, its activities are not such that their enjoyment can be regarded under any conditions from the point of view of emergency.

"The interest of the public in theatres and other places of entertainment may be more nearly, and with better reason, assimilated

[38] 273 U. S. 418, 452-453.

to the like interest in provision stores and markets and in the rental of houses and apartments for residence purposes; although in importance it falls below such an interest in the proportion that food and shelter are of more moment than amusement or instruction. As we have shown, there is no legislative power to fix the prices of provisions or clothing or the rental charges for houses or apartments, in the absence of some controlling emergency; and we are unable to perceive any dissimilarities of such quality or degree as to justify a different rule in respect of amusements and entertainments."[34]

In a separate dissent Mr. Justice Holmes indicates broader grounds for disagreement when he says:

"We fear to grant power and are unwilling to recognize it when it exists. The states very generally have stripped jury trials of one of their most important characteristics by forbidding the judges to advise the jury upon the facts * * *, and when legislatures are held to be authorized to do anything considerably affecting public welfare it is covered by apologetic phrases like the police power, or the statement that the business concerned has been dedicated to a public use. The former expression is convenient, to be sure, to conciliate the mind to something that needs explanation: the fact that the constitutional requirement of compensation when property is taken can not be pressed to its grammatical extreme; that property rights may be taken for public purposes without pay if you do not take too much; that some play must be allowed to the joints if the machine is to work. But police power often is used in a wide sense to cover and, as I said, to apologize for the general power of the legislature to make a part of the community uncomfortable by a change.

"I do not believe in such apologetics. I think the proper course is to recognize that a state legislature can do whatever it sees fit unless it is restrained by some express prohibition in the Constitution of the United States or of the state, and that courts should be careful not to extend such prohibitions beyond their obvious meaning by reading into them conceptions of public policy that the particular court may happen to entertain. Coming down to the case before us I think * * * that the notion that a business is clothed with a public interest and has been devoted to the public use is little more

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[34] 273 U. S. 418, 439-440.

than a fiction intended to beautify what is disagreeable to the sufferers. The truth seems to me to be that, subject to compensation when compensation is due, the legislature may forbid or restrict any business when it has a sufficient force of public opinion behind it. Lotteries were thought useful adjuncts of the state a century or so ago; now they are believed to be immoral and they have been stopped. Wine has been thought good for man from the time of the Apostles until recent years. * * * What has happened to lotteries and wine might happen to theatres in some moral storm of the future, not because theatres were devoted to a public use, but because people had come to think that way.

"But if we are to yield to fashionable conventions, it seems to me that theatres are as much devoted to public use as anything well can be. We have not that respect for art that is one of the glories of France. But to many people the superfluous is the necessary, and it seems to me that government does not go beyond its sphere in attempting to make life livable for them. I am far from saying that I think this particular law is a wise and rational provision. That is not my affair. But if the people of the state of New York speaking by their authorized voice say that they want it, I see nothing in the Constitution of the United States to prevent their having their will."[35]

Mr. Justice Brandeis joins in this dissent. He and Mr. Justice Holmes join in the dissent of Mr. Justice Stone. Mr. Justice Sanford adds a separate dissenting opinion in which, after referring to the concededly constitutional regulation of the charges of grain elevators, he says:

"So, I think, that here—without reference to the character of the business of the theatres themselves—the business of the ticket brokers, who stand 'in every gateway' between the theatres and the public, depriving the public of access to the theatres for the purchase of desirable seats at the regular prices, has become clothed with a public interest and is subject to regulation by the legislature limiting their charges to reasonable exactions and protecting the public from extortion and exorbitant rates."[36]

[35] 273 U. S. 418, 445-447.
[36] 273 U. S. 418, 455.

The debate over price-fixing and the usefulness of the category of "business affected with a public interest" was renewed in *Ribnik v. McBride*[37] which by a vote of six to three held unconstitutional a New Jersey statute authorizing the state commissioner of labor to set limits to the fees charged by private employment agencies. According to the minority opinion the action of the commissioner did not set an absolute limit to the agency's compensation since there was freedom to charge the employers in addition to the fees charged employees. The majority opinion does not mention this fact. Possibly the reconciliation is that the agencies customarily confine their charges to those demanded of employees and that the restriction in respect to these fees did not set an absolute limit to the return, since the agency was still free to charge an additional, though a limited, amount to the employers. For the majority of the court Mr. Justice Sutherland quotes his previous declaration that to justify price-fixing the business must be such "as to justify the conclusion that it has been *devoted* to a public use and its use thereby, in effect, *granted* to the public" and adds:

