St. John's Law Review

Volume 8, December 1933, Number 1 Article 6

Constitutionality of Regulation of Milk Prices

Rubin Baron

NOTES AND COMMENT

Editor—RUBIN BARON

CONSTITUTIONALITY OF REGULATION OF MILK PRICES.

The ancient phrase, "affected with a public interest," has become the magic touchstone by which the constitutionality of all price-fixing regulation is to be gauged.[1] Such a criterion is admittedly vague and therefore unsatisfactory. Mr. Chief Justice Taft insists "that the circumstances which clothe a particular kind of business with a public interest" must be "such as to create a peculiarly close relation between the public and those engaged in it, and raise an implication of an affirmative obligation on their part to be reasonable with the public," [2] which test is equally as vague, and he himself readily admits its lack of precision. Mr. Justice Stone terms the expression as "too vague and illusory to carry us very far on our way to a solution." [3] Mr. Justice Holmes, who never accepted this "public interest" concept, describes it as "little more than a fiction intended to beautify what is disagreeable to the sufferer." [4] Mr. Justice Sutherland, while concluding that it is the established test, admits that the phrase is "indefinite." [5] Yet in spite of these criticisms, a more specific test has yet to be formulated and it has been adopted by the courts for what it is worth for want of a better standard.

At the last New York State legislative session, a temporary measure [6] regulating the milk industry was enacted to meet what the statute defines as an existing emergency. The Act provides for the establishment of a Milk Control Board whose duty it shall be to establish the minimum wholesale and retail prices of milk handled within the state for fluid consumption, including the prices on sales by milk dealers who run stores (unless the milk is to be consumed on the premises). Pursuant to the provisions of this statute, the Board established such a minimum price to be charged for milk by stores to consumers. Any sale at less than the minimum price so fixed was declared to be unlawful.[7]

In the first case arising under this statute, the defendant, a retail grocer, was indicted and convicted of the crime of selling milk below

---

[1] Hamilton, *Affection With Public Interest* (1930) 39 YALE L. J. 1089.

[2] Wolff Packing Co. v. Court of Industrial Relations, 262 U. S. 522, 536, 43 Sup. Ct. 630, 633 (1923).

[3] Tyson & Bro. v. Banton, 273 U. S. 418, 451, 47 Sup. Ct. 426, 435 (1927).

[4] *Id.* at 446, 47 Sup. Ct. at 434.

[5] Williams v. Standard Oil Co., 278 U. S. 235, 239, 49 Sup. Ct. 115, 116 (1929).

[6] L. 1933, c. 158, to be in effect for one year, ending March 31, 1934.

[7] *Ibid.* In fixing the price, the Board is directed to take into consideration the amount necessary to yield a "reasonable return."

the price set by the Board, in violation of the statute and the order of said Board. The defendant contended that the Act was unconstitutional, being in conflict with Section 6 of Article 1 of the State Constitution and with the Fourteenth Amendment of the Federal Constitution, in that such Act constituted a taking of property without due process of law. Upon appeal to the Court of Appeals,[8] the judgment of conviction was affirmed. This case thus squarely presents the issue of the constitutionality of the act of the Legislature in attempting to regulate the price of milk in this state.

Upon what grounds may we justify this act of the Legislature in attempting to dictate the prices at which milk may be sold? Two outlets appear: first, the temporary nature of the Act in dealing with what it declares to be a temporary emergency; second, the public-interest theory, on the ground that the milk industry is so affected with a public interest as to make regulation of prices permissible.

Upon the justification that an emergency exists, temporary legislation has been sustained, which, under normal circumstances, would have been deemed unconstitutional. In the matter of the regulation of rents, during a housing shortage, the Supreme Court of the United States declared:

> "The regulation is put and justified only as a temporary measure. * * * A limit in time, to tide over a passing trouble, may well justify a law that could not be upheld as a permanent change." [9]

Mr. Justice O'Brien, in his dissenting opinion in the instant case,[10] points out that the legislative declaration of an existing emergency is not conclusive upon the court, seeking to distinguish the rent law cases by holding that there the emergency arose because of inadequacy of housing facilities, while under the present evils there is an abundance of milk. That shortage may quickly follow upon the heels of abundance has been but too clearly brought out by our present economic era. That the present overabundance can quickly turn into scarcity can readily be visualized where the selling price of milk has fallen below the cost of production. Should it be necessary that the Legislature wait until the present evils cause such disintegration of the milk industry that the milk supply be imperiled? It seems, therefore, that upon the temporary emergency ground alone the constitutionality of the statute under review might be sustained.

---

[8] People v. Nebbia, 262 N. Y. 259, 186 N. E. 694 (1933).

