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# UNWARRANTED APPLICATION OF THE DUE PROCESS CLAUSE

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## CHAPTER IV

### ATTITUDE OF THE UNITED STATES AND PHILIPPINE SUPREME COURTS ON SOCIAL LEGISLATIONS AS GLEAMED FROM CASES DECIDED

In this chapter, we shall present cases, decided by the Supreme Courts of the United States and of the Philippines, involving the constitutionality of social legislations. It is not pretended that all cases dealing with social legislations are included in our chapter. We especially selected cases wherein the issue involved is the conflict of the due process clause and the police power, and wherein the laws tested were declared unconstitutional, as being violative of the due process clause. We shall present both the majority and the vigorous dissenting opinions, and shall allow the eminent justices to speak for themselves, instead of us paraphrasing what they have to say. Our purpose in thus quoting from the decisions at length is to present to our readers the mental processes, the trend of reasoning of the eminent justices, and to leave to them (our readers) to detect any flaw in the reasoning thus presented.

For lack of time, we are not able to include among our cases the very recent decision of the United States' Supreme Court declaring the New York Minimum Wage Law unconstitutional as being violative of the due process clause. Justices Brandeis, Cardozo, Stone and Chief Justice Hughes dissented very vigorously.

*Lochner v. New York*
198 U. S. 46

In error to the County Court of Oneida County, state of New York to review a judgment of conviction for a violation

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of the labor law of that state by permitting an employee to work more than 60 hours a week.

Section 110 of the labor law provides:

"No employee shall be required or permitted to work in a biscuit, bread or cake bakery or confectionery establishment more than sixty hours in any one week, or more than ten hours in any one day, unless for the purpose of making a shorter work day on the last day of the week; nor more hours in any one week than will make an average of ten days during such week in which such employee shall work."

Mr. Justice Peckham delivered the opinion of the court:

"It is not an act merely fixing the number of hours which shall constitute a legal day's work, but an absolute prohibition upon the employer permitting, under any circumstances, more than ten hours work to be done in his establishment. The *employee may desire* to earn the extra money which would arise from his working more than the prescribed time, but this statute forbids the employer from permitting the employee to earn it. * * *

"Therefore when the state by its legislature, in the assumed exercise of its police powers, has passed an act which seriously limits the right to labor or the right of contract in regard to their means of livelihood between persons who are sui juris (both employer and employee), it becomes of great importance to determine which shall prevail,—*the right of the individual to labor for such time as he may choose, or the right of the state to prevent the individual from laboring, or from entering into any contract to labor beyond a certain time prescribed by the state.* * * *

"There is no contention that bakers as a class are not equal in intelligence and capacity to men in other trades or manual occupations, or that they are not able to assert their rights and care for themselves without the protecting arm of the state interfering with their independence of judgment and of action. They are in no sense wards of the state. Viewed in the light of a purely labor law, with no reference whatever to the question of health, we think that a law like the one before us involves neither the safety, the morals nor the welfare of the public, and that the interest of the public is not in the slightest degree affected by such an act. * * *

Mr. Justice Harlan with whom Mr. Justice White and Mr. Justice Day concurred, dissenting:

"It is plain that this statute was enacted in order to protect the physical well-being of those who work in bakery and confectionery establishments. It may be that the statute had its origin, in part, in the belief that employers and employees in such establishments were not upon an equal footing, and that the necessities of the latter often compelled them to submit to such exactions as unduly taxed their strength. Be this as it may, the statute must be taken as expressing the belief of the people of New York that as a general rule, and in the case of the average man, labor in excess of sixty hours during a week in such establishments may endanger the health of those who thus labor. Whether or not this be wise legislation, it is not the province of the court to inquire * * * the court may inquire whether the means devised by the state are germane to an end which may be lawfully accomplished, and have a real and substantial relation to the protection of health, as involved in the daily work of the persons male and female, engaged in bakery and confectionery establishments. But when this inquiry is entered upon, I find it impossible, in view of common experience, to say that there is no real or substantial relation between the means employed by the state and the end sought to be accomplished. * * *

"I do not stop to consider whether any particular view of this economic question presents the sounder theory. What the precise facts are, it may be difficult to say. It is enough for the determination of this case and it is enough for this court to know, that the question is one about which there is room for debate, and for an honest difference of opinion. There are many reasons of a weighty, substantial character, based upon the experience of mankind, in support of the theory that, all things considered, more than ten hours steady work each day, from week to week in a bakery or confectionery establishment, may endanger the health and shorten the lives of the workmen, thereby diminishing their physical and mental capacity to serve and to provide for those dependent upon them. * * *

"If such reasons exist, that ought to be the end of this case for the state is not amenable to the judiciary, in respect of its legislative enactments, unless such enactments are plainly, and palpably beyond all question, inconsistent with the Constitution of the United States * * *."

Mr. Justice Holmes dissenting:

"This case is decided upon an economic theory which a large part of the country does not entertain. If it were a question whether I agreed with that theory, I should desire to study it further and long before making up my mind. But I do not conceive that to be my duty, because I strongly believe that my agreement or disagreement has nothing to do with the right of a majority to embody their opinions in law. It is settled by various decisions of this court that state constitutions and state laws may regulate life in many ways which we as legislators might think as injudicious, or if you like as tyrannical, as this, and which equally with this, interfere with the liberty to contract. Sunday laws and usury laws are ancient examples. A more modern one is the prohibition of lotteries. The liberty of the citizen to do as he likes, so long as he does not interfere with the liberty of others to do the same, which has been a shibboleth for some well-known writers, is interferred with by school laws, by the Postoffice, by every state or municipal institution which takes his money for purposes thought desirable whether he likes it or not. The 14th Amendment does not enact Mr. Herbert Spencer's Social Statics. * * *

"General propositions do not decide concrete cases. The decision will depend on a judgment or intuition more subtle than any articulate major premise. But I think that the proposition just stated, if it is accepted, will carry us far toward the end. Every opinion tends to become a law; I think that the word "liberty" in the 14th Amendment, is *perverted when it is held to prevent the natural outcome of a dominant opinion,* unless it can be said that a rational and fair man necessarily would admit that the statute proposed would infringe fundamental principles as they have been understood by the traditions of our people and our law. It does not research to show that no such sweeping condemnations can be passed upon the statute before us. A reasonable man might think it a proper measure on the score of health. Men whom I certainly could not pronounce unreasonable would uphold it as a first instalment of a general regulation of the hours of work. Whether in the latter aspect it would be open to the charge of inequality, I think it unnecessary to discuss. * * *

*Adair v. United States*
208 U. S. 161

This case involves the constitutionality of certain provisions of the act of Congress of June 1, 1898 (30 Stat. at L. 424 chap. 370 U. S. Comp. Stat. 1901 p. 3205), concerning carriers engaged in interstate commerce and their employees.

The 10th section upon which the prosecution is based is in these words:

"That any employer subject to the provisions of this act, and any officer, agent or receiver of such employer, who shall require any employee, or any person seeking employment, as a condition of such employment, to enter into an agreement, either written or verbal, not to become or remain a member of any labor corporation, association or organization; *or shall threaten any employee with loss of employment, or shall unjustly discriminate against any employee because of his membership in such labor corporation, association or organization* * * * is hereby declared guilty of a misdemeanor * * *."

