1950

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THE PERSISTENCE OF SUBSTANTIVE DUE PROCESS IN THE STATES

By Monrad G. Paulsen*

It is a commonplace that in the years between 1890 and 1937, the Supreme Court of the United States declared many state statutes regulating business and labor unconstitutional as violations of the Fourteenth Amendment. Not that the Fourteenth Amendment in terms says anything which would prohibit state regulation of economic affairs. Yet by a long, gradual process, the words "liberty," "property" and "due process" were twisted to permit extensive limitations on state legislative power. That process is too well known to require re-telling here. By giving broad scope to these vague expressions of the Fourteenth Amendment, the judiciary seized the power to nullify legislative enactments because the judges found them vicious or silly. "Liberty" was found to include freedom to contract and to engage in business. Interference with this freedom was in accordance with "due process" only if the interference bore, in the eyes of the judges, some relation to public health, safety or welfare. In sum, for about fifty years the Court operated on the assumption that the power of legislatures to deal with business affairs was limited by a rule of judicial reason.

Few legal doctrines have been subjected to more bitter criticism than this testing of regulatory legislation by the due process clause. Mr. Justice Black has termed it "an incongruous excrescence on our Constitution." Dean Pound, in discussing due process cases involving some early labor legislation, declared, "The evil of those cases

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1. For the best telling of the history see Hamilton, The Path of Due Process of Law, The Constitution Reconsidered 167 (Read ed. 1938).

It has been charged that the doctrine of substantive due process has been the means whereby conservative judges have read classical economic theory into the Constitution. The doctrine is seen as a violation of sound democratic procedures in that it permits judges to substitute their judgment as to political policy for that of the legislature. Courts presumably are less responsive to the electorate and, in addition, possess neither the tools for social investigation nor the broad responsibility for developing consistent political and economic policy.

These criticisms have not failed to influence the Supreme Court in recent years. Although a majority of the Court still seems to insist that the Court retains some power to pass upon the substance of state economic regulation under the due process clause, two judges on the present Court apparently have disavowed the doctrine. Even the majority of the Court will uphold state enactments if the facts reveal a basis for legislation which might commend itself to any reasonable man, not merely to the judges. Taken literally such a test of constitutionality would validate almost every statute once enough votes were mustered to secure its passage through the legislature. It is significant that since 1937 the Court has not declared a statute regulating economic affairs to be a violation of due process. With two members of the Court willing to forswear the weapon of due process as against economic regulation, and the rest unwilling to find occasion to use it, the invalidation by reason of the due process clause of state laws seems (for the moment, at least) to be a matter for history.

In contrast, since 1937 some state supreme courts when interpreting the due process clause or its equivalent in their state constitutions have continued to interfere freely with legislative policies.

5. Corwin, Court Over Constitution 107-8 (1938); Cushman, The Supreme Court and the Constitution, 7 Public Affairs Pamphlet 19 (1938); Levy, Our Constitution: Tool or Testament 140 (1941).
7. "A violation of the Fourteenth Amendment . . . would depend upon whether there is any rational basis for the action of the legislature." Sage Stores Co. v. Kansas, 323 U. S. 32, 35 (1944). See also Carolene Products Co. v. United States, 323 U. S. 18, 31 (1944). It should be noted that Justices Black and Douglas concurred in the result in these cases rather than join in the opinions which upheld the legislation but affirmed by implication some vestigial doctrine of substantive due process. A student note, 24 Ind. L. J. 451 (1949) reviews the present position of the Court.
The conviction that legislators cannot be trusted unless they are kept in harness by courts and lawyers has run deep in American life. The doctrine of substantive due process was not invented in 1890 by the federal courts. Clear traces of the concept can be found in state court opinions applying state constitutional provisions before the Civil War. Recent research has revealed the role played by state court opinions, lawyers and text writers in the development of the idea immediately after the Civil War. Therefore, it is not surprising that just as the doctrine of substantive due process was finding expression in the states before 1890, so also the principle should continue to enjoy a vigorous life in some states after it has fallen into disuse on the national level.

Of course, in interpreting the limitations on legislative action which are derived from state constitutions, the state supreme court is the final arbiter. In these matters there is no federal question and hence no review by the Supreme Court of the United States.

It is the purpose of this paper to show what has occurred in the state courts rendering substantive due process decisions under state constitutions since 1937. Several matters have been excluded from consideration: (1) public utility rate cases; (2) cases involving the validity of state taxation; and (3) zoning cases. Opin-

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9. Twiss, Lawyers and the Constitution cc. 6, 7 (1942).
10. Throughout this article the phrase "due process" has been used to refer to clauses in state constitutions which are phrased differently from the Fourteenth Amendment as well as those which are identical to it. Some state constitutions contain clauses guaranteeing natural rights, e.g., Va. Const. Art. I, § 1. Others forbid the taking of liberty or property save by "the law of the land," e.g., Minn. Const. Art. I, § 2. Still others may contain the phrase "due course of law," e.g., Ind. Const. Art. I, § 12. Whatever the wording, these clauses and perhaps others like them have placed unspecified general limitations on legislative power. A state constitution often contains more than one such clause. Compare Va. Const. Art. I, § 1 ("natural rights") with Va. Const. Art. I, § 11 ("due process"). State constitutions also contain clauses prohibiting arbitrary classification in legislation. There is obviously a close relationship between those cases striking down statutes because they classify unreasonably and those in which laws are declared unconstitutional simply because they are unreasonable. Cases involving the constitutionality of ordinances limiting business hours indicate how either ground can be easily used: Compare Gronlund v. Salt Lake City, 194 P. 2d 464 (Utah, 1948), with Hart v. Teaneck, 135 N. J. L. 174, 50 A. 2d 856 (1947); City of Cincinnati v. Correll, 141 Ohio 535, 49 N. E. 2d 412 (1943). Nevertheless, in the interest of brevity, the classification cases have not been treated.
11. By no means have all states been active in upsetting legislation on substantive due process grounds. State cases following the federal trend have not been discussed except in the section on labor law. An attempt is made to point up the extent to which substantive due process is still active in some states rather than to discuss exhaustively the present status of the constitutional doctrine of substantive due process in all states.
ions involving statutes regulating the conduct of business enterprise and legislation attempting to regulate labor have been given greatest consideration.

**PRICE REGULATION**

... the right of the owner to fix a price at which his property shall be sold or used is an inherent attribute of the property itself ... and, as such, within the protection of the due process clauses of the Fifth and Fourteenth Amendments.¹²

So said Mr. Justice Sutherland in his opinion in the 1926 case of *Tyson & Bro. v. Banton.*¹³ The learned Justice also insisted that the validity of any price regulation is "always open to judicial inquiry."¹⁴

Using these principles, the pre-New Deal Supreme Court steadfastly denied the existence of a general legislative power to fix prices. Only if a business were within the closed class of those "affected with the public interest" might its charges be regulated by the state. In particular price fixing as to theater tickets,¹⁵ wages,¹⁶ gasoline,¹⁷ and the rates charged by employment agencies¹⁸ was considered a violation of due process of law. Thus large areas of American business found constitutional protection from governmental interference with pricing—the heart of the economic process in a system of private capitalism.

