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The Convenience of the Public Interest Concept

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THE CONVENIENCE OF THE PUBLIC INTEREST CONCEPT

By J. A. McCLAIN, JR.*

IT is no longer novel to disagree with the Supreme Court in its interpretation of the "public interest" concept. The origin and historical development of the phrase, "business affected with a public interest," have recently had a very full and interesting treatment.[1] That the phrase found publication and notoriety largely by chance and the undaunted efforts of Lord Hale's ardent admirer, Mr. Francis Hargrave, is undoubtedly true.[2] And it seems equally certain that its author never intended the phrase to have any application whatsoever to statutory regulation, but used it to explain the duties imposed in the absence of statute by the common law on the owners and operators of certain limited conveniences to charge only reasonable prices for their services.[3] Despite

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[1]McAllister, Lord Hale and Business Affected With A Public Interest, (1930) 43 Harv. L. Rev. 759. Hamilton, Affectation with Public Interest, (1930) 34 Yale L. J. 1089.

[2]McAllister, Lord Hale and Business Affected With A Public Interest, (1930) 43 Harv. L. Rev. 759. See Hargrave, Law Tracts, Preface 2, 3.

[3]This appears evident when the many statutes are considered which regulated prices and wages before Lord Hale wrote (1596-1603). See Cassidy, The Emergence of the Free Labor Contract in England, (1929) 18 Am. Ec. Rev. 201; 2 Cunningham, Growth of English History and Commerce, 22; Gilmore, Governmental Regulation of Prices, (1905) 17 Green Bag 627; Cheadle, Governmental Control of Business, (1920) 20 Col. L. Rev. 550. For list of the statutes having particular reference to wages and laborers see Sayre, Cases on Labor Law 3 et seq.

The English courts applying Lord Hale's principle clearly show that irrespective of statute an owner or operator of a convenience "affected with a public interest" could charge only reasonable prices. See Allnut v. Inglis, (1810) 12 East 527, where a duty to charge only reasonable prices was imposed on certain warehouses in the absence of Parliamentary limitation.

When the matter has come before the American State courts, the existence of a "public interest" has been declared a legislative and not a judicial question. Unless the legislature has spoken, no "public interest" will be found. This is true regardless of whether a monopoly exists. Ladd v. Southern Cotton Press Mfg. Co., (1880) 53 Tex. 172. Nor does the magnitude of the business conducted affect the question until legislative declaration. American Live Stock Comm. Co. v. Chicago Live Stock Exchange, (1890) 143 Ill. 210, 32 N. E. 274. See also, Delaware L. & W. R. R. Co. v. Central Stockyard & T. Co., (1889) 45 N. J. Eq. 50, 17 Atl. 146.

These decisions would seem to be unsound since the question of a "public interest" was always a judicial one in its English development. It may be said, however, that even though the legislature has declared a

the recent expositions on the subject by Mr. Justice Sutherland and others,[4] it still remains a puzzle to many that the Supreme Court should have gone to the common law of England, where Parliament sits with plenary constitutional power, to select the criteria by which the constitutionality of American price and wage regulation should be determined; and that in so doing the statutory declarations of England which would have justified the most far-reaching results in price and wage fixing were utterly ignored.[5] However strange this may be, a still more curious phenomenon is the surprising agility with which the court may—at its pleasure—seize upon the concept to affirm or deny regulation on the one hand, or, on the other, leave it to repose unnoticed on the shelf of judicial tools.

Mr. Justice Sutherland has stated for the majority of the court that there is a great deal of difference between regulation as to price and regulation with respect to other features of a business, and that in order for price restrictions to be valid the business in question must be "affected with a public interest."[6] If this be true, there must be some extraordinary severity pertaining to regulations affecting prices as distinguished from those affecting wages and those resulting in taking the subject matter of property. This seems to be a most peculiar result, however, for has not the court said that an industrial commission cannot be authorized to fix the wages in a business even though it be "affected with a public interest?"[7] And one would ordinarily think that an actual taking of the thing itself is of equal if not greater severity than a mere regulation with regard to price.[8]

"public interest" to exist, a court may decide otherwise. See cases infra note 4.

[4]Mr. Justice Sutherland has been the spokesman for the majority in the last three cases in which the existence of a "public interest" was denied. Tyson v. Banton, (1927) 273 U. S. 418, 47 Sup. Ct. 426, 71 L. Ed. 718; Ribnik v. McBride, (1928) 277 U. S. 350, 48 Sup. Ct. 545, 72 L. Ed. 913; Williams v. Standard Oil Co., (1929) 278 U. S. 235, 49 Sup. Ct. 115, 73 L. Ed. 287.

[5]Supra note 3.

[6]Tyson v. Banton, (1927) 273 U. S. 418, 47 Sup. Ct. 426, 71 L. Ed. 718; Ribnik v. McBride, (1928) 277 U. S. 350, 48 Sup. Ct. 545, 72 L. Ed. 913. Is this same view of the police power held by Mr. Justice Sutherland in Euclid v. Ambler Realty Co., (1929) 272 U. S. 365, 47 Sup. Ct. 114, 71 L. Ed. 303?