Mr. Justice Harlan delivered the opinion of the court:

"In our opinion that section in the particular mentioned, is an invasion of the personal liberty as well as of the right of property, guaranteed by the fifth amendment. Such liberty and right embrace the right to make contracts for the purchase of the labor of others, and equally the right to make contracts for the sale of one's own labor; each right, however, being subject to the fundamental condition that no contract whatever its subject—matter, can be sustained which the law, upon reasonable grounds, forbids as inconsistent with the public interests, or as hurtful to the public order, or as detrimental to the common good. * * * It was the legal right of the defendant Adair—however unwise such a course might have been—to discharge Coppage because of his being a member of a labor organization, as it was the legal right of Coppage, if he saw fit to do so—however unwise such a course on his part might have been—to guit the service in which he was engaged, because the defendant employed some persons who were not members of a labor organization. In all such particulars, the employer and the employee have equality of right, and any legislation that disturbs that equality is an arbitrary interference with the liberty of contract which no government can legally justify in a free land. * * *"

Mr. Justice McKenna—dissenting:

"We are told that labor associations are to be commended. May not, then Congress recognize their existence? Yes, and recognize their power as conditions to be counted with in framing legislation? Of what use would it be to attempt to bring bodies of men to agreement and compromise of controversies if you put out of view the influences which move them or the followship which binds them—maybe controls or impels them whether rightfully or wrongfully, to make the cause of one the cause of all? And this practical wisdom, Congress observed—observed, I may say, not in speculation or uncertain prevision of evils, but in experience of evils,—an experience which approached to the dimensions of a national calamity. The facts of history should not be overlooked, nor the course of legislation. The act involved in the present case was preceded by one enacted in 1888 of similar import, 25 Stat. at L. 501 chap. 1063. That act did not recognize labor associations, or distinguish between the members of such associations and the other employees of carriers. It failed in its purpose, whether from defect in its provisions or other cause, we may only conjecture. At any rate, it did not avert the strike at Chicago in 1894. Investigation followed, and as a result of it, the act of 1898 was finally passed. Presumably its provisions and remedy were addressed to the mischief which the act of 1898 was finally passed. Presumably its provisions and remedy were addressed to the mischief which the act of 1888 failed to reach or avert. It was the judgment of Congress that the scheme of arbitration might be helped by engaging in it the labor associations. Those associations unified bodies of employees in every department of the carriers, and this unity could be an obstacle or aid to arbitrations. It was attempted to be made an aid; but how could it be made an aid, if pending the efforts of 'mediation and conciliation' of the dispute as provided in Section 2 of the act, other provisions of the act may be arbitrarily disregarded, which are of concern to the members in the dispute? How can it be an aid, how can controversies which may seriously interrupt or threaten to interrupt the business of carriers * * * be averted or composed, if the carried can bring on the conflict or prevent its amicable settlement by the exercise of mere whim and caprice? I say mere whim and caprice, for this is liberty which is attempted to be vindicated as the constitutional right

of the carriers. * * * Liberty is an attractive theme, but the liberty which is exercised in sheer antipathy does not plead strongly for recognition."

Mr. Justice Holmes—dissenting:

"It cannot be doubted that to prevent strikes, and so far as possible, to foster its scheme of arbitration, might be deemed by Congress an important point of policy, and I think it impossible to say that Congress might not reasonably think that the provision in question could help a good deal to carry its policy along. But suppose the only effect really were to tend to bring about the complete unionizing of such railroad laborers as Congress can deal with, I think that object alone would justify the act. I quite agree that the question what and how much good labor unions do, is one on which intelligent people may differ. I think that laboring men sometimes attribute to them advantages, as many attribute to combinations of capital, disadvantages, that really are due to economic conditions of a far wider and deeper kind; but I could not pronouce it unwarranted, if Congress should decide that to foster a strong union was for the best interest, not only of the men, but of the railroads and the country at large. * * *"

*Coppage v. Kansas*
236 U. S. 1

In error to the Supreme Court of the state of Kansas to review a judgment which affirmed a conviction under an information charging a violation of a statute of the state forbidding employers to exact a promise not to join or retain membership in a labor organization, as a condition of securing or retaining employment.

The act upon which the prosecution was based reads as follows:

An Act to Provide a Penalty for Coercing or Influencing or Making Demands upon or Requirements of Employees, Servants, Laborers and Persons Seeking Employment.

Be it enacted etc.:

Section 1. That it shall be unlawful for any individual, or member of any firm, or any agent, officer or employee of any company or corporation to coerce, require, demand or influence any person, or persons to enter into any agreement, either written or verbal, not to join, or become, or remain a member of any labor organization or association, as a condition of such

person or persons securing employment, or continuing in the employment of such individual, firm or corporation.

Section 2. Provides for the penalty for violation.

Mr. Justice Pitney delivered the opinion of the court:

"But in this case, the Kansas court of last resort has held that Coppage, the plaintiff in error is a criminal, punishable with fine or imprisonment under this statute, simply and merely because, while acting as the representative of the railroad company and dealing with Hedges, an employee at will, and a *man of full age, and understanding, subject to no restraint or disability* (italics ours) Coppage insisted that Hedges should freely choose whether he would leave the employ of the company or would agree to refrain from association with the union while so employed. * * *

"The act, as the construction given to it by the state court shows, is intended to deprive employers of a part of their liberty to contract, to the corresponding advantage of the employed, and the upbuilding of the labor organizations. But no attempt is made, or could reasonably be made, to sustain the purpose to strengthen these voluntary organizations, any more than other voluntary associations of persons, as a legitimate object for the exercise of the police power. *They are not public institutions, charged by law with public or governmental duties, such as would render the maintenance of their membership a matter of direct concern to the general welfare. If they were, a different question would be presented.* (italics ours)

"No doubt, whenever the right of private property exists, there must and will be inequalities of fortune; and thus it naturally happens that parties negotiating about a contract are not equally unhampered by circumstances. This applies to all contracts, and not merely to that between employer and employee. Indeed, a little reflection will show that whenever the right of private property and the right of free contract coexist, each party when contracting, is inevitably more or less influenced by the questions whether he has much property, or little, or none, for the contract is made to the very end that each may gain something that he needs or desires more urgently than that which he proposes to give in exchange. And since it is self evident, that, unless all things are held in common, some persons must have more property than others, it is from the nature of things impossible to uphold freedom of contract and the right of private property, without at the same time

recognizing as legitimate those inequalities of fortune that are the necessary result of the exercise of those rights. But the 14th Amendment in declaring that a state shall not "deprive any person of life, liberty or property without due process of law," gives to each of these an *equal sanction*; it recognizes "liberty" and "property" as *coexistent human rights*, and debars the states from any unwarrantable interference with either. * * *

"When a man is called upon to agree not to become a member of the union while working for a particular employer, he in effect is only asked to deal openly and frankly with his employer, so as not to retain the employment, upon terms to which the latter is not willing to agree. And the liberty of making contracts does not include a liberty to procure employment from an unwilling employer, or without a fair understanding. Nor may the employer be foreclosed by legislation from exercising the same freedom of choice that is the right of the employee.

"To ask a man to agree, in advance to refrain from affiliation with the union while retaining a certain position of employment, is not to ask him to give up any part of his constitutional freedom. He is free to decline the employment on those terms, just as the employer may decline to offer employment on any other, for "it takes two to make a bargain. * * *"

Mr. Justice Holmes, dissenting:

"I think the judgment should be affirmed. In present conditions, a workman not unnaturally may believe that only by belonging to a union can he secure a contract that shall be fair to him. If that belief, whether right or wrong, may be held by a reasonable man, it seems to me that it may be enforced by law in order to establish the equality of position between the parties in which liberty of contract begins. Whether in the long run it is wise for the working man to enact legislation of this sort, is not my concern, but I am strongly of opinion that there is nothing in the Constitution of the United States to prevent it. * * *"

Mr. Justice Day dissenting:

"But liberty of making contracts is subject to conditions in the interest of public welfare, and which shall prevail—principle or condition—cannot be defined by any precise and universal formula. Each instance of asserted conflict must be determined by itself, and it has been said many times that each act of legislation has the support of the presumption that it is an

exercise in the interest of the public. The burden is on him who attacks the legislation, and it is not sustained by declaring a liberty of contract. It can only be sustained by demonstrating that it conflicts with some constitutional restraint, or that the public welfare is not subserved by the legislation. The legislature is, in the first instance, the judge of what is necessary for the public welfare, and a judicial review of its judgment is limited. The earnest conflict of serious opinion does not suffice to bring it within the range of judicial cognizance. * * *

"The right to join labor unions is undisputed, and has been the subject of frequent affirmation in judicial opinions. Acting within their legal rights, such associations are as legitimate as any organization of citizens formed to promote their common interest. They are organized under the laws of many states, by virtue of express statutes formed for that purpose, and being legal and acting under their constitutional rights, the right to join them, as against coercive action to the contrary, may be the legitimate subject of protection in the exercise of the police authority of the states. * * *

"The act must be taken as an attempt of the legislature to enact a statute which it deemed necessary to the good order and security of society. It imposes a penalty for 'coercing or influencing, or making demands upon or requirements of employees, servants, laborers, and persons seeking employments.' * * * Of course if the act is necessarily arbitrary and therefore unconstitutional, mere declarations of good intent cannot save it, but it must be presumed to have been passed by the legislative branch of the state government in good faith, and for the purpose of reaching the desired end. The legislature may have believed, acting upon conditions known to it, that the public welfare would be promoted by the enactment of a statute which should prevent the compulsory exaction of written agreements to forego the acknowledged legal right here involved, as a condition of employment in one's trade or occupation.