"The business of securing employment for those seeking work and employees for those seeking workers is essentially that of a broker; that is, of an intermediary. While we do not undertake to say that there may not be a deeper concern on the part of the public in the business of an employment agency, that business does not differ in substantial character from the business of a real estate broker, ship broker, merchandise broker or ticket broker. In the *Tyson* case, supra, we declared unconstitutional an act of the New York legislature which sought to fix the price at which theatre tickets should be sold by a ticket broker, and it is not easy to see how, without disregarding that decision, price-fixing legislation in respect of other brokers of like character can be upheld.

[37]277 U. S. 350, 48 Sup. Ct. 545 (1928), discussed by Donald Hall Hamilton, "Price Fixing by State Legislatures," 3 TEMP. L. REV. 28; and notes in 8 BOST. L. REV. 292; 17 CAL. L. REV. 55; 28 COL. L. REV. 970; 14 CORN. L. Q. 75; 42 HARV. L. REV. 126; 23 ILL. L. REV. 611; 13 MARQ. L. REV. 114; 7 NO. CAR. L. REV. 81; 3 ST. JOHNS L. REV. 104, 224; 14 ST. LOUIS L. REV. 83; 2 SO. CAL. L. REV. 277, 305; 3 U. CIN. L. REV. 69, 85; and 38 YALE L. J. 225. The case is also considered in some of the discussions listed in notes 40 and 42 infra.

For a general note on the problem see 12 CAL. L. REV. 511.

"An employment agency is essentially a private business. True, it deals with the public, but so do the druggist, the butcher, the baker, the grocer, and the apartment or tenement house owner, and the broker who acts as intermediary between such owner and tenants. Of course, anything which substantially interferes with employment is a matter of public concern, but in the same sense that interference with the procurement of food and housing and fuel are of public concern. The public is deeply interested in all these things. The welfare of its constituent members depends upon them. The interest of the public in the matter of employment is not different in quality or character from its interest in the other things enumerated; but in none of them is the interest that 'public interest' which the law contemplates as the basis for legislative price control. * * * 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 maximum or minimum, is beyond the legislative power. And we perceive no reason for applying a 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."[38]

In this case as in the *Tyson* case the majority opinion pays no attention to the economic characteristics of the business of an intermediary, there an intermediary between theatre and ticket purchaser and here an intermediary between employer and employee. Mr. Justice Sutherland relies on the fact that the *Tyson* case applied to a broker, though in that case he did not consider the position of a broker but confined himself to affirming that the theatre is not "affected with a public interest." Mr. Justice Stone in dissenting again points out that this phrase is not in the Constitution and that it can have no other meaning than that given to it by the decisions of the court. The decisions, he says, establish that price-fixing "is within the State's power whenever any combination of cirmumstances seriously curtails the regulative force of competition, so that buyers and sellers are placed at such a disadvantage in the bargaining struggle that a Legislature might reasonably anticipate serious consequences

[38]277 U. S. 350, 357-358.

to the community as a whole." Then follows a detailed review of conditions disclosed by legislative and commission investigations in various states. Fee-splitting, "job-selling," extortionate and discriminatory charges are revealed as widespread practices of private employment agencies which competition has not operated to control. To Mr. Justice Stone all brokers do not look alike. The ticket broker deals in luxuries, and his customers are not necessitous. The employment agent deals in an inexorable essential, and men without work are handicapped in bargaining. "We are not judicially ignorant of what all human experience teaches, that those so situated are peculiarly the prey of the unscrupulous and designing." "And I shall not stop to argue that the state has a larger interest in seeing that its workers find employment without being imposed upon, than in seeing that its citizens are entertained." So the problem presented by employment agencies is unlike the problems of earlier cases, and it should be dealt with on the basis of its own peculiar facts. Price regulation is not to be subjected to other tests than its appropriateness to deal with the evil demanding control. Justices Holmes and Brandeis join in the dissent of Mr. Justice Stone. Mr. Justice Sanford, who had dissented in the *Tyson* case, concurred here because he deemed the *Tyson* case controlling.[39]