The general and catastrophic price drop of the Great Depression gave birth to a great many schemes for economic recovery which involved price stabilization by law. Ruling on these depression-born statutes, the Supreme Court responded to the economic and political pressures of the day and sharply changed its position in a series of cases.

In the *Nebbia* case of 1934,¹⁹ the Court denied that the phrase "affected with the public interest" referred to a fixed class of businesses. Rather the expression was said to "mean no more than that an industry, for adequate reason, is subject to control for the public good."²⁰ So far as the Federal Constitution is concerned, the power of a state to fix minimum wages has been clear since the *West Coast Hotel* case in 1937.²¹ Finally in 1941 *Olsen v.

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¹⁶ *Adkins v. Children's Hospital*, 261 U. S. 525 (1923).
²¹ *West Coast Hotel Co. v. Parrish*, 300 U. S. 379 (1937).
Nebraska\textsuperscript{22} held that a state need no longer make justification to the Court merely because prices were being regulated. In the Olsen case, Mr. Justice Douglas summarized the drift of the modern price fixing cases:

There is no necessity for the state to demonstrate before us that evils persist despite the competition which attends the bargaining in this field. In final analysis, the only constitutional prohibitions or restraints which respondents have suggested for the invalidation of this legislation are those notions of public policy embedded in earlier decisions of this Court but which, as Mr. Justice Holmes long admonished, should not be read into the Constitution... Since they do not find expression in the Constitution, we cannot give them continuing vitality as standards by which the constitutionality of the economic and social programs of the states is to be determined.\textsuperscript{23}

But in spite of this trend on the federal level, a few state courts have persisted in holding that statutes providing for price fixing by state governmental agencies are unconstitutional. An especially interesting case, Kirtley v. State,\textsuperscript{24} was decided in 1949 by the Supreme Court of Indiana. An Indiana statute made it unlawful for any person to sell tickets of admission at a price different from that at which such tickets might be procured at regularly authorized place of sale. An enthusiastic follower of Indiana high school basketball was arrested and convicted of violating the statute by selling a ticket to the finals of the state basketball tournament for $25.00 instead of the regular $3.00. In securing the reversal of his conviction upon appeal, the basketball fan found that he had not only made a nice profit on his athletic enthusiasm, but in realizing the profit he had also exercised his constitutional right, under the Indiana constitution, to contract freely without state interference.

The fixing of maximum fees for employment agency services is beyond legislative power in Nebraska. Although in Boorner v. Olsen\textsuperscript{25} the court need only have decided that a given schedule of fees was unreasonable, its opinion went on to declare that any schedule fixing fees would violate the state constitution.

A question of more frequent concern to state courts than the imposition of maximum price ceilings, exemplified by the Kirtley and Boomer cases, is the constitutionality of minimum price regulations. In many states barbers procured the enactment of legisla-

\begin{itemize}
  \item \textsuperscript{22} 313 U. S. 236 (1941).
  \item \textsuperscript{23} Id. at 246-47.
  \item \textsuperscript{24} 84 N. E. 2d 712 (Ind. 1949).
  \item \textsuperscript{25} 143 Neb. 579, 10 N. W. 2d 507 (1943).
\end{itemize}
tion setting up agencies which would fix minimum charges for barber shops. Milk producers, too, have been the beneficiaries of various kinds of price-fixing arrangements. Although the price fixing of milk has stood the due process test of nearly every jurisdiction, \(^2\) since 1936, Alabama, \(^2\) Indiana, \(^2\) Arkansas, \(^2\) Tennessee, \(^3\) and Iowa \(^3\) have found price fixing of barber services to be a violation of constitutional liberties guaranteed by due process clauses. \(^2\)

In addition to statutes which permit state agencies to fix the prices of services or commodities, most states have various statutes which regulate generally the *price policy* of business. The so-called "fair trade acts" permit contracts between a seller of a branded product and a buyer as to the minimum price to be charged by the buyer in the resale of the product; and, further, render the stipulated minimum binding upon any merchant who, with knowledge, offers the same goods for sale in competition with the original buyer. Related "unfair sales" statutes prohibit the sale of commodities below cost and still others forbid individual or geographical discrimination in prices. Other statutes, related in purpose, have prohibited the giving of discounts or premiums to accomplish the sale of motor fuel and motor oil below posted prices.

The statutes permitting price fixing of brand-named products have generally been upheld throughout the United States. Even the pre-New Deal Supreme Court gave its approval to this kind of price regulation on the ground that such statutes merely protect the seller's property right in the "good will" symbolized by the mark or brand. \(^3\) However, in the 1949 case of *Liquor Store v. Continental Distilling Corp.*, \(^3\) the Supreme Court of Florida struck down

\(^2\) E.g., Holcombe v. Georgia Milk Producers Confederation, 188 Ga. 358, 3 S. E. 2d 705 (1939); State v. Auclair, 110 Vt. 147, 4 A. 2d 107 (1939).

\(^2\) City of Mobile v. Rouse, 233 Ala. 622, 173 So. 266 (1937).

\(^2\) State Bd. of Barber Examiners v. Cloud, 220 Ind. 552, 44 N. E. 2d 972 (1942).

\(^2\) Noble v. Davis, 204 Ark. 156, 161 S. W. 2d 189 (1942).

\(^2\) State v. Gresson, 174 Tenn. 178, 124 S. W. 2d 253 (1939).

\(^2\) Duncan v. City of Des Moines, 222 Iowa 218, 268 N. W. 547 (1936).

\(^2\) Price fixing of barbers' services has been upheld in several states: Bd. of Barber Examiners v. Parker, 190 La. 214, 182 So. 485 (1938); Herrin v. Arnold, 183 Okla. 392, 82 P. 2d 977 (1938); State v. McMasters, 204 Minn. 438, 283 N. W. 767 (1939); Arnold v. Bd. of Barber Examiners, 45 N. Mex. 57, 109 P. 2d 779 (1941). It should also be noted that in two jurisdictions the power to fix minimum charges for cleaning and dyeing service has been upheld. Miami Laundry v. Florida Dry Cleaning & Laundry Bd., 134 Fla. 1, 183 So. 759 (1938); Smith Cleaners v. Rogers, 108 Colo. 449, 119 P. 2d 623 (1941).

\(^3\) Old Dearborn Co. v. Seagram Corp., 299 U. S. 183 (1936).

\(^3\) 40 So. 2d 371 ( Fla. 1949). Three concurring and one dissenting opinions were written in the case. The opinion of the court held the act unconstitutional because it operated for private rather than public benefit.
the Florida "fair trade act" with only one judge dissenting. Again in contrast with many of the decided cases, Maryland, Nebraska, New Jersey, Ohio, Oklahoma, and Pennsylvania have declared statutes which prohibit certain sales below cost to be unconstitutional while Michigan has invalidated a statute prohibiting discrimination in selling. The Alabama, Massachusetts, and Michigan courts upset the statutes regulating the price policy of filling stations.