"It would be impossible to maintain that because one is free to accept or refuse to employ another, it follows that the parties have a constitutional right to insert in an agreement of employment any stipulation they choose. They cannot put in, terms that are against public policy, either as it is deemed by the courts to exist at common law, or as it may be declared by the legislature as the arbiter within the limits of reason of the public policy of the state * * *."

"It is constantly emphasized that the case presented is not one of coercion. But in view of the *relative position of employer and employed,* who is to deny that the stipulation here insisted upon and forbidden by the law, is essentially coercive? No form of words can strip it of its true character. Whatever our individual opinion may be as to the wisdom of such legislation, we cannot put our judgment in place of that of the legislature, and refuse to acknowledge the existence of conditions with which it was dealing. Opinions may differ as to the remedy, but we cannot understand upon what ground it can be said that a subject so intimately related to the welfare of society is removed from the legislative power * * *."

*Adams v. Tanner*
244 U. S. 590

This case involves the constitutionality of Initiative Measure Number 8—popularly known as "The Employment Agency Law" which among other things prohibits an employment agency to collect fees from persons seeking employment.

Mr. Justice McReynolds delivered the opinion of the court:

"But we think it plain, that there is nothing inherently immoral or dangerous to public welfare, in acting as paid representative of another to find a position in which he can earn an honest living. * * *

"Because abuses may, and probably do, grow up in connection with this business, is adequate reason for hedging it about by proper regulations. But this is not enough to justify destruction of one's right to follow a distinctly useful calling in an upright way. Certainly, there is no profession, possibly no business, which does not offer peculiar opportunities for reprehensible practices, and as to everyone of them, no doubt some can be found quite ready earnestly to maintain that its suppression would be in the public interest. Skillfully directed agitation might also bring about apparent condemnation of any one of them by the public. Happily for all, the fundamental guaranties of the Constitution cannot be freely submerged, if, and whenever some ostensible justification is advanced and the police power invoked. * * *"

Mr. Justice Brandies dissenting:

"The act leaves the plaintiff free to collect fees from *employers,* and it appears that private employment offices thus

restricted, are still carrying on business. But even if it should prove, as plaintiffs allege that their business could not live without collecting fees from employees, that fact would not necessarily render the act invalid. * * * And this court has made it clear, that a statute enacted to promote health, safety, morals, or the public welfare may be valid, although it will compel discontinuance of existing businesses in whole or in part. Statutes prohibiting the manufacture and sale of liquor present the most familiar example of such a prohibition. * * *

"These cases show that the scope of the police power is not limited to *regulation,* as distinguished from prohibition. They show, also, that the power of the state exists equally, whether the end sought to be attained is the promotion of health, safety or morals, or is the prevention of fraud, or the prevention of general demoralization. * * *

"The problems which confronted the people of Washington was far more comprehensive and fundamental than that of protecting workers applying to the private agencies. It was the chronic problem of unemployment—perhaps the gravest and most difficult problem of modern industry—the problem which owing to business depression, was the most acute in business during the years 1913 to 1915. In the state of Washington, the suffering from unemployment was accentuated by the lack of staple industries operating continously throughout the year, and by unusual fluctuations in the demand for labor, with consequent reduction of wages and increase of social unrest. Students of the larger problem of unemployment appear to agree, that the establishment of an adequate system of employment offices or labor exchanges, is an indispensable first step toward its solution. There is reason to believe that the people of Washington not only considered the collection by the private employment offices of fees from employees a social injustice, but that they considered the elimination of the practice, a necessary preliminary to the establishment of a constructive policy for dealing with the subject of unemployment.

"It is facts and considerations like these which may have led the people of Washington to prohibit the collection by employment agencies of fees from applicants for work. And weight should be given to the fact that the statute has been held constitutional by the supreme court of Washington, and

by the Federal district court—courts presumably familiar with the local conditions and needs. * * *"

Mr. Justice Holmes and Mr. Justice Clarke concur in this dissent.

Mr. Justice Mckenna also dissented.

*Truax v. Corrigan*
257 U. S. 312

This case involves the constitutionality of par. 1464 of the Revised Statutes of Arizona 1913, denying the relief of injunction in any dispute between employer and employee involving terms or conditions of employment, "unless necessary to prevent irreparable injury to property or to a property right of the party making the application, for which injury there is no adequate remedy at law". The statute is in effect one prohibiting granting of injunction to prevent picketing.

Mr. Justice Taft delivered the opinion of the court:

"But here the illegality of the means used is without doubt and fundamental. The means used are the libelous and abusive attacks on the plaintiff's reputation, like attacks on their employees and customers, threats of such attacks on would-be customers, picketing and patrolling of the entrance to their place of business, and the consequent obstruction of free access thereto,—all with the purpose of depriving the plaintiffs of their business. To give operation to a statute whereby serious losses inflicted by such unlawful means are in effect made remediless, is, we think to disregard fundamental rights of liberty and property, and to deprive the person suffering the loss of due process of law. * * *"

Mr. Justice Holmes dissenting:

"The dangers of a delusive exactness in the application of the 14th Amendment have been averted to before now. * * * Delusive exactness is a source of fallacy throughout the law. By calling a business 'property', you make it seem like land, and lead up to the conclusion that a statute cannot substantially cut down the advantages of ownership existing before the statute was passed. An established business, no doubt may have pecuniary value, and commonly is protected by law against various unjustified injuries. But you cannot give it definiteness of contour by calling it a thing. It is a course of conduct; and like other conduct, is subject to substantial modification according to time and circumstances, both in itself and in regard to

what shall justify doing it a harm. * * * Legislation may begin where an evil begins. If, as many intelligent people believe, there is more danger that the injunction will be abused in labor cases than elsewhere, I can feel no doubt of the power of the legislature to deny it in such cases. * * *

"I must add one general consideration. There is nothing that I more deprecate than the use of the 14th Amendment beyond the absolute compulsion of its words to prevent the making of social experiments that an important part of the community desires, in the insulated chambers afforded by the several states, even though the experiments may seem futile or even noxious to me and to those whose judgment I most respect. * * *"

Mr. Justice Pitney, with whom concurred Mr. Justice Clark, dissenting:

"The use of the process of injunction to prevent disturbance of a going business by such a campaign as defendants here have conducted is, in the essential sense, a measure of police regulation. And just as the states have a broad discretion about establishing police regulations, so they have a discretion equally broad, about modifying and relaxing them. * * *

"Hence I have no doubt that without infringing the 'due process' clause, a state might, by statute establish protection against picketing or boycotting, however conducted. * * * And just as one state might establish such protection by statute so another state may, by statute disestablish the protection. * * * In neither case can I find ground for declaring that the state's action is so arbitrary and devoid of reasonable basis that it can be called a deprivation of liberty or property without due process of law in the constitutional sense. * * *