[7]Wolff v. Court of Industrial Relations, (1923) 262 U. S. 522, 43 Sup. Ct. 630, 67 L. Ed. 1103. The Court did not in fact find a "public interest" to exist, but it did say that the regulations passed would not be valid even though the business were so affected.

[8]Noble State Bank v. Haskell, (1911) 219 U. S. 104, 31 Sup. Ct. 186, 55 L. Ed. 112, rehearing (1911) 219 U. S. 575, 31 Sup. Ct. 299, 55 L. Ed. 341.

There appear to be many instances, however, in which the court has sanctioned legislation which either affected wages or actually appropriated the thing itself; and in none of these cases has it been felt necessary to invoke the "public interest" doctrine.

The decisions in which the Supreme Court has upheld restrictions relating to the hours of labor present an interesting study in this connection.[9] For example, in *Bunting v. Oregon*[10] legislation of the state of Oregon was upheld, which provided for a ten-hour day for employees of any mill, factory or manufacturing establishment and which contained a provision that employees might work three hours overtime if paid at the rate of time and one-half of the regular wage. It was urged by those attacking the legislation that the law really provided for wage regulation by reason of the clause as to overtime work, but the court held that this stipulation was in the nature of a mild penalty to enforce the ten-hour day. It can hardly be doubted, however, that irrespective of the overtime clause, this legislation directly or indirectly affected the amount of wages paid. Certainly if the employer has to pay the same amount for fewer hours of work the rate of wages has been affected. It is generally the view of the court, however, in upholding legislation restricting hours of labor, that the employer and employee are still left free to contract as to

Here the entire Court upheld a statute which required each state bank to contribute to a sinking fund so that depositors of insolvent banks might be paid.

The Court speaking through Mr. Justice Sutherland has upheld zoning regulations that result in the owner of land being deprived of using a part thereof for building purposes. Apparently no difficulty was encountered in bringing these restrictions under the general police power, although there are state decisions holding them unconstitutional. See Euclid v. Ambler Realty Co., (1929) 272 U. S. 365, 47 Sup. Ct. 114, 71 L. Ed. 303, and Gorieb v. Fox, (1926) 274 U. S. 603, 47 Sup. Ct. 675, 71 L. Ed. 1228 where the opposing view with respect to their constitutionality is reviewed.

[9]See Holden v. Hardy, (1898) 169 U. S. 366, 18 Sup. Ct. 383, 42 L. Ed. 780, (statute upheld limiting miners to an eight hour day). Cf. Lochner v. New York, (1905) 198 U. S. 45, 25 Sup. Ct. 539, 49 L. Ed. 937 (statute providing for ten hour day in bakeries held unconstitutional). See Muller v. Oregon, (1908) 208 U. S. 412, 28 Sup. Ct. 324, 52 L. Ed. 551 (legislation upheld limiting hours of labor of women employed in laundries); Bunting v. Oregon, (1917) 243 U. S. 426, 37 Sup. Ct. 435, 61 L. Ed. 830. (ten hour day upheld for all people engaged as employees in mills, factories and other manufacturing establishments); Stettler v. O'Hara, (1914) 69 Or. 519, 139 Pac. 743, aff'd (1917) 243 U. S. 648, 37 Sup. Ct. 475, 61 L. Ed. 937, (in a memorandum opinion the Supreme Court by an equally divided court (four and four) upheld minimum wage laws for women and minors). But see Adkins v. Childrens Hospital, (1923) 261 U. S. 525, 43 Sup. Ct. 394, 67 L. Ed. 785. See also, O'Hara v. Luckenback S. S. Co., (1926) 269 U. S. 364, 46 Sup. Ct. 157, 70 L. Ed. 313.

[10](1917) 243 U. S. 426, 37 Sup. Ct. 435, 61 L. Ed. 830.

wages and that the hour restriction merely furnishes a new plane of competition.[11] From a practical standpoint, however, such a result does not follow, for, implied in every hour regulation is the understanding that the wages are to remain the same, that the employee will be paid as much for the new day as he was for the old.[12] So it would seem that in some degree at least a regulation as to hours has something to do with the rate of compensation, and yet the court has not deemed it necessary to find that each business in which the hours of labor are sought to be restricted must be "affected with a public interest" before such regulation is valid. The court seems content in these cases to rest the validity of the legislation on the general police power of the state and feels no need of moral support from the "public interest" test.