One concurring opinion would invalidate the act because of an unconstitutional classification; the others because no emergency existed and also because the law contained no yardstick with reference to which prices could be fixed. The Florida legislature immediately enacted a new Fair Trade Act in an attempt to meet constitutional objectives. Senate Bill No. 592, Fla. Laws 1949. The constitutionality of the new legislation is discussed in Note, 2 U. of Fla. Rev. 408 (1949).


42. People v. Chas. E. Austin, Inc., 301 Mich. 456, 3 N. W. 2d 841 (1942).

43. Alabama Independent Service Station Ass'n v. McDowell, 242 Ala. 424, 6 So. 2d 502 (1942).

Price competition is discouraged by some statutes which prohibit the advertising of prices. Connecticut and New Jersey courts have struck down statutes forbidding the large roadside advertisements of motor fuel. State v. Miller, 126 Conn. 373, 12 A. 2d 192 (1940); Regal Oil Co. v. State, 123 N. J. L. 456, 10 A. 2d 495 (Sup. Ct. 1939). The Michigan statute applied to the sale of bakery products as well as petroleum. People v. Victor, 287 Mich. 506, 506 N. W. 666 (1939). The Supreme Court of Minnesota has expressly rejected any distinction between state and federal due process. "The due process clause of our state constitution is not more restrictive
In declaring price-fixing statutes unconstitutional, state supreme courts have in some cases sought to distinguish recent United States Supreme Court cases and have proceeded to hold statutes unconstitutional as violating both the federal and state due process provisions. But in more recent years, state supreme courts have relied solely upon their own state constitutions. For example in the Continental Distilling case Judge Adams of Florida announced:

The court of last resort of each sovereign state is the final arbiter as to whether the act conforms to its own constitution whereas the federal courts are concerned only with whether the act offends the Federal Constitution.46

In Nebraska, the freedom of state courts from federal due process development has been recognized in an even more striking way. The Nebraska court in Boomer v. Olsen dealing with the same statute which had been tested by the Supreme Court in Olsen v. Nebraska refers to that federal case, but declines to follow it, saying:

While it is true that the supreme court of the United States has receded from this position in the later cases in interpreting the provisions of the federal Constitution, this court has consistently adhered to the doctrine, except in a business in which the owner by devoting it to a public use, in effect, grants the public an interest in the use and subjects himself to public regulation to the extent of that interest. . . .

We . . . hold that a private employment agency is not a business in which the public has such an interest that price fixing may properly be included as a method of regulation under the provisions of our Constitution.47

When a state court has thus freed itself from the modern federal cases, there remains for it the problem of defining the content of state due process. Some authority must be found to give meaning to generality. The courts have drawn upon state cases and upon pre-

than the due process clause of the Fourteenth Amendment to the federal constitution." Anderson v. City of St. Paul, 226 Minn. 186, 32 N. W. 2d 538 (1948).

47. 143 Neb. 579, 585-86, 10 N. W. 2d 507, 511-12 (1943). See also Dept. of Insurance v. Schoonover, 225 Ind. 187, 194, 72 N. E. 2d 747, 750 (1947):

"We have not found a decision of the Supreme Court of the United States where a similar state regulation has been upheld in the light of the 14th Amendment, but had there been such a decision this court would not be bound by the same when considering the involved statute as to whether it is in conflict with said Art. 1, § 1, of our Constitution although this section and the 14th Amendment are similar in meaning and application. Such a decision would only be persuasive." See Kirtley v. State, 84 N. E. 2d 712, 715 (Ind. 1949).
New Deal Supreme Court cases. Thus the Indiana court in 1949\textsuperscript{48} cited \textit{Ribnik v. McBride}\textsuperscript{49} although that case was overruled by \textit{Olsen v. Nebraska};\textsuperscript{50} in 1942 the Alabama court\textsuperscript{51} used \textit{Williams v. Standard Oil}\textsuperscript{52} as though the \textit{Nebbia} case had never been decided; and in 1939, a Tennessee opinion\textsuperscript{53} was largely filled with quotations from \textit{Lochner v. New York}.\textsuperscript{54}

Upon such authority as this price regulation statutes have been held to violate due process clauses for three principal reasons: (a) the statute as it was drawn put unduly harsh burdens upon the persons subject to regulation;\textsuperscript{55} (b) the statute was too vague in setting forth the standards of conduct required;\textsuperscript{56} or (c) the statute imposed restraints on liberty which are unreasonable because they serve a private rather than a public purpose.\textsuperscript{57}

If a statute is unconstitutional because of harshness resulting from inadequate draftsmanship or because of failure to be sufficiently precise, a legislature can and frequently does make another attempt at draftsmanship. But the courts permanently block certain types of legislative effort to solve economic and social problems when they forbid legislation in the whole area of price regulation.

The Indiana and Florida Courts, in attacking price-fixing legislation, have responded to the uncompromising conviction that price fixing itself is a violation of the personal rights of an individual and is justified only if the courts believe the public welfare is served by the restraint on liberty. Mr. Justice Sutherland himself might

\begin{itemize}
\item \textsuperscript{48} Kirtley v. State, 84 N. E. 2d 712 (Ind. 1949).
\item \textsuperscript{49} 277 U. S. 350 (1928).
\item \textsuperscript{50} 313 U. S. 236 (1941).
\item \textsuperscript{51} Alabama Independent Service Station Ass'n v. McDowell, 242 Ala. 424, 6 So. 2d 502 (1942).
\item \textsuperscript{52} 278 U. S. 235 (1929).
\item \textsuperscript{53} State v. Greeson, 174 Tenn. 178, 124 S. W. 2d 253 (1939).
\item \textsuperscript{54} 198 U. S. 45 (1905).
\item \textsuperscript{55} Serrer v. Cigarette Service Co., 148 Ohio 519, 76 N. E. 2d 91 (1947).
\item \textsuperscript{57} Alabama Independent Serv. Station Ass'n v. McDowell, 242 Ala. 424, 6 So. 2d 502 (1942); Liquor Store v. Continental Distilling Corp., 40 So. 2d 371 (Fla. 1949); Kirtley v. State, 84 N. E. 2d 712 (Ind. 1949); Sperry & Hutchinson Co. v. McBride, 307 Mass. 408, 30 N. E. 2d 269 (1940); People v. Victor, 287 Mich. 506, 283 N. W. 666 (1939); Boomer v. Olsen, 143 Neb. 579, 10 N. W. 2d 507 (1943).
\end{itemize}
well have written these sentences from the Kirtley case:

Liberty . . . embraces the right of every one to be free in the use of their powers in the pursuit of happiness in such calling as they may choose subject only to the restraints necessary to secure the common welfare. The privilege of contracting is both a liberty and a property right and is protected by the constitution of both the state and nation. 58

or these from the Continental Distilling case,

The right to own, hold and enjoy property is nearly absolute. The statute cannot be the means of leveling unequal fortunes, neither can it favor one segment of the people at the expense of another. These principles are fundamental. 59

With such language the "old Supreme Court" would be quite at home. In some courts, the good old days still live.

CONTROL OF COMPETITION BY LICENSING

Historically, there seems to have been very little controversy about the general power of a state or a properly empowered municipal corporation to license any business or occupation in the community. 60 However, there has been considerable debate over the constitutionality of particular licensing statutes and ordinances when they have been used to restrict competition or to place rather harsh burdens upon the licensee.

