THE LEGISLATIVE MONOPOLIES ACHIEVED BY SMALL BUSINESS

A favorite assumption of American society is that commerce and industry are grounded upon a free competitive system. In the picture of a nation of individual businessmen operating independently and each for himself, monopolistic combination of any sort is necessarily out of place. Anti-trust laws flourish, aimed to protect the "American Way" of competition—the inalienable right to compete in any field and to alter prices to meet the demands of the market. The N.R.A. provided a brief interlude when the necessity of paring some of competition's sharper claws was publicly recognized, but its demise only led to a highly articulate reaction towards more strenuous prosecution of monopolistic combinations. Directing the fanfare is not the consumer but the small independent—the traditional beneficiary of free competition, the ideal unit in the theoretical society that the anti-trust laws presumably perpetuate. For his own ends he preaches a philosophy of rugged individualism and every man for himself. At the same time, and likewise for his own ends, he is constantly seeking some form of stabilization to take the risks out of business—risks of reduced prices as a result of low-cost competition, risks of reduced volume as a result of additional competition. In the fight to limit competition the small business man has two chief enemies, the large corporation above and the unfinanced individuals below, each threatening the security of his middle class position. Like his larger corporate counterpart he uses the means at hand to secure monopolistic stability; for the wealthy corporation the means are economic combination, for the small businessman, political combination.

On some fronts, his fight against large scale enterprise is familiar. In the federal field, the Robinson-Patman Act, aimed in terms at "monopoly," attempts to eliminate much of the advantage in purchasing power formerly wielded by the chain store systems and mail-order houses. The Miller-Tydings amendment specifically excepts resale price fixing contracts from the bans of the Sherman Anti-Trust Law, under which they had been condemned for twenty-five years. Such legislation is but a wider expression of similar action in the states, largely secured through the trade association activity

1. "Most men who come to the Department of Justice, complaining of someone else's price fixing, implore us to tell them how to 'stabilize' their own industry, which is a polite term for restraining competition that they find it difficult to meet." Speech by Robert H. Jackson at Sea Island, Georgia, May 28, 1937. ARNOLD, FOLKLORE OF CAPITALISM (1931) 212, n.
among independents which was given a new and probably permanent vitality by the N.R.A. The new spirit is evidenced by a series of statutes designed to eliminate price cutting by the small time chiseler as well as the huge retail establishment. Under the mantle of the Miller-Tydings Act, resale price maintenance statutes set as a price floor for all retailers the resale prices fixed in a contract made by a manufacturer with any single retailer. Difficulties of enforcement led to further implements in the form of Unfair Trade Practice Acts fixing a bottom price at invoice cost plus a certain fixed mark-up. Perhaps the most publicized penalties imposed on size have been the special taxes on department and chain stores. Justification for the distinctions made is found in the very form of business organization which makes it possible to sell to the public below the prices of individual retailers.

Such statutes seem strange when the vociferous demand of the trust haters is for a less expensive system of distribution. Equally anomalous, but far less familiar, are other measures which set up legislative barriers to protect one-time monopolies from the encroachment of new methods of distribution. Typical of the checks applied to the tendency of powerful groups of retailers to penetrate lines traditionally belonging to others, are several state restaurant laws. In Colorado, for example, in limiting the vending of food to establishments in which nothing but food, candy and tobacco is sold, the restaurateurs have rid themselves of the competition of the highspeed, low cost, tipless meal service in drug, department and five and ten cent stores, and have forced upon these competitors an obligation to remodel or yield to a monopoly of restaurateurs.

Another and more important once natural monopoly which has been perpetuated in the face of the competition of more economical methods of distribution is that of the small town producer or storekeeper. Formerly, because of his geographical position, his only competition was that of the wandering peddler, the itinerant merchant, and the occasional new establishment. Now a new competition threatens. National corporations distribute directly to consumers through door-to-door solicitors. The large statewide producer, taking advantage of fast trucks and good roads, delivers goods to a customer's door, cutting into lines traditionally monopolized by the local baker, dry-
cleaner, confectioner, launderer, and wholesaler. To meet the threat of this competition the local businessman has sought to enlist a legislative weapon—the ordinance making power delegated to municipalities by the state, including the power to prohibit nuisances, to license certain occupations, and to tax for revenue.