In *Stettler v. O'Hara*[13] legislation of the state of Oregon providing for a commission with power to investigate working conditions of women and minors and to prescribe, if it thought fit, standard working conditions, standard working hours and minimum wages, was upheld by an evenly divided court of eight. No opinion was written by the Supreme Court and it is quite doubtful to just what extent the court committed itself by this decision. It is interesting to note, however, that in the decisions of the Oregon court no reference was made to the "public interest" concept, the validity of the legislation being based on its tendency to protect the health and safety of the people and to promote their general welfare. Perhaps the effect of this memorandum decision

[11]In Adkins v. Childrens Hospital, (1923) 261 U. S. 525, 553, 554, 43 Sup. Ct. 394, 67 L. Ed. 785, 795, Mr. Justice Sutherland said:

"The essential characteristic of the statute now under consideration, which differentiates it from the laws fixing hours of labor, will be made to appear as we proceed. It is sufficient now to point out that the latter, as well as the statutes mentioned under paragraph (3) deal with incidentals of the employment having no necessary effect upon the heart of the contract; that is, the amount of wages to be paid and received. A law forbidding work to continue beyond a given number of hours leaves the parties free to contract about wages and thereby equalizes whatever additional burdens may be imposed upon the employer as a result of the restrictions as to hours, by an adjustment in respect of the amount of wages."

[12]"As an essential part of the state regulation of wages and prices was the regulation of the hours of labor. Whatever affects the hours of labor also affects the wages, and whatever affects wages necessarily involves prices, so that it is impracticable to legislate on one subject without becoming concerned with the other. The modern legislation attempting to fix the hours of labor will logically lead to similar attempts at fixing prices and wages," Gilmore, Governmental Regulations of Prices, (1905) 17 Green Bag 627, 630.

[13](1914) 69 Or. 519, 139 Pac. 743, aff'd (1917) 243 U. S. 648, 37 Sup. Ct. 475, 61 L. Ed. 937.

was negatived by the later decision in *Adkins v. Children's Hospital,*[14] in which case similar legislation passed for the District of Columbia was declared unconstitutional by the Supreme Court.

There is also a group of miscellaneous cases in which various types of regulations have been upheld under the general police power of the state or under the similar power of Congress, and although it appears that some of these regulations affected wages in connection with the business in question, no reference was made to the "public interest" doctrine. In *McLean v. Arkansas*[15] a statute was declared constitutional which made it unlawful for any operator of a coal mine employing ten or more men to screen the coal before weighing it and to base their compensation on its weight thus screened. All contracts or agreements in conflict with this statute were declared void. The evident purpose of this regulation was to insure the payment of underground miners on the basis of the quantity and weight of coal in its condition as it was passed to the surface of the mine. When this was done, clearly the miners were paid more than they would have been had the compensation been measured by the weight of the coal when screened. Certainly, then, this regulation affected the amount of wages paid the miners, for they would receive more money for their labor under the provisions of this statute than they would if the practice prevailed of screening the coal before weighing it. Yet no mention was made of the coal mining industry being "affected with a public interest," and the legislation was sustained under the general police power of the state.

In *Knoxville Iron Company v. Harbison*[16] a Tennessee statute was declared valid which required the redemption in cash at face

[14](1923) 261 U. S. 525, 43 Sup. Ct. 394, 67 L. Ed. 785. The statute provided for a board to investigate the wages paid women and minors in *different occupations* in which they were employed in the District of Columbia, and, if, after conferences and a hearing from both employer and employee, the board deemed the wages paid by any business to be inadequate for the necessary cost of living, it could set a minimum wage. This legislation was declared unconstitutional by the majority who spoke through Mr. Justice Sutherland. It is to be noted that the statute was very loosely drawn and was very vague. It did not, as the legislation in the Stettler v. O'Hara case, refer to any specific industries, nor did it embrace any other conditions such as standard working hours or other conditions of work. It specifically referred to wages alone and based their amount on the "necessary cost of living." These facts seem to have influenced the Court's decision. Mr. Justice Sutherland said:

"The standard furnished by the statute for the guidance of the board is so vague as to be impossible of practical application with any reasonable degree of accuracy."

[15](1909) 211 U. S. 539, 29 Sup. Ct. 206, 63 L. Ed. 315.

[16](1901) 183 U. S. 13, 22 Sup. Ct. 1, 46 L. Ed. 55.

value of store orders or other evidences of debt issued in payment of wages. The Iron Company had a certain pay day once a month and on this day its employees were paid in cash, but if they desired wages at other times the company would give them orders for coal at its store, which orders could be used or transferred by the employees. If the employees elected to use such orders for coal they would get the coal at the market price and the orders would be received in payment. If the orders were negotiated by the employees they would receive about eighty-five cents on the dollar in cash. The employees, however, did not have to take these store orders unless they so desired, for their wages would be paid in cash on the regular pay day. The orders were merely a means whereby an employee could obtain an advance payment of his wages. Although it would seem that the regulations included in this legislation would alter the amount of wages each employee received, yet the court felt no need to invoke Lord Hale's aphorism, and the legislation was upheld under the police power of the state.[17]

A very interesting case is presented in *Frisbie v. United States*.[18] An act of Congress was declared constitutional which provided that no "agent, attorney or other person" should receive a fee of more than ten dollars ($10.00) for his services in securing a pension. The defendant, an attorney, who was indicted under the penal provisions of the act for taking a larger fee than allowed, pleaded that the act "interfered with the price of labor and the freedom of contract." The court held this objection untenable and said that since the government awarded pensions as a matter of bounty, it could also control all the conditions under which they were received. The court said:

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[17]Similar legislation in Virginia which required all employees of any manufacturing company to be paid in cash was declared to be constitutional in Keokee Consol. Coke Co. v. Taylor, (1914) 234 U. S. 224, 34 Sup. Ct. 856, 58 L. Ed. 1288. There was no reference to a "public interest."

