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## AFFECTATION WITH PUBLIC INTEREST

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### I

If, towards the close of a life which ended in 1676, Sir Matthew Hale scribbled into a treatise on the ports of the sea<sup>1</sup> the words "affected with a public interest" with an intent of making a great contribution to American constitutional law, the records make no mention of it. But whatever his meaning and purpose, events have conspired to accord to Britain's Chief Justice of the Restoration period a share in the authorship of the supreme law of the land; for a phrase which hails from a Merry England of a quarter-millennium ago has come to be the "established test by which the legislative power to fix the prices of commodities, use of property, and services, must be measured."<sup>2</sup> It is, accordingly, of some interest to inquire into the coming of this ancient phrase into the constitution of the new republic, its vicissitudes at the hands of the bench, the authority which for the moment it enjoys, and the security of its current position.

On three occasions of late the United States Supreme Court has appealed to the "test" of "affected with a public interest" to dispose of cases turning upon the power of state legislatures to fix prices. A New York statute, aimed at excessive charges by brokers, forbade the resale of a theatre ticket "at a price in excess of fifty cents in advance" of the box-office price.<sup>3</sup> A New

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<sup>1</sup> A Treatise in Three Parts. "PARS PRIMA. *De Jure Maris*. PARS SECUNDA. *De Portibus Maris*. Pars Tertia. Concerning the Custom of Goods imported and exported." From a MANUSCRIPT OF LORD CHIEF JUSTICE HALE in I HARGRAVE, COLLECTION OF TRACTS RELATIVE TO THE LAW OF ENGLAND, 1-248 (1787).

<sup>2</sup> Mr. Justice Sutherland in *Williams v. Standard Oil Co.*, 278 U. S. 235, 239, 49 Sup. Ct. 115, 116 (1929).

<sup>3</sup> *Tyson and Bro. v. Banton*, 273 U. S. 418, 47 Sup. Ct. 426 (1927).

Jersey statute, leveled at the evils attending trafficking in jobs, subjected the fees to be charged by employment agencies to the approval of the Commissioner of Labor.<sup>4</sup> A Tennessee statute, designed to secure cheaper motor fuel, conferred upon the Commission of Finance and Taxation the power to regulate the price of gasoline.<sup>5</sup> In each case the statute was found to "contravene the Federal Constitution;" in each case the industries to be regulated—traffic in theatre tickets, in human labor, and in gasoline—were discovered not to be "affected with a public interest;" in each case invalidity was found by resort to Lord Hale's words. In each instance the constitution was strictly construed; the results were made to rest upon "constitutional principles, applied as they are written," far too uniform and far too enduring "to be remodelled by law-makers or judges to save exceptional cases of inconvenience, hardship, or injustice."<sup>6</sup>

An application of a "constitutional principle" as it is "written" is no simple and automatic procedure. It has required a long line of decisions and a half-century of judicial history to establish the current rule for the validity of price regulation. The verbal prohibition is against "any state" depriving "any person of life, liberty, or property, without due process of law."<sup>7</sup> A court, whose members were mature and experienced when the Fourteenth Amendment was passed, persisted in established habits of thought. To them the constitution was the old constitution; the states might use the police power to promote the general welfare.<sup>8</sup> Due process of law was a phrase not yet quickened into life by interpretation; it took a new generation of jurists to recognize its importance and to make explicit the propositions hidden within its compact language. But in time it came to be seen that the due process clause may be invoked against state legislation; that the phrase has reference not only to the manner of the taking but also to the thing taken; that "property" contains "rights"<sup>9</sup> which the legislature has no power to abridge or

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<sup>4</sup> Ribnik v. McBride, 277 U. S. 350, 48 Sup. Ct. 545 (1928).

<sup>5</sup> Williams v. Standard Oil Co., *supra* note 2.

<sup>6</sup> Tyson & Bro. v. Banton, *supra* note 3, at 445, 47 Sup. Ct. at 433.

<sup>7</sup> Constitution of the United States of America, Fourteenth Amendment, § 1 (1868).

<sup>8</sup> A clear-cut conception of the dominance of the police power is to be found in Mr. Justice Miller's opinion in the Slaughter House Cases, 16 Wall. 36 (U. S. 1873). The potential meaning of "due process" is vaguely suggested in the dissent, particularly in the opinion of Mr. Justice Bradley, 16 Wall. at 122-123.

<sup>9</sup> For the emergence of the doctrine note, in chronological order, The Slaughter House Cases, *supra* note 8; Davidson v. New Orleans, 96 U. S. 97 (1877); San Mateo County v. Southern Pacific Ry., 13 Fed. 722 (C. C. D. Cal. 1882); Butchers' Union v. Crescent City Landing Co., 111 U. S. 746, 45 Sup. Ct. 652 (1884); Mugler v. Kansas, 123 U. S. 623, 8 Sup. Ct. 273

deny; that freedom of contract is a property right;<sup>10</sup> and that the corporation is a person to be accorded the protection given to the individual.<sup>11</sup> Thus the court came to deny the validity of legislation which oversteps its limited constitutional bounds.<sup>12</sup>

In course of time an application of "the constitutional principle" has afforded to the making of price an unusual protection against legislative interference. In respect to other matters of contract, the right of the interested parties to make what terms they will is accorded a limited protection. It must yield before a police power invoked in behalf of public safety, public health, public morals, or even on occasion that vague thing called the public welfare. Thus the legislature may shorten the working day,<sup>13</sup> insure to the laborer compensation for industrial accident,<sup>14</sup> prohibit child labor<sup>15</sup> and night work for women,<sup>16</sup> prescribe methods of wage payment,<sup>17</sup> insure the quality of wares offered for sale,<sup>18</sup> and provide for the guarantee of bank deposits.<sup>19</sup> But freedom of contract in the making of price belongs in a class by

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(1887); *Chicago, Minneapolis & St. Paul Ry. v. Minnesota*, 134 U. S. 418, 10 Sup. Ct. 703 (1890).

<sup>10</sup> *Allgeyer v. Louisiana*, 165 U. S. 578, 17 Sup. Ct. 427 (1897); *Adair v. United States*, 208 U. S. 161, 28 Sup. Ct. 277 (1908).

<sup>11</sup> *Santa Clara County v. Southern Pacific R. R.*, 118 U. S. 394, 6 Sup. Ct. 1132 (1886).

<sup>12</sup> In *Massachusetts v. Mellon*, 262 U. S. 447, 488, 43 Sup. Ct. 597, 601 (1923), Mr. Justice Sutherland remarks: "The general rule is that neither [that is, the legislative, executive or judicial] department may invade the province of the other and neither may control, direct, or restrain the action of the other . . . We have no power *per se* to review and annul acts of Congress on the ground that they are unconstitutional. . . . The power exercised . . . amounts to little more than the negative power to disregard an unconstitutional enactment, which otherwise would stand in the way of an enforcement of a legal right." The theory is that the court does not declare "void," but refuses to enforce, an unconstitutional act. The distinction, which is a neat bit of rhetoric, is equally applicable to the judicial review of state legislation.

<sup>13</sup> *Holden v. Hardy*, 169 U. S. 366, 18 Sup. Ct. 383 (1898); *Bunting v. Oregon*, 243 U. S. 426, 37 Sup. Ct. 435 (1917).

<sup>14</sup> *New York Central Ry. v. White*, 243 U. S. 188, 37 Sup. Ct. 247 (1917); *Mountain Timber Co. v. Washington*, 243 U. S. 219, 37 Sup. Ct. 260 (1917); *Arizona Employers' Liability Cases*, 250 U. S. 400, 39 Sup. Ct. 553 (1919).

<sup>15</sup> *Sturges & Burn v. Beauchamp*, 231 U. S. 320, 34 Sup. Ct. 60 (1913).