But here the courts, often docile, were apt to balk. For with all these powers runs the restriction that they must apply equally to all persons engaged in the same activity. If ordinances are to escape the ban of the equal protection clause of the Fourteenth Amendment they must include no arbitrary discriminations. For example, no ordinances could be aimed at a business merely because it was new. The courts have had to warn that the power to require bonds and license fees from itinerant vendors, once used to protect consumers against the frauds of casual merchants and peddlers, and to secure to the city the taxes they avoided by dodging in and out of business between assessments with "fire" and "bankruptcy" sales, may not be extended to form a barrier to all new establishments by attributing to them elements of itineracy. Another such discrimination was found to exist in an ordinance which forbade the peddling of bakery products within 1000 feet of a bakery and thereby set up a wall around the clientele of such shops. The court con-


15. Illustrative of the effectiveness of the licensing power was an ordinance taxing sellers of bread baked outside of the city three times as much as resident bakeries. When challenged, the ordinance was changed to one imposing a license fee of an equal amount upon itinerant dealers in bread. This measure was held valid. American Bakeries Co. v. Opelika, 229 Ala. 388, 157 So. 206 (1934). License fees, however, must stay within the uncertain bounds of reasonableness. Dugan Bros., Inc. v. Zorn, 145 Misc. 611, 261 N. Y. Supp. 592 (Sup. Ct. 1932).


17. There are, of course, no "commerce clauses" in state constitutions to invalidate these municipal tariff barriers. See (1934) 43 Yale L. J. 1314, criticizing Duffin v. Tucker, 113 Fla. 621, 153 So. 298 (1934). But ordinances have been declared invalid for indefiniteness [Peterson Baking Co. v. Fremont, 119 Neb. 212, 228 N. W. 256 (1931), (1931) 9 Neb. L. Bull. 204], and as ultra vires and void under the authority granted by the state. Ex parte Frank, 52 Cal. 606 (1878); see McQuillan, Municipal Corporations (2d ed. 1928) 1087-1092.


sidered it too patently intended merely to "eliminate some of the competition between bakery stores and those peddling bakery products." The defendant "peddler" was a corporation distributing bakery products through several counties. Again, members of the same business may not be arbitrarily subclassified on grounds of residency or nonresidency alone. In this respect licensing ordinances sought to be set up by the local merchant against the statewide distributor most commonly fail. For as between the two, each delivering upon orders to the customer's door, the only distinction that can be drawn seems to be the situs of the plants from which the trucks depart. In a few instances the courts have found that a license tax differentiated upon the maintenance or non-maintenance of a plant in the city does not amount to a discrimination against non-residents, but the weight of authority is to the contrary.

The court's prohibitions, however, have in many instances been ingeniously evaded. Thus, although a distinction drawn on residence is arbitrary, one drawn on a difference in the mode of conducting business is not. And for the most part the situs of the plant is deemed one circumstance which may so affect the nature of the business as to afford a basis of classification. In effect this amounts to a recognition of the validity of a discrimination upon residence alone. For example, a license fee imposed on trucks delivering certain specified food products, but exempting those operating from a resident food dealing establishment, was held to be reasonable in that the costs of inspecting the vehicles varied. And the difference between collecting clothing for dry cleaning outside the city limits and collecting clothing at a plant within the city was held a sufficient basis for exacting a $200 fee in the first instance and a $25 fee in the latter. Against the reasonableness of such regulations it has been urged that a statewide merchant pays taxes in his own city, that his hauling expenses make up for any advantage he may

22. N. Y. Dugan Bros., Inc. v. New York City, 7 N. Y. S. (2d) 162, 163 (Sup. Ct. 1938); cf. People v. Kuc, 272 N. Y. 72, 4 N. E. (2d) 939 (1936) (prohibition of peddling newspapers in the street held unconstitutional).

23. Ward Baking Co. v. Fernandina, 29 F. (2d) 789 (D. Fla. 1928); Ex parte Hart, 36 Cal. App. 627, 172 Pac. 610 (1918); O'Connell v. Kontajohn, 179 So. 802 (Fla. 1938); In re Irish, 121 Kan. 72, 250 Pac. 1056 (1926); Hair v. Humboldt, 133 Kan. 67, 299 Pac. 268 (1931).


have over a local merchant, that special burdens imposed by a municipal legislature in which he is not represented are not subject to democratic controls, and, finally, that such a provincial tariff and the local monopoly which it protects are uneconomic. For their validity it is urged that the statewide distributor must be expected to bear his share of the burdens of local government, police protection and street improvement, since he is its beneficiary in the profits he takes from his business within the city, and that public policy requires the economic stability of the local merchant, who pays taxes and wages to residents. The latter argument seems most nearly to approach the true rationales behind such legislation and its success in the courts. The interests of the non-vocal consumer go unconsidered as against those of a pressure group which can identify itself with the public interest.