See also Patterson v. Eudora, (1902) 190 U. S. 169, 23 Sup. Ct. 821, 47 L. Ed. 1022, where Congress was sustained in an act which forbade any advance payment of wages to seamen, and which punished any infraction of the act by a fine, and further provided that such advance payment should not absolve the vessel, master or owner from full payment of wages earned exclusive of such advance payment. The act was held to apply to foreign ships in American ports.

And see Schmidinger v. City of Chicago, (1913) 226 U. S. 578, 33 Sup. Ct. 182, 57 L. Ed. 364 where an ordinance was upheld which fixed a standard size and weight for loaves of bread and punished any infraction thereof by fine.

[18](1895) 157 U. S. 160, 15 Sup. Ct. 586, 39 L. Ed. 657.

"No man has a legal right to a pension, and no man has a legal right to interfere in the matter of obtaining pensions for himself or others."[19]

Regardless of whether the court could have more logically based its decision on the "police power" of Congress, as was done in the later case,[20] the interesting point in this discussion is that no need was felt to apologize for legislation which directly limited the fee which a lawyer could charge for his services in securing a pension, a significant fact in light of the usual reluctance of the court to allow a state to fix wages regardless of the legislature's conviction as to the necessity for such regulation.

Another very interesting example of the court's forgetfulness of the "public interest" concept occurred in *Noble State Bank v. Haskell.*[21] There a statute was upheld which required every bank to contribute a certain amount of money, which was determined by taking one per cent of its average daily deposits with certain deductions, to a guaranty fund for insolvent banks. Oklahoma passed this statute to insure full payment of depositors in banks that failed. Mr. Justice Holmes, speaking for a full court, declared that this statute was a valid exercise of the police power of the state and did not infringe any constitutional rights. He frankly admitted that the effect of the requirement was to take the property of one to help pay the debts of a failing rival, but stated that more powerful considerations contributing to the safety and welfare of the public demanded that the legislation be sustained. Without questioning the wisdom or validity of this

[19](1895) 157 U. S. 160, 166, 15 Sup. Ct. 586, 39 L. Ed. 657.

[20]In Calhoun v. Massee, (1920) 253 U. S. 170, 40 Sup. Ct. 474, 64 L. Ed. 843 the Court by a five to four decision sustained an act of Congress, the effect of which prevented the appellant from receiving fees for which he had contracted seventeen years before the appropriation was made and the fee limit fixed for certain Civil War claims. Mr. Justice Brandeis said for the Court:

"An appropriate exercise by a state of its police power is consistent with the 14th Amendment, although it results in serious depreciation of property values; and the United States may, consistently with the fifth amendment, impose, for a permitted purpose, restrictions upon property which produce like results."

[21](1911) 219 U. S. 104, 31 Sup. Ct. 186, 55 L. Ed. 112, rehearing (1911) 219 U. S. 575, 31 Sup. Ct. 299, 55 L. Ed. 341. See Lankford v. Platte Iron Works, (1914) 235 U. S. 461, 470, 35 Sup. Ct. 173, 59 L. Ed. 316. In Abilene Nat. Bk. v. Dolley, (C.C.A. 8th Cir. 1910) 102 C. C. A. 607, 179 Fed. 461 the circuit court of appeals had already held that it was constitutional for a legislature to give state banks authority to contribute to a guaranty fund, and that national banks were not discriminated against by such legislation.

See also Farmers' Bank v. Federal Reserve Bank of Richmond, (1922) 262 U. S. 649, 43 Sup. Ct. 651, 67 L. Ed. 1157.

legislation, it would seem that the exercise of the police power in this situation is equally as severe, to say the least, as so-called price fixing legislation, for here the property of one is not merely limited as to the charge for its use but the property itself is actually taken, and yet no mention was made of banks being "affected with a public interest." That legislation of this type is upheld while the constitutionality of price regulation is denied leads one to wonder if it is viewed in a more favorable constitutional light when the property itself is taken than when the rate charged for the use of the subject-matter of property is regulated.[22]

Although the regulations just reviewed vary in kind, yet each regulation in one respect or another touches wages or actually appropriates property. Is the answer for their constitutionality on the one hand, while price regulations are condemned on the other, that the legislature may in the exercise of its police power do indirectly that which it cannot do directly? Or is the difference in attitude towards the two types of regulations determined by a more marked interference with the competitive system, in the court's opinion, by direct price regulation than it feels to be present in the other type of regulation? If the latter be the case, then the competitive system has been apotheosized to the highest possible degree, and constitutional rights are determined by a theory of economics that one cannot find expressed in the federal constitution. It is difficult to see why the very "heart of a contract," to use Mr. Justice Sutherland's words,[23] is affected by a regulation pertaining to wages and prices when it is admitted that all the other features of a contract of employment may be regulated as the legislature deems best. 'Especially does this difficulty exist when some of the admittedly valid regulative provisions result in a difference in the wages paid. And as to the ones which do not go to this length, but only affect the mode or time of payment, it seems sound to say, as expressed by Mr. Chief Justice Taft in his dissenting opinion in the *Adkins Case,* that:

[22]This view is suggested by a note in (1921) 70 U. of Pa. L. Rev. 48-51. The editor says there is no limit to the police power when the thing itself is taken, so long as its taking is justified by a public need. Quaere: Can the "need" for insuring payment of depositors in failing banks properly be called a "public need"? See Comment, (1927) 36 Yale L. J. 985 for exposure of Court's inconsistency in approving the expenditure of public money for recreational purposes on the one hand, while denying the power of the state to regulate commissions of ticket brokers on the other.

[23]Adkins v. Children's Hospital, (1923) 261 U. S. 525, 554, 43 Sup. Ct. 394, 67 L. Ed. 785.

"In absolute freedom of contract the one term [of a contract] is as important as the other, for both enter equally into the consideration given and received; a restriction as to one is not any greater in essence than the other, and is of the same kind. One is the multiplier and the other the multiplicand."[24]

With respect to the cases that have dealt directly with the "public interest" concept there may be said to be two distinctive periods of development. For convenience they may be called "the affirmative and the negative periods." In the "affirmative period," which may be said to date from *Munn v. Illinois*[25] to the rent cases,[26] the Supreme Court uniformly found a "public interest" to exist in every important case involving price regulation.[27] The march of price regulation certainly seemed to be onward, although voices of vigorous dissent were consistently heard. Beginning with the case of *Wolff Packing Co. v. Court of Industrial Relations* and extending up to date, however, a negative reaction seems to have set in, and the validity of price regulation has been denied in every case of importance.[28] Again strong dissents from the opposing justices are registered.[29] From such radical disagree-

[24]Adkins v. Children's Hospital, (1923) 261 U. S. 525, 564, 43 Sup. Ct. 394, 67 L. Ed. 785.

[25](1876) 94 U. S. 113, 24 L. Ed. 77.

[26]Block v. Hirsh, (1921) 256 U. S. 135, 41 Sup. Ct. 458, 65 L. Ed. 865; Brown v. Feldman, (1921) 256 U. S. 170, 41 Sup. Ct. 465, 65 L. Ed. 877; Levy Leasing Co. v. Siegel, (1922) 258 U. S. 242, 42 Sup. Ct. 289, 66 L. Ed. 595.

[27]The cases in this period are: Munn v. Illinois, (1876)) 94 U. S. 113, 24 L. Ed. 77; Budd v. New York, (1891) 143 U. S. 517, 12 Sup. Ct. 468, 36 L. Ed. 247; Brass v. Stoeser, (1894) 153 U. S. 391, 14 Sup. Ct. 857, 38 L. Ed. 757; Cotting v. Kansas City Stockyards, (1901) 183 U. S. 79, 22 Sup. Ct. 30, 46 L. Ed. 92; German Alliance Insurance Co. v. Lewis, (1914) 233 U. S. 389, 34 Sup. Ct. 612, 58 L. Ed. 1011; Block v. Hirsh, (1921) 256 U. S. 135, 41 Sup. Ct. 458, 65 L. Ed. 865; Brown v. Feldman, (1921) 256 U. S. 170, 41 Sup. Ct. 465, 65 L. Ed. 877; Levy Leasing Co. v. Siegel, (1922) 258 U. S. 242, 42 Sup. Ct. 289, 66 L. Ed. 595.

[28]Adkins v. Children's Hospital, (1923) 261 U. S. 525, 43 Sup. Ct. 394, 67 L. Ed. 785; Wolff Packing Co. v. Court of Industrial Relations, (1923) 262 U. S. 522, 43 Sup. Ct. 630, 67 L. Ed. 1103; Tyson v. Banton, (1927) 273 U. S. 418, 47 Sup. Ct. 426, 71 L. Ed. 718; Ribnik v. McBride, (1928) 277 U. S. 350, 48 Sup. Ct. 545, 72 L. Ed. 913; Williams v. Standard Oil Co., (1929) 278 U. S. 235, 49 Sup. Ct. 115, 73 L. Ed. 287.

[29]The more liberal view of the dissenting justices is well represented by Mr. Justice Stone's opinions in Tyson v. Banton, (1927) 273 U. S. 418, 47 Sup. Ct. 426, 71 L. Ed. 718, and Ribnik v. McBride, (1928) 277 U. S. 350, 48 Sup. Ct. 545, 72 L. Ed. 913. In both of these cases he argues against confining the limits of control by barren historicity and contends for a more scientific study of existing social and economic conditions as a basis for regulation. It is very interesting to compare the similarity between the attitude of the dissenting justices in the earlier cases (supra note 25) who inveighed against regulation and that of the majority who have denied regulation in the recent cases. Supra note 26.

ment one could hardly expect to find positive outlines that would unmistakably identify the form of a "public interest." The reactionary period has within it a doctrine which has received scant attention from the court, although it can hardly be said that occasion has demanded a consideration of such doctrine and its consequences. It seems quite possible, however, that in the future this doctrine may be more disturbing and less innocuous than it now seems.