The Old Court insisted that the requirements for licensing bear some reasonable relationship to the Court's conception of the general welfare. Devoted as it was to principles of classical economics, the Court was convinced that the general welfare could never be advanced by a statute which favored the competitive advantage of one group at the expense of another. This conviction was clearly the heart of the matter in New State Ice Company v. Liebmann. 61 There, in 1932, the Supreme Court declared unconstitutional a statute which required the obtaining of a certificate

58. 84 N. E. 2d 712, 714 (Ind. 1949).
59. 40 So. 2d 371, 374 (Fla. 1949). See also Boomer v. Olsen, 143 Neb. 579, 585-86, 10 N. W. 2d 507, 511-12 (1943) : "[the statute] has the further effect of substituting human judgment for the market place, and the judgment of individuals has never proved to be an adequate substitute for supply and demand. The right to deal with one's property by barter and trade is thereby seriously infringed. . . . The stifling of a legitimate occupational pursuit by legislative price fixing has been condemned as unconstitutional by this court as being beyond the realm of a regulatory statute. . . . We find no reason for receding from this position."
60. On licensing generally see Silverman, Bennett, and Lechliter, Control by Licensing Over Entry Into the Market, 8 Law & Contemp. Prob. 234 (1941).
of public convenience and necessity before persons could engage in the manufacture or in the distribution of ice in the state of Oklahoma. Certificates were to be issued only upon a showing that additional facilities were needed in the community where a proposed ice business was to be set up. Mr. Justice Sutherland declared that to interfere thus with an ordinary employment was to create and foster monopoly against the interests of the consuming public. In his opinion the case involved:

... a private corporation ... [which] seeks to prevent a competitor from entering the business of making and selling ice. It claims to be endowed with state authority to achieve this exclusion.\(^2\)

He saw no difference between imposing this kind of licensing requirement upon ice manufacturers and imposing it upon any other occupation such as shoe-making, dairying or the renting of houses. Obviously, the latter pursuits could be followed (as a matter of constitutional right) without a license the purpose of which was to exclude competition for private benefit. Just as a state could not fix the prices charged by a business not affected with a public interest, so also these ordinary businesses could not be required to obtain certificates of convenience and necessity.

For some reason the Supreme Court has never openly repudiated the *Liebmann* case although the decision clearly rests upon two old-fashioned constitutional doctrines: (1) "Businesses affected with the public interest" are a closed class of enterprises—the so-called "natural monopolies." (2) A state may not pursue economic policies which differ sharply from the policies supposedly required by *laissez-faire* theory. The "fixed class" conception is no longer tenable after the re-definition of the phrase in the *Nebbia* case. Also in the *Nebbia* case the freedom of a state to choose among economic policies was forcefully stated:

So far as the requirement of due process is concerned, and in the absence of other constitutional restriction, a state is free to adopt whatever economic policy may reasonably be deemed to promote public welfare, and to enforce that policy by legislation adapted to its purpose.\(^3\)

Yet today the viewpoint of seemingly authoritative *Liebmann* is as vigorously alive in the states as many of its expressly overruled cousins. The 1948 Pennsylvania Supreme Court opinion of

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62. *Id.* at 278.
Hertz Drivursel Station v. Siggins was cut from the same cloth as the Liebmann case.

In 1943, the legislature of Pennsylvania sought to give the Pennsylvania Public Utility Commission power to require public convenience and necessity certificates of motor vehicle lessors. Ordinarily when a state chooses to impose this requirement on a "common carrier" there is little serious constitutional question. But in recent years a new phenomenon has developed. In many places companies now stand ready to lease motor vehicles without drivers either to individuals or commercial establishments. It is these companies which were to be regulated by the Pennsylvania statute.

The Pennsylvania Court held that the business of leasing motor vehicles was not affected with the public interest and hence a certificate could not be required. Furthermore the licensing provision was not designed to protect the public welfare. Neither the power of the state to regulate its highways nor its power to control those enterprises competing with regulated carriers provided a sufficient basis for the statute.

The phrase "affected with a public interest" was given a definition based upon Mr. Chief Justice Taft's discussion in Wolf Packing Co. v. Court of Industrial Relations:

... private property used in the enjoyment of a monopoly (either governmental or circumstantially created) for the rendition of a needed and useful service to the public is subject, as a legally necessary concomitant, to legislative regulation and control....

The Drivursel Company selected its customers; therefore the

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64. 359 Pa. 25, 59, A. 2d 464 (1948); cf. North Little Rock Transp. Co. v. City of No. Little Rock, 207 Ark. 976, 184 S. W. 2d 52 (1944). There the Arkansas Supreme Court held a statute unconstitutional which would permit presently licensed taxicab drivers to provide additional service when the need for such service had been established by a city council finding made in response to a new application for a cab permit. In the court's judgment, the act was not a proper exercise of the police power and therefore violated Arkansas' constitutional prohibition against monopolies. See also State v. Moore, 91 N. H. 16, 13 A. 2d 143 (1940).

65. See Hall, State Control of Business Through Certificates of Convenience and Necessity (Bureau of Gov't Research, Dep't of Gov't, Indiana Univ. 1948), esp. pp. 15-21.


67. 359 Pa. 25, 37, 58 A. 2d 464, 471 (1948). (Italics are the court's). The Pennsylvania court has also been active in striking down legislation on due process grounds in areas other than that of business regulation. See Wilcox v. Penn Mutual Life Ins. Co., 357 Pa. 581, 55 A. 2d 521 (1947), in which the Pennsylvania community property law was declared unconstitutional as a violation of due process.
public had no right to expect the leasing service to be available to anyone demanding it—another characteristic of the class "affected with a public interest."

The judges were greatly concerned that the real purpose of the legislation was to benefit Driveurself's competitors and not the public. The company was required to file a schedule of rates which were not to be lower than the rates charged by common carriers. A statement in an intervenor's brief of a Yellow Cab Company subsidiary provided the final proof of the private benefit served by the statute:

"... Yellow Rental caused a bill to be prepared and introduced into the legislature which, after some amendments, was enacted. It was signed by the Governor on June 5, 1943." And, that is the Act now before us.6

Entrance into a business or occupation may be restricted in many other ways than requiring a showing of community need before a public agency. If those who wish to enter some area of the business world are required to demonstrate a certain degree of technical proficiency or moral fiber some prospective competitors will never actually set up shop. This device for limiting competitors is especially attractive because a real public interest can be honestly urged in most cases. If work is well done there is some benefit to all and there are tricks to learn in every trade. Enviously eyeing the long-standing educational and technical prerequisites for lawyers, doctors, dentists and the like, persons in other fields have sometimes attempted to procure the enactment of statutes which similarly would set up standards to be met by newcomers.

Here we meet the barbers again. In most states, barbers are licensed and qualifications of training or experience must be shown before a license will be issued. The requirement of a semi-professional training has met with court approval in almost every instance.69 Courts have been impressed by the close relationship between the haircut and the transmission of disease. This is in contrast to the mixed reception given legislation fixing the prices of barbers' services. It is apparently assumed that a trained though impoverished barber will nevertheless be clean.