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[39]These cases on ticket brokers and employment agencies were said by Mr. Justice Brandeis in Tagg Brothers v. United States, 280 U. S. 420, 50 Sup. Ct. 220 (1930), not to stand for the proposition that "charges for personal services cannot be regulated." "The question upon which the court divided in those cases," he added, "was whether the services there sought to be regulated were then affected with a public interest." This depends not upon the amount of capital employed, but upon the character of the service being rendered. This was said in an opinion for a unanimous court holding that commission men selling stock at stockyards may be subjected to price regulation. The fact that the commission men had little capital or property was said to be immaterial. They use the property of the stockyards, but the constitutionality of fixing their fees was declared not to depend upon that. They perform an indispensable service and enjoy a substantial monopoly at the Omaha stockyards. They had already bound themselves to charge uniform fees. Their own concerted price-fixing was a sufficient answer to the contention that prices should not be uniform for enterprisers with varying ability. "There is here no attempt to fix anyone's wages or to limit anyone's net income. Differences in skill, industry and experience will continue to be factors in the earning power of the several plaintiffs. For the order fixes only the charges to be made in individual transactions."

The decision in the court below is discussed in 8 NEB. L. BUL. 183.

That in one sense Mr. Justice Sutherland was not wholly unmoved by Mr. Justice Stone's reiterated analysis of the phrase "affected with a public interest" may be inferred from the overtone of his recurrence to the theme in *Williams v. Standard Oil Co.*[40] which denied the power of a state to regulate the retail price of gasoline. After observing that "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 or property involved is 'affected with a public interest,'" he continues:

"Nothing is gained by reiterating the statement that the phrase is indefinite. By repeated decisions of this court, beginning with *Munn v. Illinois*, * * *, that phrase, however it may be characterized, has become the established test by which the legislative power to fix prices of commodities, use of property, or services must be measured. As applied in particular instances, its meaning may be considered both from an affirmative and a negative point of view. Affirmatively, it means that a business or property, in order to be affected with a public interest, must be such or be so employed as to justify the conclusion that it has been *devoted* to a public use and its use thereby in effect *granted* to the public. * * * Negatively, it does not mean that a business is affected with a public interest merely because it is large or because the public are warranted in having a feeling of concern in respect of its maintenance. * * * 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."[41]

[40]278 U. S. 235, 49 Sup. Ct. 115 (1929), discussed by Arthur L. Haugan, "Vicissitudes of the Price Fixing Doctrine," 2 DAK. L. REV. 430; Estes Kefauver, "Legislative Price Control," 7 TENN. L. REV. 193; Henry B. Witham, "State Regulation of Business," 7 TENN. L. REV. 177; and notes in 4 ALA. L. REV. 214; 17 CAL. L. REV. 309; 24 ILL. L. REV. 482; 14 IOWA L. REV. 257; 13 MINN. L. REV. 378; 4 NOTRE DAME LAW. 475; 3 TEMP. L. REV. 321; 4 WASH. L. REV. 90; 38 YALE L. J. 674; and 39 YALE L. J. 674. A state decision on a similar law is noted in 6 No. CAR. L. REV. 459 and 6 TENN. L. REV. 287.

Somewhat analogous issues are considered in notes in 15 ST. LOUIS L. REV. 88, 414, on regulation of price of ice in Arkansas; in 12 VA. L. REV. 522 on tobacco warehouse; and 21 MICH. L. REV. 455 on a case holding a municipal fuel yard not to be a public-service plant.

[41]278 U. S. 235, 49 Sup. Ct. 115.

The power of Congress to exert the war power to authorize the Presi-

Doubtless it was not because of this refusal to restate what was said in the *Tyson* case that Justices Brandeis and Stone confined their concurrence to the result. Mr. Justice Holmes dissented, without opinion,—a rare instance of solitary dissent on his part. To his general statement, Mr. Justice Sutherland added that gasoline is an ordinary commodity of trade and that it does not matter that it is a necessity and widely used. To a claim of monopoly control of gasoline in Tennessee he replied that "objections to the materiality of the contention aside, an inspection of the pleadings and of the affidavits submitted to the lower court discloses an utter failure to show the existence of such monopoly." The contention that foreign corporations could not do business within the state without complying with the conditions prescribed was answered by saying that "while that is the general rule, a well-settled limitation upon it is that the state may not impose conditions which require the relinquishment of rights guaranteed by the Federal Constitution." This im-