"Doubtless, the legislature, upon a review of the subject in the light of a knowledge of conditions in their own state that we do not possess, concluded that in labor controversies, there were reasons affecting the public interest for preventing resort to the process of injunction and leaving the parties to the ordinary legal remedies, which reasons did not apply generally. * * *"

Mr. Justice Brandeis dissenting:

"This right to carry business—be it called property or liberty—has value; and he who interferes with the right without cause renders himself liable. But for cause the right

may be interfered with and even be destroyed. Such cause exists when, in the pursuit of an equal right to further their several interests, his competitors make inroads upon his trade, or when suppliers of merchandise or of labor make inroads upon his profits. What methods and means may be permissible in this struggle of contending forces is determined in part by decisions of the courts, in part by acts of the legislatures. The rules governing the contest necessarily change from time to time. For conditions change; and furthermore, the rules involved being merely experiments in government must be discarded when they prove to be failures. * * *

"Practically every change in the law governing the relation of employer and employee must abridge, in some respect, the liberty or property of one of the parties, if liberty or property be measured by the standard of the law theretofore prevailing. * * * Although the change may involve interference with existing liberty or property of individuals, the statute will not be declared a violation of the due process clause unless the court finds that the interference in arbitrary or unreasonable, or that, considered as a means, the measure has no real or substantial relation of cause to a permissible end. * * *

"Nearly all legislation involves a weighing of public needs as against private desires; and likewise a weighing of relative social values. Since, government is not an exact science, prevailing public opinion concerning the evils and the remedy is among the important facts deserving consideration, particularly when the public conviction is both deep-seated and widespread, and has been reached after deliberation. What, at any particular time is the paramount public need, is necessarily largely a matter of judgment. * * * The history of the rules governing contracts between employer and employee in the several English-speaking countries, illustrate both the susceptibility of such rules to change, and the variety of contemporary opinion as to what rules will best serve the public interest. The divergence of opinion in this difficult field of governmental action should admonish us not to declare a rule arbitrary and unreasonable merely because we are convinced that it is fraught with danger to the public weal, and thus to close the door to experiment within the law."

*Adkins v. Children's Hospital*
261 U. S. 525

The question presented for determination in this case was the constitutionality of an act providing for the fixing of minimum wages for women and children in the district of Columbia.

Mr. Justice Sutherland delivered the opinion of the court:

"In view of the great—not to say revolutionary—changes which have taken place since that utterance, in the contractual, political and civil status of women culminating in the 19th Amendment, it is not unreasonable to say that these differences have now come almost if not quite to the vanishing point. In this aspect of the matter, while the physical differences must be recognized in appropriate cases, and legislation fixing hours or conditions of work may properly take them into account, we cannot accept the doctrine that women of mature age, *sui juris*, require or may be subjected to restrictions upon their liberty of contract which could not lawfully be imposed in the case of men under similar circumstances. To do so would be to ignore all the implications to be drawn from the present day trend of legislation, as well as that of common thought and usage, by which woman is accorded emancipation from the old doctrine that she must be given special protection or be subjected to special restraint in her contractual and civil relationships. * * *

"It is simply and exclusively a price-fixing law, confined to adult women (for we are not now considering the provisions relating to miners), who are legally as capable of contracting for themselves as men * * *. The price fixed by the board need have no relation to the capacity or earning power of the employee, the number of hours which may happen to constitute the day's work, the character of the place where the work is to be done, or the circumstances or surroundings of the employment. And while it has no other basis to support its validity than the assumed necessities of the employee, it takes no account of any independent resources that she may have. * * *

"The law takes account of the necessities of only one party to the contract. It ignores the necessities of the employer by compelling him to pay not less than a certain sum, not only whether the employer is capable of earning it, but irrespective of the ability of his business to sustain the burden, generously leaving him of course, the privilege of abandoning his business as an alternative for going at a loss. * * * It compels him to

pay at least the sum fixed in any event, because the employee needs it, but requires no service of equivalent value from the employee. It therefore undertakes to solve but one half of the problem. The other half is the establishment of a corresponding standard of efficiency; and this forms no part of the policy of the legislation, although in practice the former half without the latter, must lead to ultimate failure, in accordance with the inexorable law that no one can continue indefinitely to take out more than he puts in without ultimately exhausting the supply. The law is not confined to the great and powerful employers, but embraces those whose bargaining power may be as weak as that of the employee. It takes no account of periods of stress and business depression, of crippling losses, which may leave the employer himself without adequate means of livelihood. * * *

"The ethical right of every worker, man or woman, to a living wage, may be conceded. One of the declared and important purposes of trade organizations is to secure it. And with that principle, and with every legitimate effort to realize it in fact, no one can quarrel, but the fallacy of the proposed method of attaining it is that it assumes that very employer is bound, at all events to furnish it * * *."

Mr. Chief Justice Taft, with whom concurs Mr. Justice Sanford, dissenting:

"Legislatures in limiting freedom of contract between employer and employee by a minimum wage, proceed on the assumption that employees in the class receiving least pay are not upon a full level of equality of choice with their employer, and in their necessitous circumstances are prone to accept pretty much anything that is offered. They are peculiarly subject to the overreaching, the harsh and greedy employer. The evils of the sweating system and of the long hours and wages which are characteristic of it, are well known. Now, I agree that it is a disputable question in the field of political economy how far a statutory requirement of maximum hours or minimum wages may be a useful remedy for these evils, and whether it may not make the case of the oppressed employee worse than it was before. But it is not the function of this court to hold congressional acts invalid simply because they are passed to carry out economic views which the court believes to be unwise or unsound. * * *

"Legislatures which adopt a requirement of maximum hours or minimum wages may be presumed to believe that when

sweating employers are prevented from paying unduly low wages by positive law they will continue their business, abating that part of their profits which were wrung from the necessities of their employees, and will concede the better terms required by the law; and that while in individual cases hardship may result, the restriction will inure to the benefit of the general class of employees in whose interest the law is passed, and so to that of the community at large. * * *"

Mr. Justice Holmes dissenting:

"I confess that I do not understand the principle on which the power to fix a minimum for the wages of women can be denied by those who admit the power to fix a maximum for their hours of work. I fully assent to the proposition that here, as elsewhere, the distinctions of the law are distinctions of degree; but I perceive no difference in the kind or degree of interference with liberty, the only matter with which we have any concern, between the one case and the other. The bargain is equally affected whichever half you regulate. Muller v. Oregon, I take it, is as good law today as it was in 1908. It will need more than the 19th Amendment to convince me that there are no differences between men and women, or that legislation cannot take these differences into account. * * *

"This statute does not compel anybody to pay anything. It simply forbids employment at rates below these fixed as the minimum requirement of health and right living. It is safe to assume that women will not be employed at even the lowest wages unless they earn them, or unless the employer's business can sustain the burden * * *."

*Missouri Ex Rel. Bell T. Co. v. Public Service Commission*
262 U. S. 281

This case involves the validity of an order of the Public Service Commission of Missouri, undertaking to reduce rates for exchange service, and abolish the installation and moving charges theretofore demanded by plaintiff in error. The order is challenged as confiscatory and in conflict with the 14th Amendment.

Mr. Justice McReynolds delivered the opinion of the court:

"Obviously, the commission undertook to value the property without according any weight to the greatly enhanced costs of material, labor, supplies, etc., over those prevailing in 1913, 1914, and 1916. As matter of common knowledge, these increases were large. * * *

"There must be a fair return upon the reasonable value of the property at the time it is being used for the public. * * * And we concur with the court below in holding that the value of the property is to be determined as of the time when the inquiry is made regarding the rates. If the property which legally enters into the consideration of the question of rates has increased in value since it was acquired, the company is entitled to the benefit of much increase.