In addition to the regulation of barbering, several states have set up boards to license other service vocations such as the practice of professional photography or dry cleaning. Typically, the statutes

68. Id. at 50, 58 A. 2d at 478. (Italics are the court's.)
69. See the cases cited by Silverman, Bennett and Lechliter, supra note 60, at 238 n. 16.
setting up the boards provide for the issuance of a license only after the payment of a modest fee, the passing of an examination and a showing as to the applicant's business integrity. Without a license, to provide the service for compensation is a misdemeanor.

The photography statutes have been tested and declared unconstitutional in seven jurisdictions; and in North Carolina the statute licensing dry cleaners has been invalidated. In reaching these decisions, the courts have viewed professional photography and the dry cleaning business as harmless, ordinary callings in which all men are free to engage. No perceivable connection is seen between the public health or welfare and the imposed restrictions. As to photography in particular, the pleasure which many receive from it as a hobby is emphasized to show the unreasonableness of requiring mental and moral examinations before engaging in the pursuit for hire.

Here, as in the price fixing cases, the state courts have either distinguished federal cases such as *Nebbia* and *Olsen v. Nebraska* or declined to find them definitive of state due process. Even if, by distinguishing the Supreme Court cases, a state court finds the statute to violate the Fourteenth Amendment, the decisions nevertheless have been carefully grounded upon provisions of the state as well as the Federal Constitution, leaving no possibility of a United States Supreme Court reversal.

In these cases the economic and political philosophy of the judges becomes quite easy to read and has plainly influenced the results. Sometimes judicial faith in the ideals of individualism shines forth in the course of an opinion:

Resort to the police power to exclude persons from an ordinary calling, finding justification only by the existence of a vague public interest, often amounting to no more than a doubtful social convenience, is collectivistic in principle, destructive to the historic values of these guaranties, and contrary to the genius of the people who did all that was humanly possible to secure them in a written constitution. . . . A departure from these standards may be re-

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71. State v. Harris, 216 N. C. 746, 6 S. E. 2d 854 (1940). Note, 27 N. C. L. Rev. 532 (1949) shows a correspondence between legislative and judicial attitudes in regard to this type of licensing statute in North Carolina. While the Supreme Court of North Carolina has decided the *Harris* case and State v. Ballance, *supra* note 70, the legislature has generally refused to enact new statutes of a similar sort.
garded as social retrogression. No good can come to society from a policy which tends to drive its members from the ranks of the independently employed into the ranks of those industrially dependent, and the economic fallacy of such a policy is too obvious for comment.\(^2\)

In the Virginia photographer's case, the court strikes out against the advance of bureaucracy:

In this day of bureaucracies multiplied we are constrained to emphasize the virtue of a firm adherence to the philosophy that that state is best governed which is least governed.\(^3\)

The dislike of protecting special groups from the rigors of competition is an attitude which runs through all the opinions. Again and again there is insistence that the real purpose of the legislation is to protect private rather than public interest. Monopoly with legislative sanction is the evil which these courts would avoid. The legislature alone cannot hold back the forces of concentrated minorities:

What we have said regarding the statute is, of course, no reflection upon the legislature which enacted it. Beyond question the legislative motive and purpose were good. But it is a matter of common knowledge that pressure groups are frequently able to bring about legislative action they believe will be to their advantage by their argument that it is needed for the protection of the public.\(^7\)

To exclude persons from the opportunity of earning a living not only creates the danger of their being made public charges but also deprives them of fundamental human rights:

... the right to earn a living must be regarded as inalienable. Conceding this, a law which destroys the opportunity of a man or woman to earn a living in one of the ordinary harmless occupations of life by the erection of educational and moral standards of fitness is legal grotesquery.\(^7\)

To all this is added the fear of advancing in the direction toward which this type of licensing regulation is supposed to lead. If photographers and dry cleaners can set semi-professional standards so can any other business group. The process can only end with the

\(^72\). Id. at 763, 6 S. E. 2d at 865.
\(^74\). State v. Cromwell, 72 N. D. 565, 580, 9 N. W. 2d 914, 921-22 (1943).
\(^75\). State v. Harris, 216 N. C. 746, 759, 6 S. E. 2d 854, 863 (1940). The North Carolina court has felt free to redraft a statute if necessary in order to avoid the placing of licensing requirements upon a group which that court feels cannot be licensed under proper exercise of the police power. See Palmer v. Smith, 229 N. C. 618, 51 S. E. 2d 8 (1948).
The whole economic community organized after the manner of the medieval guilds or the corporate state:

Statutes regulating trades and occupations by the delegation of governmental power to boards and commissions formed largely of the groups affected, intended primarily to control the personnel of the business, have become so common as to affect progressively and importantly the social and economic life of the State. . . . The stage of internal protest has been reached. . . . Without the aid of the statute these groups would be mere trade guilds, or voluntary business associations; with it they become State agencies, retaining, however, as far as possible, distinctive guild features.\(^76\)

The offering of services for hire may be made subject to mental or moral qualifications by the device of requiring that the services may be provided hereafter only by an already licensed group. This device may not meet with judicial approval even if the activity is placed within the province of an established profession, the power to license which is indisputable. Recently the Mississippi Supreme Court\(^77\) upset a statute which limited to lawyers and certified public accountants the practice of making out tax returns for compensation. The legislature was without power to give a monopoly of such business. To choose those who will make out one's tax return is a "right of the citizens of this State."\(^78\) Undoubtedly the Court was influenced as well by what it saw to be a local problem in Mississippi: "there are scores and scores of small communities without any Certified Public Accountants"\(^79\) and it was "well known that not enough members of the legal profession are willing to assist with small Income Tax Returns."\(^80\)

Licensing may sharply restrict economic rivalry if the acquisition of a license is costly either in the price of the license itself or in the expenditure necessary to qualify for its issuance or retention.

In many cases large licensing fees have been imposed for the principal purpose of discouraging certain kinds of business for the benefit of competitors. An example is the heavy license fees which many states exact from those who deal in oleomargarine. Within

\(^{76}\) Id. at 751-52, 6 S. E. 2d at 858-59. The Harris case has been drawn upon so freely because of its importance as authority in the photography cases after 1940.

\(^{77}\) Moore v. Grillis, 39 So. 2d 505 (Miss. 1949).

\(^{78}\) Id. at 509.

\(^{79}\) Id. at 508.

\(^{80}\) Id. at 511.
two victories by successfully attacking state license-tax legislation the past four years the proponents of oleomargarine have scored in Pennsylvania and Montana under the respective due process provisions of those state constitutions. Under the Pennsylvania act licenses to manufacture oleo cost $1,000 per year; wholesalers were charged $500 annually and retailers $100. In Montana the licenses were $1,000 and $400 per year for wholesalers and retailers respectively.

Both courts rejected the argument that the license fee was merely revenue raising. The Pennsylvania court pointed to the title of the statute which announced it was an "act . . . to regulate the manufacture and sale of oleomargarine. . . ." Montana's Judge Adair was impressed with the fact that 92% of the state's grocery stores were unable to sell the butter-substitute because the license was so expensive. A disproportion between the amount of the fee and the cost of proper police regulation was seen in both situations. The statutes setting up the licensing scheme were clearly regulations of business rather than taxing acts.