The political fight against new distributing methods is not limited to sellers of merchandise. Professional men deny that they engage in "trade" or in restraints of trade. But the professions have their own pattern for pegging the status quo and with it a traditional price level. Contemporary investigation by the Department of Justice reveals the pressure exerted by the Medical Association of the District of Columbia in opposition to group health plans. Necessarily subject to comparable scrutiny must be the legal doctrines that have so long prohibited corporate practice in all the professions. It is apparent that here, too, is protection of a monopoly of a traditional method and the price fixing implicit in a customary basis for the reckoning of fees. The opponent in the fight is the corporation which would bring into the professions a new method of distributing services and satisfy a demand for lower professional prices. Chief legal weapon of the individualists is the prohibition of "corporate practice" either expressed in statute and years of dicta, or implicit in a legalistic interpretation of the words of a statute limiting practice to "licensed persons," a status which a corporate person cannot attain. On the social level vigorous arguments are made


30. "Their first defense is that the anti-trust laws are directed against monopolies in restraint of trade while the practice of medicine is in no sense a trade within the commonly accepted meaning of the term." (1939) 112 J. AM. MEDICAL ASS'N: 53, 56 (quoting reactions to the indictment of The Medical Association of the District of Columbia). See also Atlantic Cleaners and Dyers, Inc. v. United States, 286 U. S. 427, 436 (1932).

31. See DEPT OF JUSTICE, INVESTIGATION OF MEDICAL SOCIETIES, PUBLIC STATEMENT (Aug. 1938); (1937) 47 YALE L. J. 1193.


33. See, e.g., In re Cooperative Law Co., 198 N. Y. 479, 483, 92 N. E. 15, 16 (1910); State Electro-Medical Institute v. State, 74 Neb. 40, 42, 103 N. W. 1078, 1079 (1905).

that by dividing loyalties corporate practice impairs the intimate personal relationship which is fundamental to the practice of the professions, and that commercialization is necessarily accompanied by a collapse of ethics.35

But the corporations affected by the prohibition vary considerably. There is the department store which practices optometry in order to sell spectacles at its optical goods counter,36 or the bank which draws up wills to be executed by its own trust department.37 There are the dental parlors operated for profit by laymen, where actual dental work is done by licensed dentists and where the lay director may or may not exercise a substantial supervision over the professional activities.38 There may be a group of professional men banded together to secure the benefits of a corporate organization, or a non-profit cooperative corporation formed to extend the benefits of a system of prepayments for professional services.39 Yet while in each varied situation a different evaluation of the corporation's practice of the profession should be made,40 the same ethical objections are raised,41 obviously because the threat of lower prices is common to all the corporate forms.42 It is evident that in many situations the rationalizations put forth against corporate practice are not applicable. It is reasonable to suggest, therefore, that the restraints on competition which are alleged to exist in the District of Columbia may be only the extra-legal suasions43 perfecting the monopoly


37. E.g., State v. St. Louis Union Trust Co., 335 Mo. 845, 74 S. W. (2d) 348 (1934) (practice forbidden); In re Eastern Idaho Loan & Trust Co., 49 Idaho 260, 288 Pac. 157 (1930), 40 YALE L. J. 482.

38. E.g., Iowa v. Bailey Dental Co., 211 Iowa 781, 234 N. W. 260 (1931) (lay supervision, practice forbidden); Painless Parker Dentist v. Board of Dental Examiners, 216 Cal. 285, 14 P. (2d) 67 (1932) (lay supervision exercised only over business end, dentist's license revoked).


40. See (1938) 48 YALE L. J. 346; (1931) 44 HARV. L. REV. 1114.

41. See cases cited supra notes 35-38.

42. Professor Llewellyn recognizes that the "problem of unauthorized practice of the law is a problem of using the processes of law to define and protect a monopoly." Llewellyn, The Bar's Troubles. Poultices—and Cures? (1938) 5 LAW & CONTEMP. PROB. 104.

43. These suasions are being applied, perhaps coincidentally, in one of the few instances where the legal attack on grounds of corporate practice has failed. Compare Group Health Ass'n v. Moor, 24 F. Supp. 445 (D. D. C. 1938), with State Board of Medical Examiners v. Pacific Health Corp., 82 P. (2d) 429 (Cal. 1938), petition for
of a method of practicing and computing fees which the courts continue to
preserve by enjoining corporate professional practice, however socially desir-
able it might be.