"The making of a just return for the use of the property involves the recognition of its face value, if it be more than its cost. The property is held in private ownership, *and it is that property, and not the original cost of it,* of which the owner may not be deprived without due process of law. * * *"

Mr. Justice Brandeis, with whom Mr. Justice Holmes concurs:

"I concur in the judgment of reversal. But I do so on the ground that the order of the state commission prevents the utility from earning a fair return on the amount *prudently* invested in it. Thus I differ fundamentally from my brethren concerning the rule to be applied in determining whether a prescribed rate is confiscatory. The court adhering to the so-called rule of Smyth v. Ames * and further defining it, declares that what is termed 'value' must be ascertained by giving weight, among other things to estimates of what it would cost to reproduce the property at the time of the rate hearing.

"The so-called rule of Smyth v. Ames is in my opinion legally and economically unsound. The thing devoted by the investor to the public use is not specific property, tangible and intangible, but capital embarked in the enterprise. Upon the capital so invested, the Federal Constitution guarantees to the utility the opportunity to earn a fair return. Thus, it sets the limit to the power of the state to regulate rates. The Constitution does not guarantee to the utility the opportunity to earn a return on the value of all items of property, or of any of them. The several items of property constituting the utility, taken singly and freed from the public use, may conceivably have an aggregate value greater than if the items are used in combination. * * *

"The investor agrees, by embarking capital in a utility, that its charges to the public shall be *reasonable.* His company is the substitute for the state in the performance of the public

* 169 U. S. 466.

service, thus becoming a public servant. The compensation which the Constitution guarantees an opportunity to earn, is the reasonable cost of conducting the business. Cost includes not only operating expenses, but also capital charges. Capital charges cover the allowance, by way of interest, for the use of the capital, whatever the nature of the security issued therefor; the allowance for risk incurred; and enough more to attract capital. The reasonable rate to be prescribed by a commission may allow an *efficiently managed utility* much more. But a rate is constitutionally compensatory, if it allows to the utility the opportunity to earn the cost of the service as thus defined. * * *

"To give to capital embarked in public utilities the protection guaranteed by the Constitution, and to secure to the public reasonable rates, it is essential that the rate based be definite, stable and readily ascertainable; and that the percentage to be earned on the rate base be measured by the cost or charge of the capital employed in the enterprise. * * *

"To require that reproduction cost at the date of the rate hearing be given weight in fixing the rate base, may subject investors to heavy losses when the high war and post-war price levels pass and the price trend is again downward. * * *

"If the aim were to ascertain the value (in its ordinary sense) of the utility property, the inquiry would be not what it would cost to reproduce the identical property, but what it would cost to establish a plant which could render the service; or in other words, at what cost could an equally efficient substitute be them produced. Surely the cost of an equally efficient substitute must be the maximum of the rate base, if prudent investment be rejected as the measure. The utilities seem to claim that the constitutional protection against confiscation guarantees them a return both upon *unearned increment* and upon the cost of *property rendered valueless by obsolescence.* * * *"

*Burns Baking Co. v. Bryan*
264 U. S. 503

This case involves the constitutionality of an act of the legislature of Nebraska providing that every loaf of bread made for the purpose of sale, shall be one-half pound, a pound, a pound and a half, or exact multiples of one pound, and prohibits leaves of other weights. It allows a tolerance in excess of the specified standard weights at the rate of two ounces per

pound and no more, and requires that the specified weight shall be the average weight of not less than twenty-five loaves, and that such average shall not be more than the maximum nor less than the minimum required. Violations of the act are punishable by fine or imprisonment.

Mr. Justice Butler delivered the opinion of the court:

"No question is presented as to the power of the state to make regulations safeguarding or affecting the qualities of bread. Concretely, the sole purpose of fixing the maximum weights, as held by the Supreme Court is to prevent the sale of a loaf weighing anything over nine ounces for a one-pound loaf, and the sale of a loaf weighing anything over eighteen ounces for a pound-and-half loaf and so on. The permitted tolerance as to the half-pound loaf gives the baker the benefit of only one ounce out of the spread of eight ounces, and as to the pound loaf, the benefit of two ounces out of a like spread. There is no evidence in support of the thought that purchasers have been or likely to be induced to take a nine and one-half or a ten ounce loaf for a pound (16 ounce) loaf, or an eighteen and one-half or nineteen ounce loaf for a pound-and-a-half (24 ounce) loaf; and it is contrary to common experience and unreasonable to assume that there could be any danger of such deception. Imposition through short weights readily could have been dealt within a direct and effective way. For the reasons stated we conclude that the provision that the average weights shall not exceed the maximums fixed is not necessary for the protection of purchasers against imposition and fraud by short weights, and is not calculated to effectuate that purpose, and that it subjects bakers and sellers of bread to restrictions which are essentially unreasonable and arbitrary, and is therefore repugnant to the 14th Amendment. * * *"

Mr. Justice Brandeis, with whom Mr. Justice Holmes concurs dissenting:

"The purpose of the Nebraska Standard Weight Bread Law is to protect buyers from short weights and honest bakers from unfair competition. It provides for a few standard-size loaves, which are designated by weight, and prohibits as to each size, the baking or selling of a loaf which weights either less or more than the prescribed weight. Schmidinger v. Chicago 226 U. S. 578, settled that the business of making and selling bread is a permissible subject for regulation; that the prevention of short weights is a proper end of regulation; that the fixing of standard

sizes and weights of loaves is an appropriate means to that end; and that prevalent marketing frauds make the enactment of some much protective legislation permissible. * * *

"Why it should be a crime to bake one which weights more than the standard is not obvious. The reason given is that such a loaf, also, is a handy instrument of fraud. In order that the buyer may be afforded protection, the difference between standard sizes must be so large as to be evident and conspicuous. The buyer has usually in mind the difference in appearance between a one-pound loaf and a pound-and-a-half loaf, so that it is difficult for the dealer to palm off the former for the latter. But a loaf weighing one pound and five ounces may look so much like the buyer's memory of the pound-and-a-half loaf that the dealer may effectuate the fraud by delivering the former. The prohibition of excess weight is imposed in order to prevent a loaf of one standard size from being increased so much, that it can readily be sold for a loaf of a larger standard size. * * *"

*Wolff Packing Co. v. Court of Industrial Relations of Kansas*
267 U. S. 552

This was an original proceeding in mandamus in the supreme court of Kansas to compel the Wolff Packing Company to put into effect an order of a state agency, called the court of industrial relations, determining a dispute respecting wages, hours of labor, and working conditions in a slaughtering and packing plant owned and operated by the company. The order was made in a compulsory proceeding under a Kansas statute called the Industrial Relations Act.

Mr. Justice Van Devanter delivered the opinion of the court:

"The declared and adjudged purpose of the act is to insure continuity of operation and production in certain businesses which it calls 'essential industries'. To that end it provides for the compusory settlement by state agency of all labor controversies in such businesses which endanger the intended continuity. It proceeds on the assumption that the public has a paramount interest in the subject which justifies the compulsion. The businesses named include among others, that of manufacturing and preparing food products for sale and human consumption. * * * No distinction is made between wages and hours of labor; both are put on the same plane. In the fixing

of wages, regard is to be had for what is fair between employer and employee, and in the fixing of hours of labor, regard is to be had for what are healthful periods; but neither is to be fixed save in the compusory adjustment of an endangering controversy to the end that business shall go on.

"The power of the legislature to compel continuity in a business can only arise when the obligation of continued service by the owner and its employees is direct, and is assumed when the business is entered upon. A common carrier which accepts a railroad franchise is not free to withdraw the use of that which it has granted to the public. It is true that if operation is impossible without continuous loss, it may give up its franchise and enterprise, but short of this it may continue. Not so the owner (in another field) when by mere changed conditions his business becomes clothed with a public interest. He may stop at will whether the business is losing or profitable. * * *

"The system of compulsory arbitration which the act establishes is intended to compel, and if sustained will compel the owner and employees to continue the business on terms which are not of their making. It will constrain them not merely to respect the terms if they continue the business, but will constrain them to continue the business on those terms. True the terms have some qualifications, but as shown in the prior decision, the qualifications are rather illusory and do not subtract much from the duty imposed. Such a system infringes the liberty of contract and rights of property guaranteed by the due process of law clause of the 14th Amendment. * * *"

*Frost v. Railroad Commission*
271 U. S. 583

This case involves the constitutionality of the Auto, Stage and Truck Transportation Act of California. The act provided for the supervision and regulation of transportation for compensation over public highways by automobiles, auto trucks etc., by the Railroad Commission. It was further provided that no transportation company shall operate for compensation over the highways without first having secured from the commission a certificate of public convenience and necessity so to do.