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dent to fix the price of coal during the war emergency was sustained by a unanimous court in Highland v. Russell Car & Snow Plow Co., 279 U. S. 253, 49 Sup. Ct. 314 (1929), at least as to coal sold to a manufacturer of snow plows for use of railroads. After reciting the situation as to coal prices and saying that Congress and the President in exerting the war power of the nation "have wide discretion as to means to be employed successfully to carry on," Mr. Justice Butler continues:

"The principal purpose of the Lever Act was to enable the President to provide food, fuel and other things necessary to prosecute the war without exposing the government to unreasonable exactions. The authorization of the President to prescribe prices and also to requisition mines and their output made it manifest that, if adequate supplies of coal at just prices could not be obtained by negotiation and the price regulation, expropriation would follow. Plaintiff was free to keep his coal, but it would have been liable to seizure by the government. The fixing of just prices was calculated to serve the convenience of producers and dealers as well as of consumers of coal needed to carry on the war. As it does not appear that plaintiff would have been entitled to more if his coal had been requisitioned, the act and orders will be deemed to have deprived him only of the right or opportunity by negotiation to obtain more than his coal was worth. Such an exaction would have increased the cost of the snow plows and other railroad equipment being manufactured by the defendant and therefore would have been directly opposed to the interest of the government. As applied to the coal question, the statute and executive orders were not so clearly unreasonable and arbitrary as to require them to be held repugnant to the due process clause of the Fifth Amendment." [279 U. S. 253, 262.] The problem of the case is presented in Bevine Stedman, "Lever Act as a Civil Remedy," 8 VA. L. REG. (N.S.) 641.

plies that the state may exact nothing as a condition on a foreign corporation that it could not otherwise impose, but the decisions clearly do not go so far. To a complaint that the general provisions of the statute should not be denied enforcement merely because of the vice in the price-fixing requirement, Mr. Justice Sutherland answered that the other provisions are all related to the price-fixing plan and therefore can not be saved notwithstanding the separability provision of the statute.[42]

No comment on Mr. Justice Sutherland's elaboration of the words "affected with a public interest" could be more cruel than to place his discourse in juxtaposition with Mr. Justice Stone's elucidation of its question-begging meaninglessness. The decisions are not hard to understand when viewed in the light of the other decisions which the majority of the court rendered in the era of Mr. Chief Justice Taft. It is clear enough that there was a group in the court that was determined to protect private business initiative to the utmost against any distinctly novel legislative restrictions. In various fields of constitutional law in which the technical issues were quite unrelated we had substantially the same divisions of the court in case after case. The explanation of the decisions lies quite out-

[42]Some or all of these recent cases on price fixing are the provocation and the chief target of the following articles: Walton H. Hamilton, "Affectation with a Public Interest," 39 YALE L. J. 1089; Breck P. McAllister, "Lord Hale and Business Affected with a Public Interest," 43 HARV. L. REV. 759; and Maurice H. Merrill, "New Judicial Approach to Due Process and Price Fixing," 18 KY. L. J. 3.

For other articles on the general subject, see Arthur S. Aiton, "Early American Price-Fixing Legislation," 25 MICH. L. REV. 15; Norman F. Arternurn, "The Origin and First Test of Public Callings," 75 U. PA. L. REV. 411; William A. Newman, "When Is a Business So Affected with a Public Interest that It May Be Regulated by Statute," 10 BI-MON. L. REV. 15; Gustavus H. Robinson, "The Public Utility Concept in American Law," 41 HARV. L. REV. 277; Henry Rottschaefer, "The Field of Governmental Price Control," 35 YALE L. J. 438; F. Dumont Smith, "The Granger Cases," 10 A. B. A. J. 343; and Edgar Watkins, "The Law and the Profits," 32 YALE L. J. 29.

Other special phases of price regulation are treated in William Draper Lewis, "Coal Price Regulation and the Constitution," 109 ANN. AM. ACAD. POL. SCI. (No. 200) 292; Sidney Post Simpson, "Due Process and Coal Price Regulation," 9 IOWA L. REV. 145; Lowell M. Greenlaw, "The Regulation of Holding Companies," 14 PROC. ACAD. POL. SCI. (N. Y.) 108; and Philip P. Wells, "Public Regulation of the Holding Company in Public Utilities," 11 PROC. ACAD. POL. SCI. (N. Y.) (No. 4) 156.

side the opinions. Yet one still wonders how men in high judicial position can care to write long opinions that avoid the essential issues when this avoidance is so clearly pointed out by dissenting opinions which will go down to posterity as so infinitely superior to those which they challenge. To refuse to consider, in one case, the peculiar position of a broker, and then, in the next case, to adduce the first case as a controlling precedent because it dealt with a broker, is to make law by the exercise of power rather than by the exercise of reason. We are left with the conclusion that ticket brokers and employment agents are saved from price-fixing because a majority of the Supreme Court wanted to have them saved and not because the Constitution or the phrase "affected with a public interest" had anything to do with it.