[9] Block v. Hirsch, 256 U. S. 135, 157, 41 Sup. Ct. 458 (1921); see also Wilson v. New, 243 U. S. 332, 37 Sup. Ct. 298 (1916); Fort Smith & Western R. R. Co. v. Mills, 253 U. S. 206, 40 Sup. Ct. 526 (1919); Marcus Brown Holding Co. v. Feldman, 256 U. S. 170, 41 Sup. Ct. 465 (1921), which held constitutional the New York State rent laws passed in 1920.

[10] *Supra* note 8, at 275, 186 N. E. at 695.

Viewing the legislation from the *public interest* theory or the *public utility* [11] concept, a more difficult problem is presented. When is a business so affected with a public interest as to justify the regulation of prices? In the solution of this question, precedent seems of little value except in so far as the general attitude of the Court upon the subject may be ascertained.

At the outset of a long train of cases dealing with the constitutionality of legislative attempts at price fixing is the decision of *Munn* v. *Illinois,*[12] a decision recognized as a landmark in constitutional law.[13] There, a statute involving the fixing of the maximum price for the storing of grain was held to be constitutional, the Court declaring that the grain elevator business was such "in which the whole public has a direct and positive interest." [14] In *Brass* v. *North Dakota* [15] and *Budd* v. *New York* [16] similar statutes were sustained. Following the rule laid down in *Munn* v. *Illinois,* the United States

---

[11] Manley, *Constitutionality of Regulating Milk as a Public Utility* (1933) 18 CORN. L. Q. 410; Cross, *Legal Aspects Leading to Milk Control Law* (May, 1933) N. Y. STATE BAR ASS'N BULL. 211, 216.

The statute provides: "Section 200. Legislative finding; statement of policy. This article is enacted in the exercise of the police power of the state and its purposes generally are to protect the public health and public welfare. It is hereby declared that unhealthful, unfair, unjust, destructive, demoralizing and uneconomic trade practices have been and are now carried on in the production, sale and distribution of milk and milk products in this state, whereby the dairy industry in the state and the constant supply of pure milk to inhabitants of the state are imperiled. That such conditions constitute a menace to health, welfare and reasonable comfort of the inhabitants of the state. That in order to protect the well-being of our citizens and promote the public welfare and in order to preserve the strength and vigor of the race, the production, transportation, manufacture, storage, distribution and sale of milk in the State of New York is hereby declared to be a business affecting the public health and interest. That the production and distribution of milk is a paramount industry upon which the prosperity of the state in large measure depends. That the present acute economic emergency being in part the consequence of a severe and increasing disparity between the prices of milk and other commodities, which disparity has largely destroyed the purchasing power of milk producers for industrial products has broken down the orderly production and marketing of milk and has seriously impaired the agricultural assets supporting the credit structure of the state and its local governmental subdivisions. That the danger to the public health and welfare is immediate and impending, the necessity urgent and such as will not admit of delay in public supervision and control in accord with proper standards of production, sanitation and marketing. The foregoing statements of fact, policy and application of this article are hereby declared as a matter of legislative determination." (§300, AGRICULTURAL AND MARKETS LAW, L. 1933, c. 158.)

[12] 94 U. S. 113 (1876).

[13] Finkelstein, *From Munn v. Illinois to Tyson v. Banton, A Study in the Judicial Process* (1927) 27 COL. L. REV. 769.

[14] For criticism of this holding, see 1 BRYCE, AM. COM. (1889) 267; Forster, *Property Affected by Public Interest* (1895) 5 YALE L. J. 49; Marshall, *A New Constitutional Amendment* (1890) 24 AM. L. R. 908.

[15] 153 U. S. 391, 14 Sup. Ct. 857 (1893).

[16] 143 U. S. 517, 12 Sup. Ct. 468 (1892).

Supreme Court in *German Alliance Insurance Co.* v. *Lewis*[17] held that the fire insurance business was such as to come within the *public interest* rule of the *Munn* case. From then, the trend toward the present conservatism appears. In *Wolff Packing Co.* v. *Court of Industrial Relations*,[18] the Court held invalid a statute of a state legislature attempting to fix wages paid by packers and other employments involving the production of clothing and food. The question of whether the preparation of food could be subjected to regulation as a utility was left open, for even if there could be, the Court held there was no justification for carrying regulation of such a business to the extent of fixing wages. In 1927, the Supreme Court invalidated the New York ticket-scalping law wherein the Legislature attempted to regulate the prices for the resale of theatre tickets.[19] In the following year, a statute, enacted by the New Jersey Legislature regulating the rates of private employment agencies was declared to be unconstitutional.[20] A Tennessee statute conferring upon the Commissioner of Finance power to regulate the price of gasoline was held unconstitutional.[21] The last utterance of the Supreme Court on the subject is to be found in *New State Ice Co.* v. *Liebmann*.[22] That case involved a statute declaring the manufacture and sale of ice to be a public business, placing it under the control of a State Corporation Commission both as to rates and practices. Mr. Justice Sutherland, adopting the time-worn standard, declared that the ice business was not so "charged with a public use as to justify the particular regulation above stated," holding the statute uncon-

---

[17] 233 U. S. 389, 34 Sup. Ct. 612 (1914); see also O'Gorman & Young v. Hartford F. Ins. Co., 282 U. S. 251, 51 Sup. Ct. 130 (1931).