Mr. Justice Sutherland delivered the opinion of the court:

"Having regard to form alone, the act here is an offer to the private carrier of a privilege, which the state may grant or deny, upon a condition, which the carrier is free to accept or

reject. In reality, the carrier is given no choice, except a choice between the rock and the whirlpool,—an option to forego a privilege which may be vital to his livelihood, or to submit to a requirement which may constitute an intolerable burden.

"It is not necessary to challenge the proposition that as a general rule, the state having power to deny a privilege altogether may grant it upon such conditions as it sees fit to impose. But the power of the state in that respect is not unlimited, and one of the limitations is that it may not impose conditions which require the relinquishment of constitutional rights. If the state may compel the surrender of one constitutional right, as a condition of its favor, it may, in like manner, compel a surrender of all. It is inconceivable that guaranties embedded in the Constitution of the United States may thus be manipulated out of existence. * * *"

Mr. Justice Holmes dissenting:

"I agree of course with the cases cited by my brother Sutherland, * * * that even generally lawful acts or conditions may become unlawful when done or imposed to accomplish an unlawful end. But that is only the converse of the proposition that acts in other circumstances unlawful may be justified by the purpose for which they are done. This applies to acts of the legislature as well as to the doings of private parties. The only valuable significance of the much abused phrase 'police power' is this power of the state to limit what otherwise would be rights having a pecuniary value, when a predominent public interest requires the restraint. The power of the state in its turn is limited by the constitutional guaranties of private rights, and it often is a delicate matter to decide which interest preponderates, and how far the state may go without making compensation. The line cannot be drawn by generalities, but successive points in it must be fixed by weighing the particular facts.

"The point before us seems to me well within the legislative power. We all know what serious problems the automobile has introduced. The difficulties of keeping the streets reasonably clear for travel and for traffic are very great. If a state speaking through its legislature should think, that, in order to make its highways most useful, the business traffic upon them must be controlled, I suppose that no one would doubt that it constitutionally could, as I presume most states or cities do, exercise some such control. The only question is how far it can go. I

see nothing to prevent it going to the point of requiring a license and bringing the whole business under the control of a railroad commission so far as to determine the number, character and conduct of transportation companies, and so to prevent the streets from being made useless and dangerous by the number and lawlessness of those who seek to use them. * * *"

*Tyson and Brother v. Banton*
275 U. S. 418

This case involves the constitutionality of an act providing thus:

"Section 167: Matters of public interest. It is hereby determined and declared that the price of or charge for admissions to theatres, places of amusement or entertainment, or other places where public exhibitions, games, contests or performances are held is a matter affected with a public interest and subject to the supervision of the state for the purpose of safeguarding the public against fraud, extortion, exorbitant rates and similar abuses."

"Section 172: Restriction as to price. No licenses shall resell any such ticket or other evidence of the right of entry to any theatre * * * at a price in excess of fifty cents in advance of the price printed on the face of such ticket. * * *"

Mr. Justice Sutherland delivered the opinion of the court:

"A theatre is a private enterprise, which in its relation to the public, differs obviously and widely, both in character and degree from a grain elevator * * * etc.; or stock yard * * * etc.; or an insurance company * * * etc. Sales of theatre tickets bear no relation to the commerce of the country; and they are not interdependent transactions, but stand, both in form and in effect, separate and apart from each other terminating in their effect with the instances. And certainly, a place of entertainment is in no legal sense a public utility; and quite as certainly its activities are not such that their enjoyment can be regarded under any conditions from the point of view of an emergency.

"The interest of the public in theatres and other places of entertainment may be more nearly, and with better reason assimilated to the like interest in provision stores and markets and in the rental of houses and apartments for residential purposes; although in importance it falls below such an interest in the proportion that food and shelter are of more moment than amusement or instruction. As we have shown, there is no leg-

islative power to fix the price of provisions or clothing or the rental charges for houses or apartments, in the absence of some controlling emergency; and we are unable to perceive any dissimilarities of such quality or degree as to justify a different rule in respect of amusements and entertainments. * * *

"While theatres have existed for centuries and have been regulated in a variety of ways, and while price fixing by legislation is an old story, it does not appear that any attempt hitherto has been made to fix their charges by law. * * *

"That such evils exist in some degree in connection with the theatrical business and its ally, the ticket broker, is undoubtedly true, as it unfortunately is true in respect of the same or similar evils in other kinds of business. But evils are to be suppressed or prosecuted by legislation which comports with the constitution, and not by such as strikes down those essential rights of private property protected by that instrument against undue government interference. * * *"

Mr. Justice Holmes dissenting:

"We fear to grant power and are unwilling to recognize it when it exicts * * * and when legislatures are held to be authorized to do anything considerably affecting public welfare, it is covered by apologetic phrases like the police power, or the statement that the business concerned has been dedicated to a public use. The former expression is convenient to be sure, to conciliate the mind to something that needs explanation. * * * But police power often is used in a wide sense to cover and as I said to apologize for the general power of the legislature to make a part of the community uncomfortable by a change.

"I do not believe in such apologies. I think the proper course is to recognize that a state legislature can do whatever it sees fit to do, unless it is restrained by some express prohibition in the Constitution of the United States, or of the state, and that courts should be careful not to extend such prohibitions beyond their obvious meaning, by reading into them conceptions of public policy that the particular court may happen to entertain. Coming down to the case before us, I think as I intimated in Adkins v. Children's Hospital 261 U. S. 525 that the notion that the business is clothed with a public interest and have been devoted to the public use is little more than a fiction intended to beautify what is disagreeable to sufferers. The truth seems to me that, subject to compensation when compensation is due, the legislature may forbid or restrict any busi-

ness *when it has a sufficient force of public opinion behind it.* Lotteries were thought useful adjuncts of the state a century or so ago; now they are believed to be immoral and they have been stopped. Wine has been thought good for man from the time of the Apostles until recent years. But when public opinion changed, it did not need the 18th Amendment, notwithstanding the fourteenth to enable a state to say that the business should end. Mugler V. Kansas, 123 U. S. 623. What has happened to lotteries and wine might happen to theatres in some moral storm of the future, not because theatres were devoted to a public use, but because people had come to think that way.

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

Mr. Justice Brandeis concurs in this opinion.

Mr. Justice Stone dissenting:

"It is undoubtedly true as a general proposition that one of the incidents of the ownership of property is the power to fix the price at which it may be disposed. It may also be assumed that as a general proposition, under the decisions of this court, the power of state governments to regulate and control prices may be invoked only in special and not well defined circumstances. But when that power is invoked in the public interest and in consequence of the gross abuse of private right disclosed by this record, we should make searching and critical examination of those circumstances which in the past have been deemed sufficient to justify the exercise of the power before concluding that it may not be exercised here.