As regulations which tended toward suppression of the sale of oleo the statutes were termed unreasonable and oppressive. The economic advantages of dairy farmers might not be advanced at the expense of another legitimate business:

Obviously the legislature was and is without power to prohibit a legitimate business or to create a monopoly in favor of one branch of industry handling food products and against another branch of industry handling equally wholesome articles of food.

The particular statutes involved in these cases had been on the books for a long time. The Pennsylvania act was passed in 1901 and the Montana statute in 1929. The age of the enactment was urged as a reason to sustain them, but this argument was expressly brushed aside. There is no statute of limitation which runs against the exercise of a judge's will to invalidate legislation.

Onerous burdens other than high fees as conditions of obtaining or keeping a license to engage in business are shown in two New

83. 199 P. 2d 971, 978. Even if the license fee is rather modest licensing may violate a state constitution if the purpose of the license is shown to be protection of a "private" rather than a "public" interest. Kresge Co. v. Couzens, 290 Mich. 185, 287 N. W. 427 (1939).
Jersey cases. New Jersey attempted to discourage the operation of used car lots by granting licenses only to those who did business in a place not less than 1,000 square feet in area—that is, to those who supposedly were substantial businessmen. The licensee was also required to provide facilities for complete motor vehicle servicing. The statute was invalidated by the New Jersey Superior Court because the Court saw no real public interest at stake in the regulation which would justify the interference with the right to engage in lawful business. In part the Court relied on the Supreme Court opinion in the Liebmann case.

In the other New Jersey case the practice of denistry with the use of leased equipment was made a statutory ground for suspending a dentist's license to practice. Observing that a dentist's skill has nothing to do with his ability to buy equipment, the New Jersey Supreme Court held the statute unconstitutional as an arbitrary encroachment on individual liberty.

Occasionally a legislature will deny business licenses to a group by flat prohibit without regard to the public necessity for the enterprise or the qualifications of the applicant. An Indiana licensing statute attempted to better the competitive position of the independent insurance salesmen by this method. Fire and casualty insurance agents were to be licensed only if they sold on a commission basis. Salesmen who were paid a salary would no longer be able to sell policies. Holding the act unconstitutional without extended discussion, Indiana's Supreme Court Judge Starr said: "Whether an insurance agent is paid a salary or commission has nothing to do with the public welfare..." His opinion shows not only how readily the Indiana Court will upset a statute which it judges unreasonable but also how that Court apparently will deprive itself of the facts with which to make the judgment:

... extrinsic evidence will not be received on the constitutionality of such statute. The only extrinsic facts which will be considered are those of which the court will take judicial notice.

Certainly there will be many facts not subject to judicial notice.

87. Id. at 193, 72 N. E. 2d at 750.
88. Id. at 190, 72 N. E. 2d at 748.
which are relevant to the issue of whether a given statute is reasonable. Absent such facts the judicial constitutional method must be "to lay the article of the Constitution which is invoked beside the statute which is challenged and to decide whether the latter squares with the former." 89

**Prohibition of Business Methods**

The great majority of the cases in the sections above have dealt with statutes designed to meet the economic problems of the business area sought to be regulated. Restrictions may of course be put on an enterprise to deal with a great many other matters which fall within an orthodox definition of the police power. Because the power of the legislature is usually admitted in these cases, the statutes are unconstitutional only because the courts find the statutes not reasonably related to the end sought. In no group of cases does the substitution of judicial for legislative judgment stand out more clearly.

Typical of the pre-New Deal Court's willingness to second-guess the legislature is the case of *Adams v. Tanner.* 90 The state of Washington had by initiative prohibited the operation of private employment agencies, a business in which fraudulent practices were common. The opinion of the Court by Mr. Justice McReynolds in this 1917 case contained language which has been relied upon in the states deciding cases under their own constitutions:

> 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 up-right way. Certainly there is no profession, possibly no business, which does not offer peculiar opportunities for reprehensible practices; and as to every one of them, no doubt, some can be found quite ready earnestly to maintain that its suppression would be in the public interest." 91

This judicial attitude is quite different from the present one of the Court, as shown by the late Mr. Justice Murphy's opinion in the 1949 case of *Daniel v. Family Security Life Insurance Co.* 92

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89. Roberts, J., in United States v. Butler, 297 U. S. 1, 62 (1936). Chief Justice Gilkison of Indiana has paraphrased this very dictum. "In the consideration of this case we . . . shall consider only the statute upon which the charge is founded, and the sections of the state constitution with which it is claimed to be in conflict." Kirtley v. State, 84 N. E. 2d 712, 714 (Ind. 1949).

90. 244 U. S. 590 (1917).

91. Id. at 594.

After briefly reviewing the background of a South Carolina statute, the Justice said:

The forum for the correction of ill-considered legislation is a responsive legislature.

We cannot say that South Carolina is not entitled to call the funeral insurance business an evil. Nor can we say that the statute has no relation to the elimination of those evils. There our inquiry must stop.93

Two courts, the New York Court of Appeals94 and the New Jersey Court of Errors and Appeals,95 have invalidated city ordinances on the ground expressed in *Adams v. Tanner*. The cases both involved a prohibition of selling ice cream bars and similar products from carts or wagons on the city streets. Despite the traffic hazard which such selling may create, both courts were persuaded the other regulations less drastic than prohibition could be adopted to accomplish any protection necessary to the public welfare. This point of view has also prevailed in three Ohio inferior courts in other "Good Humor" cases.96 The legislature may deal with the traffic problems in these states only by more reasonable means.

The legislative judgment that the public interest in protection against fraud or over-reaching business tactics requires some legislative enactment, may also be judicially challenged. Again, the courts in some states make an independent judgment whether the statute is related to the end sought.

To do two kinds of business in close conjunction may provide easy opportunity for over-reaching. On this ground the Massachusetts General Court sought to forbid cemetery corporations from selling memorial monuments. While this type of regulation is a great deal less drastic than complete prohibition of monument

93. *Id.* at 224.
94. *Good Humor Corp. v. City of New York*, 290 N. Y. 312, 49 N. E. 2d 153 (1943). The opinions passing on these "Good Humor" ordinances are difficult to classify in that an ordinance may be invalid either because it is unconstitutional or because it is unreasonable and hence beyond the powers conferred by statute upon the municipal corporation. Cases are seldom precise as to the ground chosen. However, the approach of the courts in substituting judicial for legislative judgment is identical in either event.
96. *Frecker v. City of Dayton*, 85 N. E. 2d 419 (Ct. of App., Ohio, 1949); *Schul v. King*, 70 N. E. 2d 378 (Ct. of Com. Pleas, Ohio, 1946); *Frecker v. City of Zanesville*, 72 N. E. 2d 477 (Ct. of Com. Pleas, Ohio, 1946). A so-called confiscatory tax on ice-cream dealers was held unconstitutional in *Martin v. Nocero Ice Cream Co.*, 269 Ky. 151, 106 S. W. 2d 64 (1937).
selling, yet it seemed unreasonable to the Massachusetts Judicial Court. Consequently the Massachusetts legislature was advised by the Justices\textsuperscript{97} that the statute would deprive the cemetery corporation of constitutional rights. Hence the right to sell monuments either solely or in connection with another enterprise is a right guaranteed by the Massachusetts Constitution. It is "fanciful rather than real" to suggest "that a bereaved family seeking a place to bury their dead might possibly be exposed to undesirable importunity in the matter of purchase of a monument or might be discriminated against for refusal to buy..."\textsuperscript{98}