The decisions on brokers were possible only because Mr. Chief Justice Taft did not persevere in maintaining the fundamental outlook of the view which he expressed in dissenting in *Adkins v. Children's Hospital*[43] which declared unconstitutional the minimum-wage law passed by Congress for the District of Columbia. Since this statute was not confined to any particular business, the constitutional issue was not fought out under the banner of the slogan "affected with a public interest." But the issue was substantially the same. Here in dissent the Chief Justice pointed to the conditions which gave to employers coercive power in bargaining with women employees. The majority acutely distinguished the precedents relied on to sustain the legislation, but were unable to see any significant distinction between fixing minimum wages and fixing maximum wages

[43] 261 U. S. 525, 43 Sup. Ct. 394 (1923), discussed in Irene Osgood Andrews, "Status of Minimum Wage Legislation in the United States," 15 AM. LABOR LEGIS. REV. 298; Minor Bronaugh, "Minimum Wage Laws," 27 LAW NOTES 28; Harry Cohen, "Minimum Wage Legislation and the Adkins Case," 2 N. Y. U. L. REV. 48; George W. Goble, "The Minimum Wage Decision," 12 KY. L. J. 3, reprinted in 58 AM. L. REV. 423; George Gorham Groat, "Economic Wage and Legal Wage," 33 YALE L. J. 489; Thomas I. Parkinson, "Minimum Wage and the Constitution," 13 AM. LABOR LEGIS. REV. 131; Thomas Reed Powell, "The Judiciality of Minimum Wage Legislation," 37 HARV. L. REV. 545; Ira Jewell Williams, "Minimum Wage Laws," 9 CONST. REV. 195; and notes in 96 CENT. L. J. 147, 399; 11 CAL. L. REV. 353; 23 COL. L. REV. 565; 11 GEORGETOWN L. J. (No. 4) 83; 18 ILL. L. REV. 118, 21 MICH. L. REV. 906; 8 MINN. L. REV. 60; 8 ST. LOUIS L. REV. 263; 2 TEX. L. REV. 99, reprinted in 58 AM. L. REV. 531; 71 U. PA. L. REV. 360; 9 VA. L. REV. 639; and 32 YALE L. J. 388, 829.

or between fixing the price of women's labor and the price of groceries. The dissenters were the Chief Justice and Justices Holmes and Sanford. Mr. Justice Brandeis did not sit. His views, however, can be surmised from his views in other cases. When Mr. Justice McKenna was succeeded by Mr. Justice Stone, there was added a fifth Justice who, it is clear, would have sustained minimum-wage legislation for women had it arisen before him for the first time. Had the Chief Justice remained with those who were with him in the dissent in the *Adkins* case, the *Tyson* case would have gone the other way. With that case decided in favor of the statute, Mr. Justice Sanford could not have adduced it as a precedent against regulating the fees of employment agencies.

These divisions of opinion lend added interest to the shift in *O'Gorman & Young v. Hartford Fire Insurance Co.*[44] in which only Justices Van Devanter, McReynolds, Sutherland and Butler dissented from the decision sanctioning statutory limitation of the commissions of insurance agents. The succession of Mr. Chief Justice Hughes and Mr. Justice Roberts has changed the intellectual complexion of the court. This is apparent already in other cases. Perhaps the complexion that counts is not wholly that of the intellect. Mood may move men more than mind. Why men think as they think, and feel as they feel, and judge as they judge remains still a mystery which no psychological oracle has yet revealed to the mere student of constitutional law. Yet in this mystery lies hidden the determining factor in the decision of the most closely contested issues of constitutional law. We can put down in print the judgments, and we can quote the opinions adduced in their support; but make our record faithful as we may, we must still leave in doubt and darkness the real forces that turn the paper requirement of due process into an effective negative on the efforts of legislatures to ameliorate the evils that inhere in the increasing complexities of modern life.

[44]282 U. S. 251, 51 Sup. Ct. 130 (1931), note 15, supra.