<sup>16</sup> *Radice v. New York*, 264 U. S. 292, 44 Sup. Ct. 325 (1924).

<sup>17</sup> *Knoxville Iron Co. v. Harbison*, 183 U. S. 13, 22 Sup. Ct. 1 (1901); *McLean v. Arkansas*, 211 U. S. 539, 29 Sup. Ct. 206 (1909).

<sup>18</sup> *Hipolite Egg Company v. United States*, 220 U. S. 45, 31 Sup. Ct. 364 (1911); *Armour & Co. v. North Dakota*, 240 U. S. 510, 36 Sup. Ct. 440 (1916); *United States v. Forty Barrels and Twenty Kegs of Coca-Cola*, 241 U. S. 265, 36 Sup. Ct. 573 (1916); *United States v. Johnson*, 221 U. S. 488, 31 Sup. Ct. 627 (1911). But see *Weaver v. Palmer Bros. Co.*, 270 U. S. 402, 46 Sup. Ct. 320 (1926), in which the court found invalid a statute of Pennsylvania forbidding the use of "shoddy" in manufacturing.

<sup>19</sup> *Noble State Bank v. Haskell*, 219 U. S. 104, 31 Sup. Ct. 186 (1911).

itself; a statute intended to abridge the rights of the high contracting parties to agree upon what compensation they will must meet an extra constitutional hazard. It is to be found valid only in an industry "affected" or in a business "clothed" with "a public interest."<sup>20</sup>

It has thus come about that a train of propositions stretch away from the simple words of "the due process" clause to the ultimate "test"<sup>21</sup> of "public interest." They are, each and every one of them, essential to a judgment of invalidity upon price regulation. Take away a single one and the argument of unconstitutionality cannot march to its conclusion. Such, in the safeguarding of market price against the action of the state, has been the course of "constitutional principles applied as they are written."

## II

The knack of putting up new wine in old bottles is one of the most valuable tricks of the judicial trade. It may keep law backward by crowding stuff of a newer world into an outworn term which was never intended to hold it; it may serve a living law by permitting a graceful accommodation of a vocabulary that endures to the shifting exigencies of a developing society. Its use is neither good nor bad in itself; it depends upon the crudeness or the skill, the blindness or the awareness, with which the feat is accomplished. The practice of the judicial art could hardly go on without it. The survival of the term "affected with a public interest" is in large measure due to the ease with which it is adapted to a changing common sense and judicial opinion.

The term was coined by Sir Matthew Hale towards the end of the third quarter of the seventeenth century. The essay in which it appears remained in manuscript for more than one hundred

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<sup>20</sup> It is necessary to distinguish between "public interest" and "affected with a public interest." Public interest is a general term connoting matters which legally are of common concern; "affected with a public interest" has come to be a technical term belonging to the vocabulary of constitutional interpretation. An example of the broader usage is to be found in *Mobile v. Yuille*, 3 Ala. (N. S.) 140 (1837), in which a rather belated assize of bread is found not to be "contrary" to the constitution of the state. An example of the narrower usage is *Tyson & Bro. v. Banton*, *supra* note 3.

<sup>21</sup> The term "public interest" is employed by the court in cases relating to such matters as eminent domain, taxation, and price-fixing. It would be interesting, but beyond the scope of this article, to inquire into the meaning which it has come to have in respect to each of these subjects. Here the discussion is limited to the "public interest" which is the test of legislative price-fixing.

An excellent discussion of the judicial use and the economic significance of "public interest" as related to price-fixing is to be found in KEEZER AND MAY, *THE PUBLIC CONTROL OF BUSINESS* (1930) 97-163.

years, almost unnoticed; it was published in the very year in which the Constitution of the United States was set down on parchment.<sup>22</sup> In the early part of the nineteenth century the phrase was quoted and the essay cited by the English courts.<sup>23</sup> In 1837 an erudite justice of the United States Supreme Court, in a treatise packed with learning, which is at once an essay on the nature of the constitution and a series of separate opinions, refers to the treatise but fails to quote the phrase.<sup>24</sup> In the *Munn* case,<sup>25</sup> argued in the year that marked the bicentennial of Lord Hale's death and the centennial of the Declaration of Independence, the phrase was given currency and started upon its legal adventures.<sup>26</sup> In the *Wolff* case<sup>27</sup> it emerges definitely as the "constitutional principle" applicable to price regulation.

In the passage in Lord Hale's essay, in which the phrase is first used, there is little to attract unusual attention. In a distinction between public and private wharves, the author insists that "a man" who "for his own private advantage" sets up a wharf or a crane "may take what rates he and his customers may agree;" but at a wharf unto which all persons must come to unlade or lade their goods "there cannot be taken arbitrary or excessive duties," but "the duties must be reasonable and moderate." The reason is that "now the wharf and the crane and other conveniences are affected with a publick interest, and they cease to be *juris privati* only."<sup>28</sup>

It is difficult to find here a criterion for price-fixing or even a clear-cut rule of law. Instead, the meaning seems to be insepar-

<sup>22</sup> An excellent account of the history of the manuscript and of the judicial use of the doctrine is to be found in McAllister, *Lord Hale and Business Affected with a Public Interest* (1930) 43 HARV. L. REV. 759.

<sup>23</sup> *Bolt v. Stennett*, 8 T. R. 606 (1800); *Allnutt v. Inglis*, 12 East 527 (1810).

<sup>24</sup> In the concurring opinion of Mr. Justice Baldwin in the case of *Charles River Bridge v. Warren Bridge*, 11 Peters 420 (U. S. 1837). The opinion appears as a section of A GENERAL VIEW OF THE ORIGIN AND NATURE OF THE CONSTITUTION AND GOVERNMENT OF THE UNITED STATES, which was published at Philadelphia in 1837, and is reprinted in 9 L. Ed. 868. The references to Lord Hale's essay are at pp. 938-955.

<sup>25</sup> *Munn v. Illinois*, 94 U. S. 113 (1877).

<sup>26</sup> The dates which mark the progress of the doctrine are interesting, 1676, 1876, 1887. It is perhaps a bit more significant that the first date precedes, and the second follows by a century Adam Smith's *Wealth of Nations* (1776). In this book is to be found the beginnings of a philosophy of economic individualism, in terms of which Lord Hale's phrase was a century and a half later to be interpreted.

<sup>27</sup> *Wolff Packing Co. v. Court of Industrial Relations of Kansas*, 262 U. S. 522, 43 Sup. Ct. 630 (1923), 267 U. S. 552, 45 Sup. Ct. 441 (1924).

<sup>28</sup> *Supra* note 1, at 77-78. Little is added by the quotation of the whole passage. Readers to whom HARGRAVE, *TRACTS* is not accessible will find it in *Munn v. Illinois*, *supra* note 25, at 127, or in *McAllister, op. cit. supra* note 22, at 764.

able from the subject under discussion, the common-sense which then prevailed, and the accepted notions about price control. The lines occur in a paragraph set in an orderly and comprehensive discussion of the ports of the sea; the passage is concerned with a division of that larger subject. It defines public wharves; finds them to operate by the King's license; recognizes their monopoly character; and notes the limitations imposed upon their charges. In their context, and against the background of custom and thought, the meaning of these simple words is not far to seek. In the days in which English industry was largely domestic, the production and use of most goods was untouched by trade. Where wares and services came to market, and in a public place were bought and sold, it was the ordinary thing for prices to be fixed by Parliament, or in the absence of a statute by justices of the peace.<sup>29</sup> In the disorder attending and following the civil wars many an ancient usage was relaxed; and "cranage, wharfage, and pesage," unchecked by the government, may have become extortionate charges. Although authority had not the strictness of Elizabethan days, the prevailing notions of what should be remained as they were. In Lord Hale's time, however laxly the laws were enforced, all activity comprehended under what today we call business, was public, and all of it subject to price control.<sup>30</sup> The words may be a sanction for prosecution for extortion even when prices are not authoritatively fixed;<sup>31</sup> they may be an admonition lest the ancient law be forgotten; they are most likely only a statement of a legal ideal to which usage is supposed to conform.<sup>32</sup>

But, with whatever meaning historical scholarship may endow the phrase, it is clear that here is no "test" for legislative price-fixing. If "conveniences" like cranes and wharves are "affected with a public interest," it does not follow that a like cloak must be thrown about trades and callings to bring their prices under control. It is quite impossible to find in Lord Hale's sentences a standard by which is to be measured a price regulation whose legality and economic soundness had not been questioned; or to discover there a limit to legislative discretion in a country in which even to this day Parliament decides for itself how far it may go in the control of industry. In law, as elsewhere, questions are not formally answered before they are asked.