To protect against oppressive credit arrangements through the regulation of financial institutions is clearly within the competence of state legislatures. Yet when the Small Loans Act of Illinois prohibited a loan company from pledging notes given by borrowers to anyone except banks authorized to do business in Illinois, an Illinois trust company successfully contended that to exclude other types of lenders from the business was an unreasonable exercise of legislative power.\textsuperscript{99} While banks are much more extensively supervised than trust companies in Illinois, it was the Court's judgment that:

If, as appellants contend, it was the intention of the General Assembly to limit the pledge or hypothecation of such paper to institutions subject to examination and control of a department of the State, this purpose affords no reasonable basis for discrimination against trust companies, for, as we have seen, they are likewise under such control of the State.\textsuperscript{100}

Burial insurance companies have been guilty of a great many abusive practices. The principal danger lies in a close tie-up between the insurance company and undertakers. When the policies call for the use of a given undertaker, he has a monopoly position which may be exploited in poor service, high prices or both. Although the legislature of Kentucky has attempted to strike at the methods of these companies, it has had no success because of interference by the courts.

In 1932, it was made unlawful for any burial association to

\textsuperscript{97} Opinion of the Justices, 322 Mass. 755, 79 N. E. 2d 883 (1948).
\textsuperscript{98} Id. at 761, 79 N. E. 2d at 887.
\textsuperscript{99} Metropolitan Trust Co. v. Jones, 384 Ill. 248, 51 N. E. 2d 256 (1943).
\textsuperscript{100} Id. at 256, 51 N. E. 2d at 260. The close link between due process and constitutional prohibitions against unreasonable classification is seen in the Metropolitan Trust case. "A law which deprives one class of persons of the right to acquire and enjoy property, or to contract with relation thereto, in the same manner as others under like conditions... is not comprehended within the true meaning or the words 'due process of law..."
issue a certificate providing for the payment of benefits in merchandise or services. The Supreme Court of Kentucky took most of the force out of this statute by holding that the act did not forbid a certificate which contractually limited the insured's representative to a choice among nine undertakers named in the policy and who were to be paid by the insurer. In 1938 the Legislature countered with a statute which forbade certificates providing for payment to any single undertaker or list of undertakers. In the case of *Goodpaster v. Kenton & Campbell Benev. Burial Ass'n* the Kentucky Court declared the 1938 statute unconstitutional as a veiled attempt to abolish the burial insurance business. In the course of the opinion, the Court said:

Had [protection against monopoly] been the actuating motive it seems patent that the legislature would have approached the question from an entirely different angle. The monopoly feature could be easily met, for example, by the simple process of requiring that undertakers who gave the required security and agreement should thereby become entitled to status as "official undertakers."

The legislature, apparently seizing upon this quotation tried once more and in 1944 provided that any undertaker who put up security for the faithful performance of these contracts would be permitted to perform them and again prohibited a listing of undertakers by contract between the association and its members. All this was to no avail because in 1946 the legislature found that its judgment on policy had been wrong all along:

We claim no perfection or sureness in reasoning, but after careful study and resolving all doubts we perceive no reasonable necessity or rational basis for saying that the Act is protective of the members of the Association. ... 104

An Illinois act aimed at the conservation of natural resources in land was invalidated in 1947 on the ground that the means were not reasonably related to the end. The statute required the operator of strip coal mines to level spoil ridges to approximately the original contour upon completion of mining operations. The Illinois Supreme Court had no hesitation in substituting its judgment for that
of the General Assembly as to the effectiveness of the law as a conservation measure: "The method here employed does not bear any reasonable relation to the object sought. . . ." For good measure even if the enactment would create lands suitable for farming, the Court added:

. . . the State has no authority, under the guise of a conservation theory, to compel a private owner, at his own expense, to convert his property to what it considers to be a higher or better use.\(^{107}\)

REGULATION OF LABOR UNIONS AND UNION PRACTICES

Substantive due process as it developed under the Fourteenth Amendment was brought to full flower in labor cases. \(\text{Lochner v. New York}\)\(^ {109}\) in 1905, invalidated an attempt by the state of New York to regulate the hours of work for bakers and three years later the Court upset a federal statute prohibiting discrimination by employers against union members.\(^ {109}\) \(\text{Coppage v. Kansas}\)\(^ {110}\) struck down a state act which sought to abolish the yellow dog contract. These statutes failed to meet the standards of the Fourteenth Amendment because liberty to contract had been unreasonably curtailed. But the cases taught that the liberty guaranteed was that of the employee as well as the employer. In an opinion holding a Kansas compulsory arbitration law unconstitutional, Mr. Chief Justice Taft emphasized this point:

The penalties of the act are directed against effort of either side to interfere with the settlement by arbitration. Without this joint compulsion, the whole theory and purpose of the act would fail. The State can not be heard to say, therefore, that upon complaint of the employer, the effect upon the employee should not be a factor in our judgment.\(^ {111}\)

During the New Deal period with its mass of reform labor legislation, the Court revised its outlook. After \(\text{West Coast Hotel v. Parish}\)\(^ {112}\) and \(\text{N. L. R. B. v. Jones-Laughlin}\)\(^ {113}\) the old limitations upon legislation fixing wages and hours and encouraging unionization were swept away. "The course of decisions in this Court since \(\text{Adair v. The United States}\) . . . and \(\text{Coppage v. Kansas}\) . . . have completely sapped those cases of their authority," said Mr. Justice Taft.
Frankfurter in *Phelps Dodge v. N. L. R. B.* Due process was no longer a serious hurdle for legislation designed for labor's protection.

During and immediately after World War II, legislatures responded to a conviction that the New Deal had made labor and its unions too powerful. The trend of legislation changed, with numerous restrictions being imposed on unions and union practices. Faced with these enactments, labor's lawyers recalled the pre-1937 Supreme Court cases and the emphasis in them upon the constitutional liberties of employees. Labor's attack, therefore, was grounded in part on Due Process. The effort has not met with success in the Supreme Court save in those cases where state legislation has infringed the right of workers to freedom of expression. The judicial self-restraint developed in the area of business regulation was equally applicable in the labor field:

[Labor] now [ask] us to return, at least in part, to the due process philosophy that has been deliberately discarded. Claiming that the Federal Constitution itself affords protection for union members against discrimination, they nevertheless assert that the same Constitution forbids a state from providing the same protection for non-union members. Just as we have held that the due process clause erects no obstacle to block legislative protection of union members, we now hold that legislative protection can be afforded non-union workers.

In the light of what has occured in regard to state statutes regulating business, we may ask whether in the labor cases state courts have ever drawn upon old federal material to void statutes under state due process. Have the state courts used their state due process clauses to protect union members against restrictive legislation from which there is no longer an appeal to the Fourteenth Amendment?