The development of the "public interest" doctrine in the decisions prior to *Wolff Packing Co. v. Court of Industrial Relations*[30] seemed definitely to establish the principle that all business "affected with a public interest" may be subjected to price control. It was not until the *Wolff Case* that it could be doubted that finding a "public interest" would not alone solve the problem of regulation. It is true that all of these earlier decisions dealt with regulations of the prices of commodities or services, and did not directly involve wage regulations. There was an intimation in the *Adkins Case*[31] that the concept of a "public interest" might have something to do with wage regulation, but the *Stettler Case*[32] did not involve the concept at all. The Supreme Court in affirming the state court decision in the *Stettler Case* impliedly approved the legislation on the broader ground that it was designed to protect the safety and health of the people and promote their general welfare.[33] In the *Wolff Case,* however, Mr. Chief Justice Taft

[30](1923) 262 U. S. 522, 43 Sup. Ct. 630, 67 L. Ed. 1103.

[31](1923) 261 U. S. 525, 43 Sup. Ct. 394, 67 L. Ed. 785.

[32](1914) 69 Or. 519, 139 Pac. 743, aff'd (1917) 243 U. S. 648, 37 Sup. Ct. 475, 61 L. Ed. 937.

[33]There are decisions of lower federal and state courts upholding the price regulations on much broader grounds than the "public interest doctrine." The federal power to regulate the price of coal was upheld as a war measure designed to prevent unreasonable and extortionate profits in United States v. Pennsylvania Central Coal Company, (D.C. Pa. 1918) 256 Fed. 703. And while the Lever Act was held unconstitutional because of the definite price standard, United States v. Cohen Grocery Co., (1921) 255 U. S. 81, 41 Sup. Ct. 298, 65 L. Ed. 516, yet many lower federal court decisions upheld the federal power to fix the price of various necessities under this Act before it was declared unconstitutional by the Supreme Court. United States v. Spokane Dry Goods Co., (D.C. Wash. 1920) 264 Fed. 209; C. A. Weed v. Lockwood, (D.C.N.Y. 1920) 264 Fed. 453; United States v. Rosenblum, (D.C. Pa. 1920) 264 Fed. 578; United States v. Oglesby Grocery Co., (D.C. Ga. 1920) 264 Fed. 691.

And in People v. Weller, (1924) 237 N. Y. 316, 143 N. E. 205, aff'd in (1925) 268 U. S. 319, 45 Sup. Ct. 556, 69 L. Ed. 978 (with no consideration of the power to control prices) the validity of a statute forbidding, among other restrictions, ticket brokers to resell tickets to places of public amusement at more than fifty cents in advance of their face price was based more on the ground that the remedy adopted was the one most

not only declared that the validity of wage regulation was not determined by the existence of a "public interest," but also intimated that price or other regulation might be invalid even though the business in question was "affected with a public interest." He divided such businesses as follows:

"Businesses said to be clothed with a public interest justifying some public regulation may be divided into three classes:

"(1) Those which are carried on under the authority of a public grant of privileges which either expressly or impliedly imposes the affirmative duty of rendering a public service demanded by any member of the public. Such are the railroads, other common carriers and public utilities.

"(2) Certain occupations, regarded as exceptional, the public interest attaching to which, recognized from earliest times, has survived the period of arbitrary laws by Parliament or colonial legislatures for regulating all trades and callings. Such are those of the keepers of inns, cabs, and gristmills . . .

"(3) Businesses which, though not public at their inception, may be fairly said to have risen to be such, and have become subject in consequence to some government regulation. They have come to hold such a peculiar relation to the public that this is superimposed upon them. In the language of the cases, the owner, by devoting his business to the public use, in effect grants the public an interest in that use, and subjects himself to public regulation to the extent of that interest, although the property continues to belong to its private owner, and to be entitled to protection accordingly."

But—he stated:

"To say that a business is clothed with a public interest is not to determine what regulation may be permissible in view of the private rights of the owner. The extent to which an inn or a cab system may be regulated may differ widely from that allowable as to a railroad or other common carrier. It is not a matter of legis-

likely to prevent extortion, than on the more technical argument as to a "public interest." The provision as to resale price was later declared unconstitutional, however, by the federal Supreme Court in Tyson & Bro. v. Banton, (1927) 273 U. S. 418, 47 Sup. Ct. 426, 71 L. Ed. 718.