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<sup>29</sup> The price of coal in London is fixed as late as 1664 by 16 Car. II, c. 2, "An Act for regulating the measures and prices of coals."

<sup>30</sup> Adler, *Business Jurisprudence* (1914) 28 HARV. L. REV. 135.

<sup>31</sup> The writer has been permitted to read an unpublished manuscript of Mr. J. A. McLean, concerned with the concept of public interest. After a careful study of Lord Hale's essay and the economic documents of the period Mr. McLean concludes that it was an invitation to the judicial determination of "wharfage" even in the absence of statutory authority.

<sup>32</sup> McAllister, *op. cit. supra* note 22.

A lapse in usage helps a legal term to acquire a fresh meaning. The two centuries which elapsed between the scribble in an English country home and the plea of an Illinois lawyer in a Washington court room enabled the phrase to rid itself of a seventeenth century content and to take on a mid-nineteenth century meaning. As trades gave way to businesses, and production for the market began to be the rule, price came to be of great concern in a rising industrial society. In time dissatisfaction with prices established in the market was inevitable; sooner or later the persons who thought they were paying too much or getting too little would appeal to the state. The demand to curb large corporations, particularly those which intervened between producers and consumers, came to a head in the Granger movement. In the grain belt, state after state attempted to bring large-scale business under governmental control. Illinois fell in line; the legislature, prompted by the farmers and other good people of the state, decided to regulate the charges of grain elevators. Members of the trade objected, insisted that the legislation was invalid, and took the issue into the courts.

A rising business system and a written constitution were almost certain to create for the control of prices a distinctive doctrine. But it was by the merest chance that the phrase "affected with a public interest" came into that eminence. In Illinois, Munn and Scott, who had elected to try the issue at law, lost their case; the state supreme court<sup>33</sup> found the grain elevators to be engaged in "public employment;" it insisted that since they were not to be taken from their owners there was no deprivation of property. The case was appealed;<sup>34</sup> and the learned counsel for plaintiffs-in-error presented to the United States Supreme Court a novel, erudite, and ingenious argument. They invoked the protection of the due process clause; insisted that this phrase was to be interpreted in the light of the common law; represented Lord Hale as a great authority upon that subject; cited his treatise upon the ports of the sea for the rule on price regulation; declared its meaning to be a limitation of legislative action to businesses "affected with a public interest;" and denied that grain elevators were anywhere to be found within that catalogue.<sup>35</sup> It is almost certain that had Munn's attorneys not called the attention of the court to the neglected essay, Lord Hale's phrase would not have been used; it is quite beyond doubt that in any event the Illinois statute would have been upheld. But here was

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<sup>33</sup> *Munn v. People*, 69 Ill. 80 (1873).

<sup>34</sup> *Munn v. Illinois*, *supra* note 25.

<sup>35</sup> For many of these details the writer is indebted to the thorough study of the record and briefs in the case made by Mr. Dexter M. Keezer, now a member of the editorial staff of the Baltimore Sun. See also KEEZER AND MAY, *op. cit. supra* note 21, at 123-125.

a gift of an argument much too useful to be rejected. So Mr. Chief Justice Waite, with a rare impartiality, accepted the rule of law from the plaintiffs-in-error, affected grain elevators with a public interest, and handed the decision to the state of Illinois.

But the issue is not as simple as all this. In an opinion marked rather by common-sense than by clean-cut reasoning a doctrine of public interest is at best to be found only in embryo. In a constructive argument the Chief Justice rests the validity of the legislation squarely upon the police power, makes no distinction between price-control and other forms of regulation, and finds a sufficient excuse in the strategic position of elevators which stand at the gateways of commerce and take their toll. In any event he would doubtless have attempted to find a word comparable to public health, public safety, and public morals, to justify and particularize the use of the police power. But beyond a short specific statement he would probably not have gone but for the temptation offered by learned counsel. He attempts a rejoinder to their use of Lord Hale's rule, is captivated by the neatness and relevancy of the phrase, and passes from rebuttal to affirmative utterance. He reads into the words the power of the legislature to regulate "a business in which the whole public has a direct and positive interest;"<sup>36</sup> and gives a flourish to his argument by the figure of devotion to "public use."<sup>37</sup> In his thought the phrase is still a generic term of common law, on all fours with "public morals," "public safety," and "public health;" it has not yet become a technical term in the vocabulary of constitutionality.<sup>38</sup> In a shorter opinion Waite could have reached his conclusion without benefit of Lord Hale's phrase;<sup>39</sup> in the longer one his use of it does not quite make his argument march.<sup>40</sup> In short

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<sup>36</sup> *Munn v. Illinois*, *supra* note 25, at 133.

<sup>37</sup> *Ibid.* 126.

<sup>38</sup> To the writer it seems that Mr. Justice Field had a much clearer appreciation of the novelty which had been brought into constitutional law than had Mr. Chief Justice Waite. In fact, by the specific attention directed to it, he comes very near to disassociating "public interest" from "the police power" and making a doctrine of it.

<sup>39</sup> A harsh critic is likely to point out many puzzles in the opinion; a generous one cannot escape pointing out a lack of economy in judicial statement. An argument that the legislation is a proper exercise of the police power is enough to support the conclusion of constitutionality; a reasoned rejection of Lord Hale's rule as implicit in due process is enough to refute the contention of unconstitutionality. It is when he does the superfluous, and argues positively that grain elevators are affected with a public interest, that he opens the door to a new doctrine and invites a protracted discussion of his unnecessary words.

<sup>40</sup> It seems to the writer that a great deal of the discussion of Waite's opinion has been beside the point because the opinion has been read without reference to the briefs. An oversight of the occasion for Waite's discussion of Lord Hale has led students and courts alike to accept as part of the positive argument a discussion which was intended to be a rejoinder



the Chief-Justice reads and expounds Lord Hale with a mind filled with the decisions of a court dominated by the spirit of Taney. He tears a fragment from the annals of the law, strips away its specific reference to wharves, and recreates it in the likeness of the police power.

But "public interest" could hardly escape positive judicial use. Along with the *Munn* case came others which gave occasion to extend the concept and to narrow its meaning. The notorious instance of evils in the wake of uncontrolled price was the railways; the problem of the regulation of rates was imperative. In disposing of these cases the Chief Justice throws a cloak of public interest about "carriers for hire." So like in his mind were railroads to grain elevators that a restatement of his argument was not demanded; it is enough to refer back to the *Munn* case.<sup>41</sup> In time "public use" helped the law of public utilities to a promising start; in doing so the general language of the opinion was neatly chiseled to make out a specific case for interference.<sup>42</sup> A few lines in which Waite translates Lord Hale's sentences into a formula of control for a coming industrialism were found to be quite in point. He declares, properly enough, that "property" becomes "clothed with a public interest when used in a manner to make it of public consequence, and affect the community at large." He insists that, when "one devotes his property to a use in which the public has an interest, he, in effect, grants to the public an interest in that use." Thus "public use" becomes the invitation to regulation; and the grantor "must submit to be controlled by the public for the common good, to the extent of the interest he has thus created."<sup>43</sup> In isolation from the opinion these sentences invite a development of a doctrine of public interest in terms of the use of property.<sup>44</sup> But if a concern with the railroad problem tended to identify public interest with public

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to counsel. Here a separation of holding from dicta, as they have been set down by interpreters, invites an interesting study in the judicial process. Had it been so read the opinion could not have been cited in support of decisions declaring legislative price fixing invalid. Its future would in all probability have been that of the *Slaughter House Cases*, 16 Wall. 36 (U. S. 1873).