[18] *Supra* note 2, at 535, 43 Sup. Ct. at 632. Chief Justice Taft classifies business affected with a public interest as follows:

> "(1) Those which are carried on under the authority of a public grant of privileges which either expressly or impliedly imposes the affirmative duty of rendering a public service demanded by any member of the public. Such are the railroads, other common carriers and public utilities. (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 * * *. (3) Businesses which though not public at their inception may be fairly said to have risen to be such and have become subject in consequence to some government regulation. They have come to hold such a peculiar relation to the public that this is superimposed upon them. In the language of the cases, the owner by devoting his business to the public use, in effect grants the public an interest in that use and subjects himself to public regulation to the extent of that interest although the property continues to belong to its private owner and to be entitled to protection accordingly."

[19] Tyson & Bro. v. Banton, supra note 3.

[20] Ribnik v. McBride, 277 U. S. 350, 48 Sup. Ct. 545 (1927).

[21] Williams v. Standard Oil Co., *supra* note 5.

[22] 285 U. S. 262, 52 Sup. Ct. 351 (1932).

stitutional, as violative of the Fourteenth Amendment. That case is distinguishable from the present one. The New York law creates no monopoly, it does not restrict production and was adopted to meet an emergency. Moreover, milk is a greater necessity than ice.[23]

There is little room for argument that milk is a common necessity upon which the public is dependent. The milk industry "is of such paramount importance as to justify the assertion that the general welfare and prosperity of the state in a large and real sense depend upon it." [24] Without attempting to submit the milk industry to the various tests handed down by the courts as a basis for price regulation, it must be admitted that it is an industry in which the public is vitally interested.

Because of this keen public interest, the milk industry has been continually subjected to government regulation. Statutes regulating the erection of cow stables and dairies have been upheld,[25] as was a statute requiring the securing of a permit as a necessary condition for the dealing in milk.[26] A statute prohibiting the operation of a milk plant or manufactory without first securing a license was held to be valid.[27] While conceding that to a certain extent government regulation of the milk industry is permissible under the police powers of the state, a distinction is sought to be found between such regulation and price fixing.[28] The difficulty arises when the line of demarcation is sought to be drawn. Whether such a distinction does in fact exist may well be doubted. "In the entire history of rate regulation * * * it has never been suggested that rate regulation stood on any different footing from any other type of industrial regulation." [29] In all the outstanding cases of price fixing, in the cases of railroads, grain elevators, and insurance cases, all of these had already been subjected to other forms of legislative regulation and no distinction was drawn between this prior regulation and the regulations fixing prices.[30] In *German Alliance Insurance Co.* v. *Lewis*,[31] the proposition that rate regulation differed from other forms of regulation was expressly repudiated, the Court holding that "it is idle therefore to debate whether the liberty of contract * * * is more intimately involved in price regulation than in other forms of regulation as to the validity of which there is no dispute."

---

[23] People v. Nebbia, *supra* note 8.

[24] AGRICULTURAL & MARKETS LAW §300, *supra* note 11.

[25] Fischer v. St. Louis, 194 U. S. 361, 24 Sup. Ct. 673 (1904).

[26] New York, *ex rel.* Lieberman v. Van DeCarr, 199 U. S. 552, 26 Sup. Ct. 144 (1905).

[27] People v. Perretta, 253 N. Y. 305, 171 N. E. 72 (1930); see also People v. Teuscher, 248 N. Y. 454, 162 N. E. 484 (1928).

[28] Dissenting opinion of O'Brien, *J.*, in People v. Nebbia, *supra* note 8, at 273, 186 N. E. at 700.

[29] Finkelstein, *From Munn v. Illinois to Tyson v. Banton*, *supra* note 13, at 779.

[30] *Ibid.*

[31] *Supra* note 16.