In all of the legislative combinations in restraint of trade so far considered
—those of the independent retailer, the small town producer and the in-
dividual professional man—the struggle has taken on the aspect of the
individual versus the corporation which fits so nicely into the ideological
pattern of the American economic system. That the development of new
methods of distribution may be hindered and prices pegged is a byproduct
of relatively small moment, attracting little attention. But it is not only
against the corporate competitor that the individual businessman sets up
his protective legislative bulwark. Taking a cue from the licensing require-
ments fencing off the “professions,” many mere occupational groups, by
pretending a quasi-professional status, have effectively checked the number
of new competitors pressing up from the ranks of the untrained and unfinanced.
This form of political monopolism can be less easily reconciled with the
customary ideas of the public. But those adversely concerned, the unidentified
youth who is in effect banned from the calling and the consumer who has
to pay “standard prices,” are not in a position to offer effective opposition.
The protection of these adverse interests therefore falls solely to the courts,
Licensing statutes and other restrictions upon the right to pursue a lawful
occupation must first satisfy the criterion that the trade affected is one which
reasonably calls for regulation under the police power. Here the courts

44. Certiorari filed, 6 U.S. L. Week 504 (U.S. 1938). The two decisions are compared in
1938) 48 Yale L. J. 346.
45. For an imposing list of occupations regulated by licensing requirements in North
Carolina, see Hanft and Hamrick, Haphazard Reglementation under Licensing Statutes
(1938) 17 N. C. L. Rev. 1, 2.
46. Typical of pressure group efficiency is the success story of the cosmeticians in
securing the enactment of licensing statutes setting up examination requirements. Fish-
47. “Police power can only be exercised to suppress, restrain or regulate the liberty
of individual action when such action is injurious to the public welfare.” Replogle v.
Little Rock, 166 Ark. 617, 622, 267 S. W. 353, 354 (1924). Thus paperhangers cannot
be examined in the name of promoting the public health, safety and general welfare.
Dasch v. Jackson, 170 Md. 251, 183 Atl. 534 (1936). Nor may a bond and license be
Pac. 1 (1918). But tile contractors in North Carolina must pass licensing examinations
fixed by future competitors. N. C. Code Ann. (Michie, Supp. 1937) §§ 5108(ggg),
5168(jjj).
appear increasingly willing to follow the legislative determination. Thus while at one time the power of the state to license plumbing and horse-shoeing was questioned, today the statutes apply not only to plumbers but to barbers, contractors, embalmers, even photographers.

The second, and more stringent test is that the regulation applied must be "reasonable," not "arbitrary," in view of the public good to be served. Commonly the regulations called for, although showing apparently haphazard variations in the different trades, follow a definite pattern. The applicant may be subject to a training period, an examination, and a license fee. Thus at the start the requirements may be such as effectively to dissuade the person without financial backing from undertaking the campaign to enter competition. For the training period may be long and set by statute, despite dicta to the effect that competency is the element which affects the public and hence is the only criterion that may be set up for licensing. Accordingly beauty operators have been held to requirements of one year's training. A three years' apprenticeship for barbers has been held not excessive. In New York City ten years' experience—or a college degree in science and three years' experience—have been required of applicants for examinations for master plumbers' licenses. Moreover, the additional burden has

49. In re Aubry, 36 Wash. 308, 78 Pac. 900 (1904).
54. See Hanft and Hamrick, supra note 45.
55. "What the public is interested to know is that the barber is competent. How he has acquired his skill or knowledge is of minor importance." State v. Walker, 48 Wash. 8, 11, 92 Pac. 775, 776 (1907).
56. State ex rel. Dally v. Woodall, 225 Ala. 178, 142 So. 838 (1932).
57. The court thought such a long training period bordered on the unreasonable and might be "intended to restrict and discourage the public from engaging in this occupation," but sustained the law. People v. Logan, 284 Ill. 83, 86, 119 N. E. 913, 914 (1918).
58. Benedetto v. Kern, 167 Misc. 831, 4 N. Y. S. (2d) 844 (Sup. Ct. 1938), aff'd, 7 N. Y. S. (2d) 227 (App. Div. ... Dept. 1938). It was argued that "this provision lugging the plumbing industry into the regulation of the right of new people to engage
been placed on the applicant in some cases that, during the training period, charges may not be made for student services. Examples might be multiplied to demonstrate the whittling away of the judicial prohibition of a requirement that makes a particular form of acquiring skill and knowledge essential. The force of that expression remains only to invalidate provisions that the 'experience be gained under certain licensed masters' and requirements of facility in a related vocation, such as embalming in the case of undertakers.