<sup>41</sup> It is likely that it was the necessity for dealing with the railroad cases that caused Waite to pass from a rejoinder to *Munn's* attorneys to a positive utterance about public interest. The disposition of the *Munn* case does not demand it; but it makes of that case a precedent which can be made to control the decisions in the railway cases.

<sup>42</sup> *Chicago, Burlington & Quincy R. R. v. Iowa*, 94 U. S. 155 (1876); *Peik v. Chicago & Northwestern Ry.*, 94 U. S. 164 (1877); and following cases.

<sup>43</sup> *Munn v. Illinois*, *supra* note 25, at 126.

<sup>44</sup> *Ruggles v. Illinois*, 108 U. S. 536, 2 Sup. Ct. 832 (1882); *Spring Valley Water Works v. Antone Schottler*, 110 U. S. 347, 4 Sup. Ct. 48 (1884); *Dow v. Beidelman*, 125 U. S. 680, 8 Sup. Ct. 1028 (1888).

use, the concept was narrowed in the name of the power of the state to control.

For a time the association of "public interest" with "public use" made no bother. Casually or carefully, the phrase had been used; it ceased to be a prop to the police power and began to take on a meaning of its own; the end of public interest began to be the rule of Public Interest. So long as cases concerned grain elevators the *Munn* decision was in point and the magic of the words was enough. Monopoly had been used to affect grain elevators with a public interest,<sup>45</sup> but contagion carried the affectation to elevators which had to compete with their kind for trade. As the police power waned, the crude lines of the new doctrine assumed form. By 1892 "no general power resided in the legislature to regulate private business," or "to fix the prices of commodities or services," or "to interfere with freedom of contract." But to the New York Court of Appeals<sup>46</sup> and to the United States Supreme Court<sup>47</sup> alike, an exception was an exception, and an act providing maximum charges for handling grain in elevators, aboard ocean lines, and on canal boats was found valid. For "there might be special conditions and circumstances" bringing the business "within principles which, by common law and the practice of free governments," justifies "legislative control and regulation in the particular case."<sup>48</sup> In 1894, two years later, a North Dakota statute was upheld which imposed price regulation by converting private into public elevators.<sup>49</sup>

It is not easy to hold legal doctrines in the service of the causes which call them into being. In the whole history of price regulation the most paradoxical of cases is that of the *German Alliance Insurance Company*.<sup>50</sup> A statute of Kansas sought to regulate the rates to be charged for insurance against fires. It seemed clear to the court that the business was affected with a public interest; in terms of common sense the issue was clear enough; insurance was a matter of general concern; since establishments generally must have it, the business interlocked with many others; in the making of terms the insured and the insurers were in unequal bargaining positions. But the language which the court had been employing was stubborn and could not be easily fitted to so peculiar an industry. The business was not like a railroad; there was no charter or franchise; the attribute of monopoly was not to be discovered; it was not easy for the judi-

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<sup>45</sup> But see McAllister, *supra* note 22, who insists that an invocation of monopoly is not an essential part of Waite's argument.

<sup>46</sup> *People v. Budd*, 117 N. Y. 1, 22 N. E. 670 (1889).

<sup>47</sup> *Budd v. New York*, 143 U. S. 517, 12 Sup. Ct. 468 (1892).

<sup>48</sup> *People v. Budd*, *supra* note 46, at 15.

<sup>49</sup> *Brass v. North Dakota*, 153 U. S. 391, 14 Sup. Ct. 857 (1894).

<sup>50</sup> *German Alliance Insurance Co. v. Kansas*, 233 U. S. 389, 34 Sup. Ct. 612 (1914).

cial eye to discern property devoted to a public use. In an ingenious opinion Mr. Justice McKenna drives an argument past obstacles of language to a triumphant conclusion. He disentangles public use from public utilities; restores to the phrase Waite's meaning, and makes the criterion serve his purpose. He explains the language of the *Munn* case: "In other words that which had been private property had from its use become, it was declared, of public concern, and the compensation to be charged for its use prescribed." In broadening the concept of public use, Mr. Justice McKenna takes from property its major role. To him, "it is the business which is the fundamental thing; property is but its instrument, the means of rendering the service which has become of public interest."<sup>51</sup>

In thus affecting insurance with a public interest Mr. Justice McKenna makes over the "standard." He refuses to give up the criterion of property devoted to public use; but he makes the concern of the business to the public the heart of the matter. In his opinion the sanction goes directly back to the law of common callings and the subject is placed within the province of trade regulation where historically it belongs. The result is a general, if indefinite, invitation to the legislature to extend price control where public concern demands it. With the help of the word "emergency," a rent law, passed as a war-time measure was found valid.<sup>52</sup> Affectation might have been extended to other industries; but a change in the personnel of the court made inevitable another interpretation. The opinion of Mr. Justice McKenna still remains in the records though today it is cited by the court only to be distinguished. It is an anomaly that a statement most in accord with the common law has had least influence on the course of decision.

### III

A new chapter in the fortunes of Lord Hale's classic phrase begins with the third decade of the twentieth century. The Supreme Court, as reconstituted in 1921-1923, found an unusual opportunity to establish and interpret a rule of law for the validity of price-fixing legislation. In four cases, which differed greatly from each other, and involved industries as distinct as brokerage in theatre tickets, running employment agencies and selling gasoline, the issue was squarely before it. The work of the court is marked by a formal recognition of "affectation with public interest" as a definite test of constitutionality and by a labored attempt to make the indefinite phrase a definite criterion. But, if the court may affect, it may refuse to affect; if it

<sup>51</sup> *Ibid.* 408, 34 Sup. Ct. at 617.

<sup>52</sup> *Block v. Hirsh*, 256 U. S. 135, 41 Sup. Ct. 458 (1921).

may throw about an industry the cloak of public interest, it may refuse the covering of that protective garment. It is significant that in this period a phrase brought into constitutional law to sanction price-fixing is consistently used to outlaw price-fixing.

In the *Wolff* case,<sup>53</sup> the first to come before the new court, the question at issue was the validity of a Kansas act providing for compulsory arbitration and determination of wages in industries concerned with the provision of food, clothing, and fuel. The act contained many novelties in legislation, bristled with constitutional issues, and presented numerous invitations to a declaration of unconstitutionality. For purposes of wage-fixing at least, a unanimous court refused to affect meat-packing with a "public interest." The decision is in no sense surprising; the opinion is of note because of a heroic and labored attempt to reduce a vague concept to a specific rule of law.<sup>54</sup>

The elaborate criteria laid down by Mr. Chief Justice Taft fall just short of being useful. He resolves the group affected with a public interest into three classes: (1) industries "carried on under the authority of a public grant or privilege" which imposes "the affirmative duty of rendering a public service"; (2) "certain occupations regarded as exceptional, the public interest attaching to which has survived"; and (3) "businesses which though not

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<sup>53</sup> *Wolff Packing Co. v. Court of Industrial Relations*, *supra* note 27; Rab-  
inowitz, *The Kansas Industrial Court Act (1923)* 12 CALIF. L. REV. 1.