It is conceded to be vital to the public welfare that the cities of the state be supplied with pure and wholesome milk. It is of utmost import to the public welfare that the farmers be induced to produce milk for the use of the cities. It is submitted that any legislation which attempts to assure the existence of these conditions is sustainable as a valid exercise of the police power, whether such regulation be in the guise of price regulation or otherwise. The Pitcher Committee which was appointed by the Legislature on March 10, 1932, "to investigate the causes of the decline in the price of milk and the resultant effect of the low prices upon the dairy industry and the future supply of milk to the cities of the state," as a result of such investigation, found that price cutting had reduced the price of milk to a point below the cost of production, causing a critical financial condition among the farmers. The types of regulation must necessarily differ with the variety of circumstances sought to be dealt with. The regulation should fit the need of the specific problem confronted. Here, the difficulty is essentially economic in its nature; why should not the remedial attempts be of a similar nature. Rather than attempt to search for a *standard* or a *test* by which each case is to be scrutinized, why should not each specific problem be fought with the weapons best suited to handle the situation? "The search for a standard" should be "replaced by a pragmatic inquiry into the necessity of each case." [32] "The scope of the application of the constitutional guaranties must expand or contract to meet the new and different conditions which are constantly coming within the field of their operation. In a changing world, it is impossible that it should be otherwise." [33] The wisdom of the words of Mr. Justice Holmes is not to be disregarded: "The truth it seems to me to be that, subject to compensation when compensation is due, the Legislature may forbid or restrain any business when it has a sufficient force of public opinion behind it." [34]

This leads us to another important inquiry. On October 23, 1933, a review of the present case was granted by the Supreme Court of the United States. The decision of the Supreme Court in this case will necessarily determine also the constitutionality of the Agricultural Adjustment Act [35] under which the Secretary of Agriculture fixed the selling price of milk in various sheds.[36] In fact,

[32] Hamilton, *Affection With Public Interest, supra* note 1, at 1111.

[33] Euclid v. Able, 272 U. S. 365, 47 Sup. Ct. 114 (1926).

[34] Dissenting opinion of Holmes, *J.*, in Tyson v. Banton, *supra* note 3.

[35] Passed by Congress on May 12, 1933.

[36] The constitutionality of the Act was upheld by a decision of Justice Donoghue in the District of Columbia Supreme Court, declaring: "The Court finds that a national emergency exists and that the welfare of the people and the very existence of the Government itself are in peril. The day has passed when absolute vested rights in contract or property are to be regarded as sacrosanct or above the law. Neither the necessities of life nor commodities affected with a public interest can any longer be left to ruthless competition or selfish greed for their production or distribution. The Court finds that the

the entire recovery program of the administration under the N. R. A. (which is surely price fixing on a broader scale than is here attempted) is directly involved. That the Supreme Court should attempt to overthrow the entire recovery platform by an adverse ruling seems highly improbable. Whether it be due to public opinion or because the Court will willingly throw off its cloak of conservatism in the face of this national crisis, it is the writer's opinion that the Supreme Court will sustain these acts.

Changed conditions and circumstances require new remedies. A rule once sound under certain conditions may prove inadequate under different surroundings. If such were the attitude of the Court towards present emergency legislation, little difficulty would be had in rejecting old standards and seemingly binding authority to the contrary,[37] and upholding a statute when the conditions so require it. It should not be necessary to conclude whether or not the milk industry is so "affected with a public interest" as to justify price regulation, as that phrase has been employed in the past. If it is such an industry, no problem arises. If it cannot be placed within that category, that fact should not prove an unsurmountable barrier. Rather, the Court should take the position that it is dealing with an old problem under different circumstances, and as such should be treated in the light of prevailing conditions.

RUBIN BARON.

THE DOCTRINE OF "THE LAST CLEAR CHANCE."

The old common law built up a system of tort liability based primarily on fault. Having achieved such a system, based upon this broad foundation, it limited liability to situations where only one of the parties was at fault, and denied recovery where the fault was mutual.[1] This limitation became known as the doctrine of contributory negligence, for when the injury complained of was the result of the fault of both parties, the defendant could set up as a complete bar to the plaintiff's recovery, the plaintiff's own contributing negligence. Today our courts still adhere to this doctrine. It is applied in our common law courts to preclude any recovery,[2] although a few

---

Agricultural Adjustment Act, passed by Congress on May 12, 1933, is constitutional and that the regulations and licenses promulgated and issued thereunder are reasonable and valid" (citing People v. Nebbia, *supra* note 8).

[37] Fairmont Creamery Co. v. Minn., 274 U. S. 1, 47 Sup. Ct. 506 (1929). This decision is "to be read in the light of surrounding circumstances." (Pound, *Ch.J.*, in People v. Nebbia, *supra* note 8.)

[1] POUND, AN INTRODUCTION TO THE PHILOSOPHY OF LAW (1922) 167; Note (1922) 32 COL. L. REV. 493.

[2] Bohlen, *Contributory Negligence* (1908) 21 HARV. L. REV. 233.