See Rottschaefer, Governmental Price Control, (1925) 35 Yale L. J. 438, 447, where it is said:

"The reasoning of all these decisions, in the final analysis, is in substance that the legislatures have the power to promote the general welfare by preventing through price control the undue capitalization by any group of its economic powers. Their significance does not consist in their having developed a more definite and easily applied test of liability to price control. They have been no more successful in that respect than the line of cases formulating the determining factors in terms of business affected with a public interest. Their chief importance lies in their broader approach to the problem of price control. It is their special merit that they have, in the very form of its statement, recognized the problem of price control as a species of well-known and more inclusive genus."

lative discretion solely. It depends on the nature of the business, on the features which touch the public, and on the abuses reasonably to be feared. . . . The regulation of rates to avoid monopoly is one thing. The regulation of wages is another."[34]

This doctrine of varying degrees of "publicness" is quite interesting for its novelty and the problems that it raises. There are possibly some who are ready to affirm that it has already seen service.[35] Certainly Mr. Chief Justice Waite would be disappointed if he could see the concept that he created thus devitalized.

In one sense, however, Mr. Chief Justice Taft struck a note of progress, for imperfectly expressed in his "degree doctrine" is the idea that one set of economic factors may call for price regulation and yet not demand wage regulation, and vice versa. It is obvious that economic disturbances may enable a business to charge exorbitant prices although the wage conditions in that business are perfectly satisfactory from a social and economic viewpoint. In fact, there is no necessary relation between a monopoly and unreasonably low wages. No one would contend that the wages paid by Munn should be regulated simply because grain elevators in Chicago possessed a monopoly, or that the wages of insurance employees could be regulated merely because the "business of insurance is affected with a public interest." It seems quite necessary for wisely planned legislation to draw a sharp distinction between the economic factors calling for wage regulation and those demanding price regulation. A law establishing minimum wages may have the effect of raising prices rather than lowering them, while a maximum wage law may lower prices by reducing the cost of production. Nor would it seem desirable to limit wage regulation to public service companies as might be inferred from the stress laid in *Wilson v. New*[36] on the fact that railroads are engaged in

[34](1923) 262 U. S. 522, 535, 539, 43 Sup. Ct. 630, 67 L. Ed. 1103. With this statement of Mr. Chief Justice Taft compare the following by Mr. Justice Holmes:

"But if the public interest be established the regulation of rates is one of the first forms in which it is asserted, and the validity of such legislation has been settled since Munn v. Illinois." Block v. Hirsh, (1921) 256 U. S. 145, 157, 41 Sup. Ct. 458, 15 L. Ed. 865

[35]In Frost v. Corporation Commissioners, (1929) 278 U. S. 515, 49 Sup. Ct. 235, 73 L. Ed. 483, the Court, in its implied approval of the Oklahoma legislature's declaration that a cotton gin is a "public business," seems to recognize a distinct legal category from either a "business affected with a public interest" or a "public utility." For discussion of this case see, Hamilton, Judicial Tolerance of Farmers' Cooperatives, (1929) 38 Yale L. J. 936.

[36](1917) 243 U. S. 332, 37 Sup. Ct. 298, 61 L. Ed. 755. It is difficult to say just how much weight the Court gave to the fact in this case that rail-

a public service. Therefore, in so far as Mr. Chief Justice Taft recognized price regulation and wage regulation as distinctive genera, his opinion is a forward step.

But the further implication that some businesses, even though "affected with a public interest," may not be regulated with respect to price raises more doubtful and disturbing questions. Must we follow Mr. Justice Sutherland in his laborious search for the Holy Grail of the "public interest" concept, only to learn when we have found it that we are but a few steps on the way toward our ultimate goal, and that we must wander further in quest of some still more elusive concept? Such a prospect, to say the least, is disturbing. The problem would cease to be merely academic if we should have an attempted regulation of the prices charged by a business which is admittedly "affected with a public interest." Historically and by judicial pronouncement an example exists in the public inn or hotel.

From a very early period in Anglo-American law inns have been treated as public callings and unusual duties and regulations have been imposed upon them.[37] The Supreme Court has often spoken of inns as "affected with a public interest" and therefore subject to public regulation,[38] and Mr. Chief Justice Taft, in his classification of such businesses in the *Wolff Case,* placed inns in the second division along with cabs and gristmills. In his dissent to the *Insurance Case,* Mr. Justice Lamar assumed that inns were subject to rate regulation, but stated that there was no American case in which the constitutionality of such regulation had been decided.[39] Today there are many provisions by statute for the supervision of inns and some features of these regulations approach dangerously close to what Mr. Justice Sutherland called price fixing in the *Ribnik Case.*[40] There is at least one recent state

roads had long been held to be "affected with a public interest" as justification for the unusual measures of the Adamson Act. See Powell, Due Process and the Adamson Law, (1917) 17 Col. L. Rev. 114; Powell, The Supreme Court and the Adamson Law, (1917) 65 U. Pa. L. Rev. 607.

[37]For discussion of this historical development, see Burdick, Origin of Public Service Duties, (1911) 11 Col. L. Rev. 514. According to his view, the businesses of the common carrier and the inn are the ones to which the common law consistently attached the duties of a common calling.