<sup>54</sup> An appeal from law to economics is here of no avail; a survey of the industrial system does not reveal the necessary standard. An "order" which is a loose aggregate of interdependent industries, each of which holds itself out to serve all who may come and who have the price, does not permit the drawing of a hard and fast line. It is not easy to separate into public and private an aggregation of businesses which differ from each other in structure, in operation, in importance, and in the ways of their control. No obvious labels mark out certain ones as subject to regulation and others as beyond the reach of the legislative hand. Size will not do; size is evidence neither that prices will get out of order nor that an appeal to the state may be made to help the matter. The planting of cotton, the retailing of groceries, and the supplying of building materials are among the greater industries; yet with the price-structure of none of them is the government likely to be called upon to interfere. Nor will the importance of the product serve the purpose; there is little evidence that the price of bread, of clothing, of medical service, or of the talkies needs to become a matter of legislative concern. Nor will the strategic position of the industry suffice. The growing of cotton is the first in a succession of industrial processes; the mining of coal keeps an industrial system going; and the smelting of pig iron makes the machine process possible. Yet in none of the three is price regulation among the probabilities. The storage of grain and insurance against fires, great and important as they are, are smaller in size, perform less important services, and are no more thoroughly intertwined with other businesses. In an industrial system, whose lines are not black and white, such criteria throw little light either upon the need for price control or upon the capacity of regulation to afford relief.

public at their inception may be said to have risen to be such."<sup>55</sup> The first group consists of industries now clearly recognized as public utilities; the right of the state to obtrude its will into their affairs is beyond dispute; to that end the use of a distinct doctrine of public interest is quite unnecessary. The second group is a historical survival; here the rightfulness of control is a matter of judicial tolerance. However it came about in the first place, "inns, cabs, and grist mills" are not at this late day to be disaffected of public interest.<sup>56</sup> The third group consists of businesses whose tangled affairs may come to demand public attention. It clearly excludes public service industries and includes far less than the whole of business. The marks of public interest are "the indispensable nature of the service," "the exorbitant charges," and the "arbitrary control" which is possible "without regulation."<sup>57</sup> But, except for marking out a rather indefinite zone, the discussion is singularly barren of a rule of affectation. The industries which belong here are not marked; the legislature may not affect as it will; the court cannot reduce its exercise of discretion to clear-cut terms. In short, price regulation is sanctioned where it is established, invited in public service industries, and threatened with an arbitrary judicial disapproval in ordinary trade.<sup>58</sup>

In the three later cases a divided court refused to extend affectation with public interest beyond its current industrial boundaries.<sup>59</sup> In the *Tyson* case,<sup>60</sup> the court refused to declare that "every public exhibition, game, contest, or performance, to which an admission charge is made, is clothed with a public interest, so as to authorize a law-making body to fix the maximum amount of the charge its patrons may be required to pay."<sup>61</sup> Accordingly

<sup>55</sup> *Wolff Packing Co. v. Court of Industrial Relations*, *supra* note 27, at 535, 45 Sup. Ct. at 632, 633.

<sup>56</sup> In the law of the constitution, as elsewhere, "bygones are bygones." But if to "inns, cabs, and grist-mills," constitutional principles were applied as recently they have been applied, it is hard to see how currently they could be affected with a public interest.

<sup>57</sup> *Wolff Packing Co. v. Court of Industrial Relations*, *supra* note 27, at 538, 45 Sup. Ct. at 634.

<sup>58</sup> Keezer, *Some Questions Involved in the Application of the "Public Interest" Doctrine* (1926) 25 MICH. L. REV. 596.

<sup>59</sup> In the *Tyson* case the vote was five to four, Stone, Holmes, Brandeis, and Sanford, J.J., dissenting; in the *Ribnik* case, six to three, Sanford, J., being unable to distinguish the case from the *Tyson* case, and voting with the majority; in the *Williams* case, eight to one, Holmes, J., alone dissenting and Brandeis and Stone, J.J., concurring in the result.

<sup>60</sup> *Tyson & Bro. v. Banton*, *supra* note 3.

<sup>61</sup> *Ibid.* 429, 47 Sup. Ct. at 428. Mr. Justice Stone insists: "The question . . . is much narrower than the one which has been 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 . . . . The statute . . . prohibits the licensed ticket broker, an intermediary in the

it held invalid a law forbidding dealers in theatre tickets to resell them to customers for a charge which is more than fifty cents in advance of the box-office price. In the *Ribnik* case,<sup>62</sup> it was forgotten that the broker is "a mere appendage of the theatre,"<sup>63</sup> it was discovered that the *Tyson* case decided that brokerage was not affected with a public interest, and it was set down that "the business of securing employment for those seeking work and employees for those seeking workers is essentially that of a broker."<sup>64</sup> It followed, as of course, that a New Jersey Act which went only so far as to provide for an official supervision of fees to be charged working men for placing them in jobs was invalid.<sup>65</sup> In the *Williams* case,<sup>66</sup> it was held that gasoline, which is one of "the ordinary commodities of trade" is "in no essential aspect" different "from the great variety of articles bought and sold;" that "the decisions of the court" which control this case, "make it perfectly clear that the business of dealing in such articles" does not "come within the phrase 'affected with a public interest;'"<sup>67</sup> and that a Tennessee statute providing for regulation of the price of gasoline is repugnant to the constitution.

But if the results are certain, the criterion by which the court refuses to affect with a public interest is far from definite. The justice who speaks for the court reads the law as he finds it written. He chooses to stand upon the decision of the court in the *Munn* case. But he does not summarize Waite's argument, determine the holding, or untangle the reason for it from the elaborate essay in which it is set. Instead, in all three opinions, Mr. Justice Sutherland seizes upon the paragraph of dicta which is concerned with the "devotion" of "property" to "public use."<sup>68</sup> He reverts to an interpretation of the question as concerned with the use of property rather than the regulation of trade. But his conception of public use is neither that of Waite nor of McKenna. He accepts grain elevators and insurance as "affected with a public interest," and formally makes the category broader than public service industries by admitting property put to a "constructive"

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marketing process, from reselling the ticket at an advance of more than fifty cents above the printed price." *Ibid.* 448-9, 47 Sup. Ct. at 434.

<sup>62</sup> *Ribnik v. McBride*, *supra* note 4.

<sup>63</sup> *Tyson & Bro. v. Banton*, *supra* note 3, at 429, 47 Sup. Ct. at 428.

<sup>64</sup> *Ribnik v. McBride*, *supra* note 4, at 356, 48 Sup. Ct. at 546.

<sup>65</sup> See Comment (1928) 38 YALE L. J. 225.

<sup>66</sup> *Williams v. Standard Oil Co.*, *supra* note 2.

<sup>67</sup> *Ibid.* 240, 49 Sup. Ct. at 116.

<sup>68</sup> *Tyson v. Banton*, *supra* note 3, at 433, 47 Sup. Ct. at 429; *Ribnik v. McBride*, *supra* note 4, at 355, 48 Sup. Ct. at 545; *Williams v. Standard Oil Company*, *supra* note 2, at 239-240, 49 Sup. Ct. at 116. See also Mr. Chief Justice Taft's quotation and explanation of this passage in *Wolff Packing Company v. Court of Industrial Relations*, *supra* note 27, at 540-541, 43 Sup. Ct. at 634-5.

public use. But he sets up no test of construction; beyond public service industries his words offer no guidance; and it is hard to think of a competitive business which he would affect with a public interest. The net effect of his attempt to set up a "standard" is to permit regulation where an industry rests upon a franchise and to reject it where an act of dedication is not clearly shown. It is to make valid the concept in public utilities, where it is not wanted, and almost to exclude its use in competitive business where alone it is needed.