Upon completing his training the applicant may be faced with an examination prepared by a board made up entirely of members of the trade, whose interests are opposed to the admission of new competitors. According with the general legislative criteria set up is required, and the courts limit the scope of examinations to subject matter affecting the public health, welfare, or safety. Thus it has been held that an examination for barbers may not emphasize tonsorial aptitude and the care of tools instead of cleanliness. But within the bounds of the statute the examination may be so difficult as to enable only three per cent of applicants to pass, as in the case of one test for plumbers. Beauty operators have been held to a technical knowledge in competition as Master Plumbers is a fascist method of control which should be allowed no headway in our democracy." Brief for Petitioners, p. 35.


62. State ex rel. Melton v. Nolan, 161 Tenn. 293, 30 S. W. (2d) 601 (1939). But cf. "Under some of the acts . . . members of the board of health form part of the examining board, but our act has not even this saving grace. We are not permitted to inquire into the motive of the Legislature, and yet why should a court blindly declare that public health is involved when all the rest of mankind know full well that the control of the plumbing business by the board and its licensees is the sole end in view?" Rudkin, J. in State ex rel. Richey v. Smith, 42 Wash. 237, 248, 84 Pac. 851, 854 (1906).


65. Brief for Petitioners, p. 2, Benditto v. Kern, 167 Misc. 831, 4 N. Y. S. (2d) 844 (Sup. Ct. 1938). It may be noted that the difficulty of examinations for admission to the professions is a repeated complaint, as in California, when only 28.5% of applicants passed the bar examinations. In re Investigation of Conduct of Examination, 1 Cal. (2d) 61, 67, 33 P. (2d) 829, 831 (1934).
of the anatomy of the skin and muscles of the neck and face as well as to recognition of certain skin diseases. Physical examinations are often required; moral and age qualifications are laid down.

Finally upon payment of an original license fee varying from five to fifty dollars, the applicant becomes entitled to compete as a member of the trade. In some trades, notably plumbing and barbering, still further guild-like distinctions have been attempted between employing or master-tradesmen and journeymen. But obviously distinctions between tradesmen already meeting the demands of public health cannot be grounded on the police power. When such further requirements reach the courts they are generally held unconstitutional. Accordingly, discrimination in the form of an equal tax put upon "each individual firm or corporation doing a plumbing business" has been held invalid as forcing individual plumbers out of business and into the employ of well-established firms.

Even within the closed occupational group, however; the individual may not have a free right to compete. If he is a barber, ordinances prescribing hours of business may prevent him from staying open late to secure patronage. His privilege of reducing prices to gain first customers may be limited.

68. The greater necessity of "good moral character" in the licensed trades of watchmaking, barbering, and photography than in the unlicensed occupations is difficult to rationalize. In State ex rel. Allen v. Davis, 119 S.W. (2d) 844 (Mo. App. 1938), a practicing barber's license was revoked partly upon the ground that he had a prison record.
69. See Hanft and Hamrick, supra note 45, at 5.
71. Wilby v. State, 93 Miss. 767, 772, 47 So. 465, 466 (1908). The court asked "why should a tax of $50 be levied on the plumber for the right to labor and a tax of $10 on the lawyer, the dentist, or other professional man? The answer is easy. It was done to make it possible to monopolize the business." Cf. State v. Foss, 147 Minn. 281, 180 N. W. 104 (1920).

For certain types of occupations, closing regulations are generally thought justified to protect public morals or welfare. Tarkio v. Cook, 120 Mo. 1, 25 S. W. 202 (1894) (billiard hall); State v. Calloway, 11 Idaho 719, 84 Pac. 27 (1906) (saloon); Churchill
by prices fixed according to statute by 75% of the members of the trade in his locality. Such statutes have been upheld by the supreme courts of Louisiana and Oklahoma, on what amounts to the tenuous rationale that the cleanliness of barber shops demands a guarantee of income to barbers.\textsuperscript{73}

Through these varying statutes and ordinances, the police powers of the states are being manipulated by pressure groups of small businessmen to bulwark their economic status with legislative monopoly. The suppressed competitor has no effective weapon. He has attacked such monopolies in the courts with arguments based on the Fourteenth Amendment. But for the most part, he has failed. Courts are not traditionally empowered to look behind the ostensible purpose of such legislation to its true designs.\textsuperscript{74} If a statute purports to meet a public need and the measures are related to the stated purposes in the slightest degree, the courts have in this field, perhaps more than elsewhere,\textsuperscript{75} refrained from questioning the opinion of