[38]Munn v. Illinois, (1876) 94 U. S. 113, 120, 24 L. Ed. 77, 84; German Alliance Ins. Co. v. Lewis, (1914) 233 U. S. 389, 426, 34 Sup. Ct. 612, 58 L. Ed. 1011.

[39]German Alliance Ins. Co. v. Lewis, (1914) 233 U. S. 389, 426, 34 Sup. Ct. 612, 58 L. Ed. 1011.

[40]The following statutes are not exhaustive but merely illustrative of the regulations in effect in many states. Ohio provides for a hotel super-

decision which may be said to approve the constitutionality of such regulations.[41] The changes in the method of operating hotels, which changes in many instances have resulted in large chain systems, may well be calculated to demand greater governmental supervision; and, in the not too remote future, it is quite probable that the Supreme Court may be called upon to declare itself on the constitutionality of hotel rate regulation. Such a case, if presented, would make a clear-cut issue of the "degree doctrine." Mr. Justice Sutherland would not have to grope for the elements constituting a "public interest," for they are concluded by history and former decisions. Would the Court allow the historical considerations to conclude the matter in favor of such legislation, or would an inquiry be made as to whether the amount of "publicness" adhering to hotels could be said to justify the regulation?

In summary, it would seem that the use of the phrase "business affected with a public interest" in connection with price and wage control represents a futile and isolated attempt to formulate in definite terms a restriction upon the police power of a state. Certainly in considering other types of regulations the Court has not attempted to delimit the field of police power. It has been content in each case to determine whether the particular legislation in question concerned the safety, health or general welfare of the people and whether the means chosen to effect a betterment bore a reasonable relation to the end in view. It does not seem reasonable

visory department in the office of the state fire marshal. Each hotel must file a schedule of rates with the state fire marshal and no advance can be made in these rates without written notice filed with the fire marshal twenty days before hand. Ohio, Gen. Code, 1926, sec. 843-18. For similar provisions see Kansas, Rev. Stat. 1923, ch. 36, art. 124-128. See also New York Consol. Laws, Cahill 1923, ch. 21, secs. 200-209; Illinois, Rev. Stat., Smith-Hurd, 1927, ch. 71, secs. 1-20.

[41]State v. Norval Hotel Co., (1921) 103 Ohio St. 361, 133 N. E. 75. The Norval Hotel Co. was indicted for charging higher rentals than provided in the schedule filed with the state fire marshal. The Court stated that the Act did not fix a price of any room, and upheld the constitutionality of the statute. The Court said:

"It is a matter of common knowledge that, at times, when large numbers of the public meet in cities or towns for conventions, or similar gatherings, the capacity of hotels and places for public accommodation is taxed and opportunity is thereby given for the exaction of exorbitant or unfair charges."

See note in (1922) 6 MINNESOTA LAW REVIEW 327.

There were statutes in the early 1800's which fixed rates for hotels. See South v. Grant, (1823) 7 N. J. L. 26; Banks v. Oden, (1819) 1 A. K. Marsh (Ky.) 546. And see State v. McFarland, (1910) 60 Wash. 98, 110 Pac. 792, where statute was upheld which made hotels pay for an inspector's services.

to maintain that a regulation as to prices or wages cuts deeper from a constitutional viewpoint than a taking of the subject matter of property, and yet in the latter type of case no technical approach such as the use of the "public interest" concept has been found necessary. The selection of a narrow and technical approach by assuming that a business must be "affected with a public interest" before its prices or wages are subject to supervision has resulted in confusion, inconsistency and uncertainty. Besides, recent decisions of the Court appear to have destroyed whatever content the concept had developed in the line of earlier cases.

In the first instance it was highly illogical to assume that the common law furnished a criterion of what our legislatures can do under the federal constitution, and it was equally illogical in making this assumption to ignore all the statutory legislation in England concerning price and wage regulation. The Court, having taken this approach, uses the phrase to approve or deny regulation no matter how widely the social and economic factors may differ in one case from another. In one case the existence of a "virtual monopoly" may seem to be the test, while in another a general failure of the competitive system to produce desired results may be the basis of the concept, and in yet another either or both of these conditions may be declared insufficient to support regulation.[42] It seems impossible in the very nature of the case for any one concept, regardless of its creator, to be so all-embracing as to reconcile these dissimilar situations, or for it to have any scientific value in solving the problem. Furthermore, the Court seems vaguely to realize the failure of the concept to settle satisfactorily the varied problems presented by wage as distinguished from price regulation. The phrase seems to act merely as a screen for concealing the real forces moving the Court to its decision, and provides an easy means for the Court to substitute its judgment for that of the legislature.

Moreover, if the Court ever attaches any weight to the degree doctrine of "publicness," the concept of a "public interest" would clearly be relegated to the background as utterly useless. For even though it be assumed that the business is "affected with a public interest," the main question would still lie ahead: What kinds of regulation are applicable?

[42]See McAllister, Lord Hale And Business Affected With a Public Interest, (1930) 43 Harv. L. Rev. 759, 768.