It seems a far cry from the time of Lord Hale, when all trafficking in wares was public, to that of Mr. Justice Sutherland, when the theatre, the employment agency, and the roadside filling station are not affected with a public interest. But if Waite may look at Lord Hale's words and say what is in his mind, Mr. Justice Sutherland may endow Waite's words with a meaning of his own. A translation of a phrase is no novelty in law. And if the former jurist was moved by a desire to justify price-fixing and the latter to condemn it, it does not follow that they did different things. Each has merely read his own understanding into a highly receptive phrase. But neither has removed its vagueness, offered a principle to guide a court of law, or found a test by which the validity of price-fixing is to be measured.

In spite of repeated attention neither the court nor any of its members has been able to reduce to specific terms the rule of affectation. 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;"<sup>69</sup> but he admits the lack of precision in such a test. Mr. Justice Stone, after a survey of judicial usage, holds the phrase to be "too vague and illusory to carry us very far on our way to a solution," and concludes that the courts, instead of saying "public interest" and therefore price-control, make of it "a convenient expression for describing those business regulations" which "have been permitted in the past."<sup>70</sup> Mr. Justice Holmes, who steadfastly refuses to use the concept, describes it as "little more than a fiction intended to beautify what is disagreeable to the sufferers."<sup>71</sup> Even Mr. Justice Sutherland, who finds it "the established test" by which the legislative power to fix prices is to be "measured,"<sup>72</sup> admits that "the phrase is indefinite."<sup>73</sup>

<sup>69</sup> *Wolff Packing Co. v. Court of Industrial Relations*, *supra* note 27, at 536, 43 Sup. Ct. at 633.

<sup>70</sup> *Tyson & Bro. v. Banton*, *supra* note 3, at 451, 47 Sup. Ct. at 435.

<sup>71</sup> *Ibid.* 446, 47 Sup. Ct. at 434.

<sup>72</sup> *Williams v. Standard Oil Co.*, *supra* note 2, at 239, 49 Sup. Ct. at 116.

<sup>73</sup> Mr. Justice McKenna, speaking for an earlier court with an eye upon

The plain truth is that here it is not argument that determines the direction in which argument moves. The legal reasons are but henchmen who do valiant service for the overlords of public policy; the real compulsions are presumptions clearly apparent in the thought of the majority of the court. An attempt to divide an order of interlocking industries, each of which produces for the market, into "public" and "private" businesses is a perilous adventure. To justices who believe that "free contract" is the rule and regulation the exception, almost the whole of the domain of competition is marked off as private enterprise. And a regard for price as "the heart of the bargain" makes it peculiarly immune to legislative control. These notions, a distinction between public and private within business enterprise, a belief in the efficacy of competition, and an elevation of price above "like terms" in a contract, lie at the basis of the constitutional principle recently stated. They are within the judicial mind; and rules of law obey them.

In the constitution there is usually more than one sanction; it is, therefore, of note that regulation which stops little short of price-fixing has been upheld without the formal affectation of business with a public interest. Statutes prescribing methods of wage-payment, the effect of which must have been substantially to increase the laborer's income, have been held valid as general regulation.<sup>74</sup> A federal regulation of the meat-packing industry has been upheld;<sup>75</sup> an order of the Secretary of Agriculture prescribing "maximum charges" for "marketing agencies" at stock-yards has been held valid<sup>76</sup> by the court at its present term. It is explained that it is the rate of pay, not the total compensation, which is being regulated; for "there is here no attempt to fix anyone's wages or to limit anyone's income," since "differences in skill, industry, and experience will continue to be factors" in "earning power."<sup>77</sup> In short, "the order fixes only the charges to be made in individual transactions."<sup>78</sup> The

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the varied industrial scene, declares that "we can best explain by examples." *German Alliance Insurance Co. v. Kansas*, *supra* note 50.

<sup>74</sup> *Knoxville Iron Company v. Harbison*, 183 U. S. 13, 22 Sup. Ct. 1 (1901); *McLean v. Arkansas*, 211 U. S. 539, 29 Sup. Ct. 206 (1909).

<sup>75</sup> *Stafford v. Wallace*, 258 U. S. 495, 42 Sup. Ct. 406 (1921). In as much as a Kansas statute regulating stock-yards was found void on other grounds, in *Cotting v. Kansas*, 183 U. S. 79, 22 Sup. Ct. 30 (1901), the court was not called upon to pass on the question of whether stock-yards were affected with a public interest.

<sup>76</sup> *Tagg Bros. and Morehead v. United States*, 50 Sup. Ct. 220 (U. S. 1930).

<sup>77</sup> *Ibid.* 224.

<sup>78</sup> It was argued by counsel for the commission men that the *Tyson* and *Ribnik* cases held that there was in government no constitutional power to fix the prices of personal services. In reply Mr. Justice Brandeis, speaking for a unanimous court, says: "There is nothing in the nature



issue of public interest is avoided; <sup>79</sup> for the purpose of the regulation is to prevent the charges of commission men from "becoming a burden upon, or obstruction of" interstate commerce. In the cases involving the prescription of minimum wages for women, the statutes applied to trades and industries generally; hence the question of public interest was not relevant. The Oregon statute was upheld, or at least a declaration of constitutionality by the Oregon Supreme Court was not reversed, a court of eight dividing evenly.<sup>80</sup> The Act of Congress, applicable to the District of Columbia, was found invalid by a vote of five to three.<sup>81</sup> In each case a minority of the court was willing to assent to the validity of a limited price-fixing without affecting business with a public interest.<sup>82</sup> Had the ninth justice sat in the *Stettler* case, or had the *Adkins* case been decided the other way, the issue would have been resolved without benefit of Lord Hale's phrase. In that event a constitutional principle of public interest could have been put to little further use. It may have been mere accident, it may have been cause; at least it has come about that it is for purposes of state, not of federal, legislation that industries are, or are not, to be affected with a public interest. The doctrine is plainly to be found within the Fourteenth Amendment; as yet it has not been discovered within the Fifth.<sup>83</sup>

In this history of the use of a phrase, there may or may not be a mystery. If time, place, and the changing court be left out of account; if the various decisions be set down side by side as if they belonged together; or if an attempt be made to run a thread of logical argument through the cases, puzzles may be made to abound. But a historical perspective will give to the subject at

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of monopolistic personal services which makes it impossible to fix reasonable charges to be made therefor; and there is nothing in the Constitution which limits the Government's power of regulation to businesses which employ substantial capital." *Ibid.* 224.

<sup>79</sup> The *Tyson* and *Ribnik* cases are rather neatly distinguished by Mr. Justice Brandeis: "This Court did not hold in *Tyson & Bro. v. Banton* and *Ribnik v. McBride* that charges for personal service cannot be regulated. The question upon which the Court divided in those cases was whether the services there sought to be regulated were then affected with a public interest." *Ibid.* 224. The use of the word "then" is significant.

<sup>80</sup> *Stettler v. O'Hara*, 243 U. S. 629, 37 Sup. Ct. 475 (1917).

<sup>81</sup> *Adkins v. Children's Hospital*, 261 U. S. 525, 43 Sup. Ct. 394 (1923).

<sup>82</sup> In neither of the cases did Mr. Justice Brandeis sit, but his belief in the constitutionality of the minimum wage is well known.

<sup>83</sup> In *Wilson v. New*, 243 U. S. 332, 37 Sup. Ct. 298 (1917), the question was the constitutionality of the Adamson Act, which insured to many of the employes of railroads engaged in running trains the wages for eight hours which before they had received for ten. The issue of public interest was not specifically raised. The result was reached by an extension of the concept of interstate commerce to include industrial relations, the support of an emergency, and the concurrence of a member of the court who allowed himself to view the statute primarily as a regulation of hours.

least so much of order and sequence as the course of events can have. In the two centuries and a half which separated Lord Hale's "rule of common law" from the "constitutional principle" of Mr. Justice Sutherland, an industrial system was transformed; the problem of the control of economic activity was remade; a common sense gave way to its better or its worse; and even a common law came to be freshly interpreted. Lord Hale belongs to an age of authoritative nationalism; to him there is nothing unseemly in price control; ancient usage is not to be allowed to be forgotten. Waite is a disciple of Taney; the state may use its police power; general welfare in its many aspects must be served; the legislature must in general fix the limits of its own discretion. Mr. Justice Sutherland is a devotee to the creed of economic individualism. The seventeenth century rule is still accepted by the court as the guiding principle in cases of this character; but if the meaning has departed alike from Hale's phrase and from Waite's words, the result is due to the hazards of interpretation which not even constitutional law can escape.