"The phrase business affected with a public interest seems to me to be too vague and illusory to carry us very far on the way to a solution. It tends in use to become only a convenient

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

"The constitutional theory that prices normally may not be regulated, rests upon the assumption that the public interest and private right are both adequately protected when there is "free" competition among buyers and sellers, and that in such a state of economic society, the interference with so important an incident of the ownership of private property as price fixing is not justified and hence is a taking of property without due process of law. * * *

"Statutory regulation of price is commonly directed toward the prevention of exorbitant demands of buyers or sellers. An examination of the decisions of this court in which price regulation has been upheld will disclose that the element common to all is the existence of a situation or a combination of circumstances materially restricting the regulative force of competition, so that buyers or sellers are placed at such a disadvantage in the bargaining struggle that serious economic consequences result to a very large number of members of the community. Whether this situation arises from the monopoly conferred upon public service companies, or from the circumstance that the strategical position of a group is such as to enable it to impose its will in matters of price upon those who sell, buy, or consume as in Munn v. Illinois, or from the predetermination of prices in the councils of those who sell, promulgated in schedules of practically controlling constancy as in German Alliance Ins. Co. v. Kansas, or from a housing shortage growing out of a public emergency as in Block v. Hirsh, the result

is the same. Self-interest is not permitted to invoke constitutional protection at the expense of public interest, and reasonable regulation of price is upheld."

Mr. Justice Sanford also dissented.

*Ribnik v. McBride*
277 U. S. 350

Chapter 227 Laws of New Jersey, 1918, p. 822, an act to regulate the keeping of employment agencies, requires that every person operating an employment agency must procure a license from the Commissioner of Labor. Among other requirements the applicant must "file with the Commissioner of Labor for his approval, a schedule of fees proposed to be charged for any services rendered to employees seeking employers, and persons seeking employment, and all charges must conform thereto. The schedule of fees may be charged only with the approval of the Commissioner of Labor.

Issue: Whether the state has the power to require employment agencies to charge only reasonable fees for their services to those seeking employment.

Mr. Justice Sutherland delivered the opinion of the court:

"The business of securing employment for those seeking work, and employees for those seeking workers is essentially that of a broker, that is, of an intermediary. While we do not undertake to say that there may not be a deeper concern on the part of the public in the business of an employment agency, that business does not differ in substantial character from the business of a real estate broker, ship broker, merchandise broker, or ticket broker. * * *

"An employment agency is essentially a private business. True, it deals with the public, but so do the druggist, the butcher, the baker, the grocer, and the apartment or tenement house owner, and the broker who acts as intermediary between such owner and his tenants. Of course, anything which substantially interferes with employment is a matter of public concern, but in the same sense that interference with the procurement of food and housing and fuel are of public concern * * * etc. The interest of the public in the matter of employment is not different in quality or character from its interest in the other things enumerated; but in none of them is the interest

that 'public interest' which the law contemplates as the basis for legislative price control.

"And we since have held definitely that the power to require a licence for and to regulate the conduct of a business is distinct from the power to fix prices. 'The latter power is not only a more definite and serious invasion of the rights of property and the freedom of contract, but its exercise cannot always be justified by circumstances which have been held to justify legislative regulation of the manner in which a business shall be carried on' Tyson v. Banton 273 U. S. 418.

"To urge that extortion, fraud, imposition, discrimination and the like have been practiced to some or to a great extent in connection with the business here under consideration, or that the business is one lending itself peculiarly to such evils, is simply to restate grounds already fully considered by this court. These are grounds for regulation, but not for price fixing, as we have already definitely decided."

Mr. Justice Sanford concurred in the opinion of the majority.

Mr. Justice Stone dissenting:

"The use by the public generally of the specific thing or business affected is not the test. The nature of the service rendered, the exorbitance of the charges and the arbitrary control to which the public may be subjected without regulation, are elements to be considered in determining whether the 'public interest' exists. Chas. Wolff Packing Company v. Court of Industrial Relations, supra, 538. The economic disadvantage of a class, and the attempt to ameliorate its condition may alone be sufficient to give rise to the 'public interest' and to justify the regulation of contracts with its members, * * * and obviously, circumstances may so change in point of time, or so differ in space as to clothe a business with such an interest which at other times and in other places would be a matter purely of private concern. * * *

"I cannot say a priori that the business of employment agencies in New Jersey lacks the requisite 'public interest'. We are judicially aware that the problem of unemployment is of grave public concern; that the conduct of employment agency business bears an important relationship to that larger problem and affects vitally the lives of great numbers of the population, not only in New Jersey, but throughout the United States; that employment agencies, admittedly subject to regulation in other

respects, and in fact very generally regulated, deal with a necessitous class, the members of which are often dependent on them for opportunity to earn a livelihood, are not free to move from place to place, and are often under exceptional economic compulsion to accept such terms as the agencies offer. We are not judicially ignorant of what all human experience teaches, that those so situated are peculiarly the prey of the unscrupulous and designing.

"Some presumption should be indulged that the New Jersey legislature had an adequate knowledge of such local conditions as the circumstances of those seeking employment, the number and distribution of employment agencies, the local efficacy of competition; the prevalent practices with respect to fees. On this deserved respect for the judgment of the local lawmaker depends of course the presumption in favor of constitutionality, for the validity of the regulation turns 'upon the existence of conditions peculiar to the business under consideration' * * *

"For thirty years or more the evils found to be connected with the business of employment agencies in the United States have been the subject of repeated investigations, official and unofficial, and of extensive public comment. They have been the primary reason for the establishment of public employment offices in the various states. * * *

"Quite apart from other evils laid at the door of the private agencies, the data supplied by these investigations and reports afford a substantial basis for the conclusion of the New Jersey legislature that the business is peculiarly subject to abuses relating to free-charging, and that for the correction of these, the restriction to a reasonable maximum charge is the only effective remedy. * * *

"Ticket brokers and employment brokers are similar in name; in no other respect do they seem alike to me. To overcharge a man for the privilege of hearing the opera is one thing; to control the possibility of his earning a livelihood would appear to be quite another. * * *

"To me it seems equally obvious that the Constitution does not require us to hold that a business, subject to every other form of reasonable regulation, is immune from the requirement of reasonable prices, where that requirement is the only remedy appropriate to the evils encountered. In this respect, I can see no difference between a reasonable regulation of price

and a reasonable regulation of the use of property, which affects its price or economic return. The privilege of contract and the free use of property are as seriously cut down in the one case as in the other.

"To say that there is constitutional power to regulate a business or a particular use of property because of the public interest in the welfare of a class peculiarly affected and to deny such power to regulate price for the accomplishment of the same end, when that alone appears to be an appropriate and effective remedy, is to make a distinction based on no real economic difference, and for which I can find no warrant in the constitution itself. nor any justification in the opinions of this court."

Mr. Justice Holmes and Mr. Justice Brandeis join in this dissent:

*New State Ice Co. v. Liebmann*
285 U. S. 262

This case involves the validity of a portion of an act forbidding a commission created by the act, to issue a license to any applicant except upon proof of the necessity for a supply of ice at the place where it is sought to establish the business, and which authorize a denial of the application where the existing licensed facilities "are sufficient to meet the public needs therein."

Mr. Justice Sutherland delivered the opinion of the court:

"Here we are dealing with an ordinary business, not with a paramount industry, upon which the prosperity of the entire state depends. It is a business as essentially private in its nature, as the business of the grocer, the dairyman, the butcher, the baker, the shoemaker or the tailor, each of whom performs a service, which, to a greater or less extent, the community is dependent upon, and is interested in having maintained, but which bears no such relation to the public as to warrant its inclusion in the category of business charged with a public use. * * *

"The control here asserted does not protect against monopoly, but tends to foster it. The aim is not to encourage competition, but to prevent it; not to regulate business, but to prevent persons from engaging in it. * * * It is not the case of a natural monopoly, or an enterprise in its nature dependent upon the grant of public privileges. The particular requirement before us was evidently not imposed to prevent a practical mono-

poly of the business, since its tendency is quite to the contrary. Nor is it a case of the protection of natural resources. There is nothing in the product that we can perceive on which to rest a distinction, in respect of this attempted control, from other products in common use which enter into free competition, subject of course to reasonable regulations prescribed for the protection of the public and applied with appropriate impartiality.