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A unique device to stop price competition by prohibiting the display of prices except within a shop was declared unconstitutional in People v. Osborne, 17 Cal. App. (2d) 771, 59 P. (2d) 1083 (1936). But many licensing statutes, like one regulating watchmakers, provide for the revocation of licenses for "unethical conduct," such as advertising of prices, giving away crystals free, repairing at less than cost "in order to advertise or increase watch repair business," etc. Wis. Stat. (1937) § 125.03. Compare the attacks launched in the name of the insurance laws against enterprising merchants in Ollendorf Watch Co. v. Pink, 253 App. Div. 73, 300 N. Y. Supp. 1175 (3d Dep't 1937) and State ex rel. Duffy, Att'y Gen. v. Western Auto Supply Co., 134 Ohio St. 163, 16 N. E. (2d) 256 (1938), (1938) 48 Yale L. J. 117.

74. "The decisions of this court from the beginning lend no support whatever to the assumption that the judiciary may restrain the exercise of lawful power on the assumption that a wrongful purpose or motive has caused the power to be exerted." McCray v. United States, 195 U. S. 27, 56 (1904).

75. "The question whether the provisions of the statute here challenged will promote and protect the public health [is] fairly debatable. Such being the factual situation we cannot substitute our judgment for that of the legislature . . . ." Kress & Co. v. Johnson, 16 F. Supp. 5, 8 (D. Colo. 1938).

76. Cf. "It is an established principle that the attainment of a prohibited end may not be accomplished under the pretext of the exertion of powers which are granted."

v. Albany, 65 Ore. 442, 133 Pac. 632 (1913) (soft drink parlor); Hyman v. Boldrich, 153 Ky. 77, 154 S. W. 369 (1913) (pawnshop); Klein v. Atlanta, 164 Ga. 529, 139 S. E. 46 (1927) (auction sales). As to Sunday laws for business, see Ex parte Searanino, 7 Cal. (2d) 309, 60 P. (2d) 288 (1936), (1937) 12 Wash. L. Rev. 82.

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the legislatures. A possible alternative weapon is the use of anti-trust legis-
lation. The applicability of the federal laws is of course limited to interstate
commerce. But, at least against municipal ordinances, an attack predicated
upon one of the thirty-five state anti-trust laws might prove a more dramatic
method of bringing home to the courts the true purposes underlying the
regulations. Remedy by counter-legislation can scarcely be hoped for. The
restrained competitors are unorganized, while consumers who should be
their natural allies are apathetic, if not actually sympathetic toward the
nominal aims of the statutes.

The situation is virtually remediless, and the existence of protected legis-
lative monopolism side by side with an ideal of free competition will probably
continue so long as the organized independent can successfully identify his
interests with those of the public. Considered functionally, there is no anomaly
in this superficial inconsistency. For even the very anti-trust laws in which
“free competition” finds consummation are revealed in the final analysis only
as further legislative protection for the independent against the economic
combinations and monopolies which result from wholly free competition. But
until cooperation among the independents in the interest of self-protection
is openly recognized as inevitable, the restrictions laid down will remain
haphazard and unfair. At present an ideological fog effectively prevents any
progress toward intelligent regulation.

United States v. Butler, 297 U.S. 1, 68 (1935). “In the Child Labor Tax Case,
259 U. S. 20, and in Hill v. Wallace, 259 U. S. 44, this court had before it statutes
which purported to be taxing measures. But their purpose was found to be to regulate
the conduct of manufacturing ... in the states ... an unconstitutional abuse
of the power to tax.” 297 U. S. 1, at 70.

77. No cases have been found wherein monopolistic licensing ordinances have been
attacked as violating the anti-trust acts, although the “burden on interstate com-
merce” argument is often pleaded. E.g., Jewel Tea Co. v. City of Troy, Ill., 80 F.
(2d) 366 (C. C. A. 7th, 1935).

78. Again, there are no cases in which discriminatory ordinances were so attacked.
The true designs behind the regulations have not been ignored by some judges, however.
E.g., Peckham, J., dissenting, People ex rel. Nechamec v. Warden of City Prison,
144 N. Y. 529, 543, 39 N. E. 686, 690 (1895); Rudkin, J., quoted supra note 62; Wilby
v. State, 93 Miss. 767, 771, 47 So. 465, 466 (1908); cf. State v. Call, 121 N. C. 643,
28 S. E. 517 (1897), cited supra note 44.