#### IV

The adage, "apart it dies, related it lives," is true of a doctrine in the law. In the future, as in the past a control of prices under auspices of the state must run the gauntlet of the court's disapproval. But an attempt to determine in isolation a rule for the judicial tolerance of price regulation is certain to lead to bewilderment; a consideration of kindred doctrines will throw upon the matter the light of perspective. The question is to be approached as an aspect of the public policy for the control of industry.

Here the beginning of wisdom is plain. Business is not above the law; the due process clause does not put price-making out of reach of the legislative hand. On the contrary, implicit within statutes passed by the legislature and approved by the courts is to be found a policy of price-control as comprehensive as the domain of business. In the intent of the law, however imperfectly it may be realized in practice, all extortionate and unreasonable prices are under the ban; in any industry the state may intervene for the protection of the public. As with other objectives of policy, a price structure which is just and reasonable is to be attained by the use of a variety of means. Prices may be directly fixed, by statute or commission, as they are for gas, power, and rail carriage. The rate of return may be specified as it is for the use of money or the services of the live-stock broker. A monopoly may be dissolved, as in oil, tobacco, or timber, that business rivalry may strip from price its excess.

Each procedure is of its own kind; each works in its own way; but all are designed to secure the same lawful result.

Accordingly the constitutional issue is not the validity of the end, but the appropriateness of the means. The measures proposed to bring prices under control, if they are to receive judicial approval, must be in accord with the picture of the structure of industry and the notions about the way in which it works held by the majority of the court. In their minds the two clear-cut classes of competition and monopoly divide industries between them. Where free enterprise prevails, price-control is indirect; the state enforces competition and trusts to an open industry and a free market to establish rightful prices. Where an industry is closed, price-control is direct; the state undertakes to say what prices are fair to the parties concerned. The system of control may be set down as three presumptions, which are to be taken in order: price is to be left to free enterprise; the anti-trust laws are to be used, if need be, to keep enterprise free; and, if free enterprise cannot be made to work, resort is to be had to formal price-fixing.

The first presumption is that the making of price is to be left to whom it may concern. The rightful charge is to emerge as the result of the exercise of the right to freedom of contract by the interested parties. But one's freedom of contract is merely the right to participation in an organized market procedure. A right of one's own to freedom of contract is checked by the freedom of one's competitors to contract and balanced by the freedom of contract on the part of those with whom one must do business. In simple terms, each person must make his living by selling his property or his services; each must live upon the goods and services produced by others. Each is free to produce and consume, sell and buy, as he pleases. The only constraint is that in whatever one does—produce goods, sell labor, borrow money, or hawk wares—one must compete with others. The rivalry is a double competitive process, seller vying with seller and buyer with buyer. Because of rivalry in their ranks sellers cannot charge too much; and because of a like rivalry among buyers, they are allowed to charge enough. The result is that prices will have a basis in costs, unfair charges cannot continue to prevail, and in the long run only reasonable gains can be taken. It is not assumed that under free enterprise price is beyond public concern; rather it is presumed that the market gives adequate protection.

Whenever enterprise ceases to be free, therefore, the matter becomes of public importance. The state may be called upon to keep an industry open to all who care to take its chances; it is to see to it that there is no collusion in the maintenance of prices. A proof of extortionate prices is not demanded; an

arbitrary control over them is enough to invite official action. For "the very power to fix prices," possessed by business rivals acting in concert, "involves power to control the market and to fix arbitrary and unreasonable prices."<sup>84</sup> Accordingly, the anti-trust laws are to be used to dissolve monopolies, to break up combinations, and to prevent trade associations from entering into price-fixing agreements. If the state goes no further, it is because it is deemed unnecessary. For, behind the policy is the belief that if competitive conditions are restored, economic forces acting of themselves and by themselves may be depended upon to establish rightful prices. The state does its task and leaves to the market what it may the better accomplish.

But if this program does not suffice, the state may use more extreme measures. Certain "natural monopolies" and businesses which operate by exclusive franchise must be recognized as a class apart; the province of monopolistic industry is to be narrowly limited. Here buyers or sellers are not protected by competition between those with whom they must deal, and the state must accord the protection which in the usual case the market is supposed to afford. Accordingly the state may resort directly to price-fixing. So firmly embedded in the law is the notion of fair price that public enterprise may be made to serve the end.<sup>85</sup> If the legislature deems it wise, a state may enter an industry, and by direct competition with private concerns force price down to a reasonable charge.<sup>86</sup>

If it has been difficult to secure from the court an approval of measures of price-control that lie beyond this simple program, it is because the picture of the industrial system which prevails reveals no proper place for them. But the economic order is rapidly changing; as our knowledge of its structure and its operation grows, our conceptions of how it works are subject to amendment or replacement. A more intricate and better understood industrial world no longer is to be resolved by clear-cut lines into the provinces of competition and monopoly; elements of the two are combined in endless permutations in various businesses; in reference to any one of a dozen great industries it

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<sup>84</sup> U. S. v. Trenton Potteries, 273 U. S. 392, 397, 47 Sup. Ct. 376, 379 (1927).

<sup>85</sup> Jones v. City of Portland, 245 U. S. 171, 38 Sup. Ct. 112 (1917); Green v. Frazier, 253 U. S. 233, 40 Sup. Ct. 499 (1920).

<sup>86</sup> It is interesting to compare the way of the Tennessee legislature, which attempted to regulate the price of gasoline, with that of the Lincoln City Council, which attempted to secure a reasonable price by a public competition with private dealers. The Tennessee statute was found invalid, Williams v. Standard Oil Co., *supra* note 2; the Lincoln City ordinance was upheld by the state supreme court, Standard Oil Co. v. City of Lincoln, 114 Neb. 243, *aff'd*, 275 U. S. 504, 48 Sup. Ct. 155 (1927). See KEEZER AND MAY, *op. cit. supra* note 21, at 184-196.

would be difficult to say whether monopoly or competition is the more appropriate word. The competitive system is no longer to be regarded as an automatic, self-regulating mechanism;<sup>87</sup> like any other human institution it may work poorly, indifferently, or well: it produces very different results in different industries. In its wake may come disorder as well as order, waste as well as efficiency, unfair as well as reasonable prices.<sup>88</sup> The price-structure in a competitive, as well as in a monopoly industry, may become disorderly; the maladjustment of its prices may become equally a matter of public concern.<sup>89</sup> A simple device of direct price control may be an effective substitute for the indirection of preventing restraint of trade.<sup>90</sup> The hazards of price regulation may well be smaller than those incident to an enforcement of the anti-trust acts. A newer and more realistic conception of competition suggests, not a new end for public policy, but another means for reaching a recognized end.

The decisions of the courts have not been untouched by such a conception of the industrial order. The argument that competition makes for disorder as well as for order has been ably presented by the minority of the court;<sup>91</sup> in even the more conservative opinions there is a recognition of the complexity of industrial activity and of differences between industries.<sup>92</sup> The realization that a measure of cooperative action may make competition more orderly lies at the basis of the larger tolerance allowed to trade associations.<sup>93</sup> An attempt to prevent unfair

<sup>87</sup> HENDERSON, *SUPPLY AND DEMAND* (1922).