"And it is plain that unreasonable or arbitrary interference or restrictions cannot be saved from the condemnation of that amendment merely by calling them experimental * * *. The principle is embedded in our constitutional system that there are certain essentials of liberty with which the state is not entitled to dispense in the interest of experiments. * * *"

Mr. Justice Brandeis dissenting:

"The Oklahoma statute makes entry into the business of manufacturing ice for sale and distribution dependent in effect, upon a certificate of public convenience and necessity. Such a certificate was unknown to the common law. It is a creature of the machine age, in which plants have displaced tools, and businesses are substituted for trades. The purpose of requiring it is to promote the public interest by preventing waste. Particularly in those businesses in which interest and depreciation charges on plant constitute a large element in the cost of production, experience has taught that the financial burdens incident to unnecessary duplication of facilities are likely to bring high rates and poor service. There, cost is usually dependent, among other things upon volume; and division of possible patronage among competing concerns may so raise the unit cost of operation as to make it impossible to provide adequate service at reasonable rate. The introduction in the United States of the certificate of public convenience and necessity marked the growing conviction that under certain circumstances free competition might be harmful to the community and that when it was so, absolute freedom to enter the business of one's choice should be denied.

"Oklahoma declared the business of manufacturing ice for sale and distribution 'a public business'; that is a public utility. So far as it appears, it was the first state to do so. Of course, a legislature cannot by mere legislative fiat convert a business into a public utility. But the conception of a public utility is not static. * * *

"Whether the local conditions are such as to justify converting a private business into a public one, is a matter primarily for the determination of the state legislature. Its determination is subject to judicial review; but the usual presumption of validity attends the enactment. * * *

"The business of supplying ice is not only a necessity like that of supplying food and clothing or shelter, but the legislature could also consider that it is one which lends itself peculiarly to monopoly. * * *. In small towns and rural communities, the duplications of plants and in larger communities, the duplication of delivery service are wasteful and ultimately burdensome to consumers. At the same time, the relative case and cheapness with which an ice plant may be constructed exposes the industry to destructive and frequently ruinous competition. Competition in the industry tends to be destructive because ice plants have a determinate capacity and inflexible fixed charges and operating costs, and because in a market of limited area, the volume of sales is not readily expanded. * * *

"Whatever the nature of the business, whatever the scope or character of the regulation applied, the source of the power invoked is the same. And likewise the constitutional limitations upon that power. The source is the police power. The limitation is that set by the due process clause, which as construed requires that the regulation shall not be unreasonable, arbitrary or capricious; and that the means of regulation selected shall have a real or substantial relation to the object sought to be obtained. The notion of a distinct category of business 'affected with a public interest', employing property 'devoted to a public use', rests upon historical error. The consequences which it is sought to draw from those phrases, are belied by the meaning in which they were first used centuries ago, and by the decision of this court in Munn v. Illinois 94 U. S. 113, which first introduced them into the law of the constitution. In my opinion, the state's power extends to every regulation of any business reasonably required and appropriate for the public protection. I find in the due process clause no other limitation upon the character or the scope of the regulation permissible.

"It is settled that the police power commonly invoked in aid of health, safety and morals extends equally to the preservation of the public welfare. The cases just cited show that, while ordinarily, free competition in the common callings has

been encouraged, the public welfare may at other times demand that monopolies be created. Upon this principle is based our whole modern practice of public utility regulation. It is no objection to the validity of the statute here assailed that it fosters monopoly. That, indeed is its design. The certificate of public convenience and necessity is a device,—a recent social-economic invention through which the monopoly is kept under effective control by vesting in a commission the power to terminate it whenever that course is required in the public interest.
* * *

"The people of the United States are now confronted with an emergency more serious than war. Misery is widespread in a time not of scarcity, but of over-abundance. The long-continued depression has brought unprecedented unemployment, a catastrophic fall in commodity prices, and a volume of economic losses which threatens our financial institutions. Some people believe that the existing conditions threaten even the stability of the capitalistic system. Economists are searching for the causes of this disorder, and are re-examining the bases of our industrial structure. Business men are seeking possible remedies. Most of them realize that failure to distribute widely the profits of industry has been a prime cause of our present plight. But rightly or wrongly, many persons think that one of the major contributing causes has been unbridled competition. Increasingly, doubt is expressed whether it is economically wise, or morally right that men should be permitted to add to the producing facilities of an industry which is already suffering from over-capacity. In justification of that doubt, men point to the excess-capacity of our productive facilities resulting from their vast expansion without corresponding increase in the consumptive capacity of the people. They assert that through improved methods of manufacture, made possible by advances in science and invention and vast accumulation of capital, our industries had become capable of producing from thirty to one hundred per cent more than was consumed even in days of vaunted prosperity; and that the present capacity will, for a long time, exceed the needs of business. All agree that irregularity in employment—the greatest of our evils cannot be overcome unless production and consumption are more nearly balanced. Many insist that there be some form of economic control. There are plans for proration. There are many proposals for stabilization. And some thoughtful men of wide busi-

ness experience insist that all projects for stabilization and proration must prove futile unless, in some way, the equivalent of the certificate of public convenience and necessity is made a prerequisite in embarking new capital in an industry in which the capacity already exceeds the production schedules.

"Some people assert that our present plight is due in part, to the limitations set by courts upon experimentation in the fields of social and economic science; and to the discouragement to which proposals for betterment there have been subjected otherwise. There must be power in the states and the nation to remould through experimentation, our economic practices and institutions to meet changing social and economic needs. I cannot believe that the framers of the 14th Amendment, or the states which ratified it, intended to deprive us of the power to correct the evils of technological unemployment and excess productive capacity which have attended progress in the useful arts. * * *"

*People v. Pomar*
46 Phil. 440

This case involves the constitutionality of Sections 13 and 15 of Act No. 3071 of the Philippine Legislature providing thus:

Section 13—"Every person, firm or corporation owning or managing a factory, shop or place of labor of any description, shall be obliged to grant to any woman employed by it as laborer who may be pregnant, thirty days vacation with pay before, and another thirty days after confinement: Provided, That the employer shall not discharge such laborer without just cause, under the penalty of being required to pay her wages, equivalent to the total of two months counted from the day of her discharge."

Section 15 provides for the penalty of fine or imprisonment for violation of Act 3071.

Mr. Justice Johnson delivered the opinion of the court:

"In a republican form of government, public sentiment wields a tremendous influence upon what the state, may or may not do, for the protection of the health and public morals of the people. Yet, neither public sentiment nor a desire to ameliorate the public morals of the people of the state will justify the promulgation of a law which *contravenes the express provisions of the fundamental law of the people—the constitution of the state.*"

After citing and expounding the cases of Adkins v. Children's Hospital of the District of Columbia 261 U. S. 525, Adair v. United States 208 U. S. 161, Coppage v. Kansas 236 U. S. 1 and Gillespie v. People 188 Ill. 176, Mr. Justice Johnson continues:

"The statute in question is exactly analogous to the 'Minimum Wage Act' referred to above. In section 13, it will be seen that no person, firm or corporation owning or managing a factory, shop or place of labor of any description, can make a contract with a woman, without incurring the obligation, whatever the contract of employment might be, *unless he also promise to pay to such woman employed as laborer, who may become pregnant, her wages for thirty days before and thirty days after confinement.* * * * The law creates a *term* in every such contract, without the consent of the parties. Such persons are, therefore, deprived of their liberty to contract. The constitution of the Philippine Islands guarantees to every citizen his *liberty,* and one of his *liberties is* the liberty to contract.

"The police power of the state is a growing and expanding power. As civilization develops, and public conscience becomes awakened, the police power may be extended, as has been demonstrated in the growth of public sentiment with reference to the manufacture and sale of intoxicating liquors. But that power cannot grow faster than the fundamental law of the state, nor transcend or violate the express inhibition of the people's law—the constitution. If the people desire to have the police power extended and applied to conditions and things prohibited by the organic law, they must first amend that law."

Street, Malcolm, Avanceña, Villamor, Ostrand, and Romualdez, J. J. concur.

(*To be concluded in the next issue.*)