<sup>88</sup> SOULE, *THE USEFUL ART OF ECONOMICS* (1929); HAMILTON AND WRIGHT, *THE CASE OF BITUMINOUS COAL* (1925); STOCKING, *THE OIL INDUSTRY AND THE COMPETITIVE SYSTEM* (1925).

<sup>89</sup> WAR INDUSTRIES BOARD, *BULLETIN OF MONTHLY PRICES DURING THE WAR*. A typical presentation of the ups and downs of prices is LESHER, *PRICES OF COAL AND COKE*.

<sup>90</sup> The operation of the anti-trust acts offers a study in law enforcement. An increasing number of persons, whose careful studies entitle their opinions to consideration, regard them as a crude, indirect, wasteful, and inefficient method of protecting the public against unreasonable prices. The hazards that lie between the end of preserving competition and its attainment by resort to law are worthy of study. For statistics on enforcement see Letter from the Attorney General, March 11, 1926, *ADMINISTRATION OF THE SHERMAN ANTITRUST ACT*, SEN. DOC. No. 79, 69th Cong. 1st Sess.

<sup>91</sup> Mr. Justice Brandeis, in *American Column and Lumber Company v. United States*, 257 U. S. 377, 418, 42 Sup. Ct. 114, 123 (1921).

<sup>92</sup> *Wolff Packing Co. v. Court of Industrial Relations*, *supra* note 27, at 539, 43 Sup. Ct. at 634.

<sup>93</sup> *Maple Flooring Manufacturers Ass'n v. United States*, 268 U. S. 586, 45 Sup. Ct. 592 (1925); *Cement Manufacturers' Protection Ass'n v. United States*, 268 U. S. 588, 45 Sup. Ct. 592 (1925).

trade practices<sup>94</sup> has committed the government to establishing a "plane of competition,"<sup>95</sup> or setting up rules of the game for the business struggle.<sup>96</sup> One by one matters once left to be determined by the market have been lifted out of the province of free bargaining and have been entrusted to public authority. The right of the state to regulate the hours of labor and the quality of the ware even in competitive industries is now clearly established. A large province of industrial activity is under the joint sovereignty of the market and the state.

The same realistic conception of competition needs to be applied to the problem of price control. If free enterprise may fail to establish a working day which is not too long or to insure quality in wares offered for sale, it may fail in the making of prices. If, in matters like hours and quality, the state may replace competition or help it over the hard places, it may be called upon to improve price performance. As a "term in a bargain"<sup>97</sup> it invites the attention given to others; but it is enough after its own kind to demand distinctive legislation. In regard to hours, quality, compensation for accident, and the like, "standards" may be prescribed for industry in general; except for the minimum wage, price control must be accommodated to the requirements of particular businesses. It must be established, instance by instance, as the occasion demands.<sup>98</sup> A case for regulation must rest upon the presence of maladjustment,<sup>99</sup> the need for amendment, the relevancy of the remedy, and the promise of results.<sup>100</sup> In short, price-fixing should be held valid, whenever "there is any combination of circumstances materially restricting the regulative force of competition, so that buyers or sellers are placed at such a disadvantage in the bargaining

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<sup>94</sup> Through the Clayton Act of October 15, 1914, 38 STAT. 730, and the Federal Trade Commission Act of Sept. 26, 1914, 38 STAT. 717.

<sup>95</sup> For the concept of a plane of competition, see ADAMS, *THE RELATION OF THE STATE TO INDUSTRIAL ACTIVITY* (1887).

<sup>96</sup> *Hills Bros. v. Federal Trade Commission*, 9 F. (2d) 481 (C. C. A. 9th, 1926), *certiorari* refused, 270 U. S. 662, 46 Sup. Ct. 471 (1925); *Federal Trade Commission v. Balne*, 23 F. (2d) 617 (C. C. A. 2d, 1928).

<sup>97</sup> Mr. Justice Stone, in *Ribnik v. McBride*, *supra* note 4, at 374, 48 Sup. Ct. at 552.

<sup>98</sup> In as much as regulation must be adapted to particular industries, an issue of "classification" may possibly be raised. A court disposed to look with hostility upon price regulation may find a potential storehouse of arguments in the "equal protection" clause of the Fourteenth Amendment. It might easily be made to serve the purpose for which "public interest" is now employed.

<sup>99</sup> Maladjustment may be of many kinds and present many manifestations.

<sup>100</sup> The question is not, whether competition works, but whether its results measure up to the competitive ideal. See Rottschaeffer, *The Field of Governmental Price Control* (1926) 35 YALE L. J. 438, 452-460.

struggle that serious economic consequences result to a very large number of members of the community."<sup>101</sup>

Such a test is clearly in accord with a realistic picture of an intricate system of unlike and interrelated industries. It abandons a simple categorical approach to a complicated industrial problem; it assumes no causal connection between a characteristic of a business and a need for a legislative concern with its prices. The search for a "standard" is replaced by a pragmatic inquiry into necessity in each particular case. This approach makes an end of affectation, robs Public Interest of its capitals, removes from price regulation a superfluous constitutional hazard, and restricts Lord Hale's meaning to what he actually said. The control of price, like authority in other industrial affairs, becomes a question of general regulation. It is to be approved or condemned, as are kindred legislative acts, by reference to the doctrine of police power.<sup>102</sup> The legislation may be novel, for ways of getting things done must change with the times. But the constitutional test is an established one; and the end of it all, the safeguarding of the public against unreasonable prices, goes back to ancient law.

In subjecting the price-structure of an industry to control, the division of labor between the legislature and the court seems clearly marked. The discretion must belong to the law-making body, a restrained power of review to the judiciary. To the primary question of the necessity for regulation the courts cannot easily give a right answer. Their crowded dockets allow scant time for a consideration of matters of policy; the procedure of hearings and briefs does not guarantee that the significant issues will be adequately presented; it is difficult for members of the bench to conduct independent investigations. The questions which focus about need, a scheme of control, and expected performance are very intricate and highly technical. The rôle of the bench, if it is to be wisely constructive, must be one of studied tolerance. The court may doubtless impose a veto upon legislation which is clearly arbitrary. It might insist that statutes rest upon adequate information, due deliberation, and careful contrivance of remedies. It might demand that the legislative record be spread before it and thus subject the procedure of the law-making body to a test of due process.<sup>103</sup> A constitution which endures allows an accommodation of means to the chang-

<sup>101</sup> Mr. Justice Stone, in *Tyson & Bro. v. Banton*, *supra* note 3, at 452, 47 Sup. Ct. at 435.

<sup>102</sup> See Comment (1929) 39 *YALE L. J.* 256.

<sup>103</sup> A subjection of legislative procedure to the test of due process is quite possible. In *Wilson v. New*, *supra* note 83, Mr. Justice Day, in his dissenting opinion, objected to the lack of deliberation with which the Adamson Act was passed and suggested this test.

ing circumstances of industrial society. Its spirit makes of the court a judicial, not a legislative or an economic, body.

All of this, needless to say, has no direct concern with the practical value of price regulation. A state may fix prices, supervise them, or control the conditions out of which they emerge; in attempting to make them less unruly, it may use the legislature, an office, or a commission. Its will may find effect in a number of schemes, in which elements of price-control are variously fitted together. A trade association might be permitted to regulate prices if an adequate check against extortion can be contrived; a price board might, under public auspices, be set up within an industry; a council of representatives of buyers and sellers might settle the matter by collective bargaining. The organization of an industry, as well as its technology, invites discovery and invention; new devices and procedures come along to enrich the art of price-making. And always, as a first chance and a last refuge, there is the market, which works at least as well as it works. It is difficult to select from a growing list of possibilities the schemes of price-control which offer the best chances of reasonable performance; the issues are not the easier because they are largely speculative. A preference among them is a risky adventure that runs far afield. Here a choice between alternative means towards the lawful end of reasonable prices must not be set down. An article must not presume to speak where the Constitution of the United States is silent.