Various attempts have been made to insure honesty and responsibility in the administration of unions. Information about the union such as its constitution, by-laws, and financial status has to be filed publicly under the terms of some statutes; others provide for the licensing of union agents. The Alabama court has sustained a state's power to require the filing of a union's constitution and

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114. 313 U. S. 177, 187 (1941).
119. Alabama State Federation of Labor v. McAdory, 246 Ala. 1, 18 So. 2d 810 (1944).
by-laws. In addition Alabama has approved the compulsory filing of union financial statements. The Texas court, on the other hand, invalidated the portion of its statute asking for unions' financial statements, but in the same case upheld sections of the statute which forced unions to list the names of its officers and affiliations. The licensing of union agents was within legislative power according to the Texas and Florida courts. But a California municipal ordinance of a similar sort was held unconstitutional there. The compulsory incorporation of unions, a step advocated as a union responsibility measure, was held unconstitutional in Colorado. It should be noted, however, that the Texas, California and Colorado courts felt bound by the federal cases in invalidating their respective acts.

In a number of jurisdictions union security devices such as the closed shop and the union shop either have been prohibited or their use has been sharply restricted. Several states have adopted constitutional amendments which typically declare: "The right to work shall not be denied or abridged because of membership or non-membership in a union." Where this is the case, of course, the only due process question arises under the Fourteenth Amendment. Representative of those cases in which a "right to work" statute has been challenged under a state as well as the Federal Constitution is the North Carolina case of State v. Whittaker. An employer and employee were charged with entering into a closed shop contract in violation of the act. On appeal from their conviction the defendants claimed the act unconstitutionally limited their freedom. Refusing to set aside the conviction, the North Carolina Supreme Court asserted that due process was an "elastic term" which could be expanded to meet the problems of the day. The reasonableness of the regulation was attested by:

15 states . . . in which laws have been adopted prohibiting closed shops. . . . Great weight must be attached to the fact that so many separate jurisdictions have, within a short space of time, seen fit to exercise their police power in the same manner. . . .

The Supreme Courts of Minnesota, Tennessee and Vir-
have followed the Whittaker decision. The Virginia opinion is especially interesting because the court, in upholding the anti-closed shop law, responds to values which are not unlike those evidenced by the cases invalidating state business regulation:

the liberty so referred to [in the Virginia constitution] includes the right of the citizen to be free in the enjoyment of all faculties and use them in all lawful ways... and to earn his livelihood by any lawful calling.\(^{132}\)

State statutes have placed limitations upon labor's right to strike. In spite of the close connection between the right to strike and the civil rights of workers, every state court which has considered the matter has refused to find that the restrictions imposed violate due process. In Michigan\(^{133}\) and New Jersey,\(^{134}\) statutes providing for the compulsory arbitration of labor disputes involving public utilities have been upheld in so far as they have been challenged under due process clauses. The imposition of procedural requirements before a union may call a strike has been sustained by the Minnesota Supreme Court.\(^{135}\)

Statutes regulating picketing are very common and many of the acts have been upheld by state courts. Where they have been held unconstitutional, the Thornhill case\(^{136}\)—a United States Supreme Court opinion—was deemed controlling by the state court.\(^{137}\)

In summary, no state case has held unconstitutional either an anti-closed shop statute or a measure imposing limitations on the right to strike. The state courts, it is true, have upset some of the union control legislation and some of the anti-picketing statutes. But there is one great difference between these latter cases and

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129. Dayton Co. v. Carpet, Linoleum and Decorators' Union, 39 N. W. 2d 183 (Minn. 1949).
130. Mascari v. International Brotherhood of Teamsters, 215 S. W. 2d 779 (Tenn. 1948).
132. \textit{Id.}\ at 875.
133. Local 170 v. Gadola, 322 Mich. 332, 34 N. W. 2d 71 (1948). However, the statute was held invalid because it provided for the imposition of non-judicial duties on certain judges.
134. State v. Traffic Telephone Workers Federation, 66 A. 2d 616 (N.J. 1949). Although the statute survived constitutional attack under due process, it was invalid because adequate standards were not set up to guide the arbitration board in making awards.
137. \textit{E.g., Ex Parte} Hunn, 357 Mo. 256, 207 S. W. 2d 468 (1948); Int'l Union of Operating Engineers v. Cox, 219 S. W. 2d 787 (Texas, 1949).
those in which business regulatory measures have been voided. The labor cases have been grounded on the Fourteenth Amendment as well as the state constitutions. In no case has a state court invalidated a statute solely on state due process grounds.

**Conclusion**

The state cases involving regulation of business show the economic, political and social judgments of judges being made part of the constitutional fabric wherever legislation is invalidated on due process grounds. The ideals which these state courts value are those of Nineteenth Century Liberalism. In the labor cases there is no evidence that any court would shield unions beyond the protection of the Fourteenth Amendment.

In the southern states generally, and in Illinois, Indiana, Massachusetts, New Jersey, Ohio, and Pennsylvania where substantive due process is very much alive, judges have frequently set up almost insurmountable barriers to government's attempt to deal with important public problems. The *Hertz Drivurself* case plainly created a serious impediment to the construction of an integrated pattern of public motor transportation in Pennsylvania. Without control of vehicle lessors, the regulated carriers may eventually be subject to the kind of competitive pressure which will undermine the whole scheme of public motor transportation.\(^{138}\) It is difficult to see what more the legislature of Kentucky can do to deal with the abusive business practices of burial insurance corporations. In Illinois the cause of conservation of natural resources has been seriously hampered because of judicial interference with legislative judgment.

A single thread has run through a great many of the cases. In some states the judiciary is reluctant to sit idly by while minority groups capture the machinery of the state in order to secure a monopoly position. Given the short legislative session in many states and the concentrated attention which pressure groups may devote to that session, one may well sympathize with that point of view. Indeed, some of the liberal members of the United States Supreme Court have apparently been willing to use the Fourteenth Amendment as some small degree of protection against this monopoly by minority. These Supreme Court liberals differ in technique from some of their brethren on the state bench in that they would employ the Equal Protection Clause rather than Due Process. During

\(^{138}\) The problems raised by the *Hertz* case are discussed in Nutting and Kuhn, *Motor Carrier Regulation—the Third Phase*, 10 U. of Pitt. L. Rev. 477 (1949).
the most recent term of Court, Mr. Justice Douglas as well as the late Justices Murphy and Rutledge dissenting from an opinion upholding a statute which would eliminate most women as barmaids in Michigan.\textsuperscript{139} In 1947, the same justices joined by Mr. Justice Reed, dissented in a case which upheld Louisiana’s power to license only those river pilots who were connected with the vocation by reason of blood relationship to already licensed pilots.\textsuperscript{140} In the dissent, Mr. Justice Rutledge said:

The door is thereby closed to all not having blood relationship to presently licensed pilots. Whether the occupation is considered as having the status of “public officer” or of highly regulated private employment, it is beyond legislative power to make entrance to it turn upon such a criterion.\textsuperscript{141}

Granted that the state-enforced economic power of small groups is undesirable, what is the remedy? Is it not to make legislatures more responsive to the public welfare? Is not judicial interference merely an encouragement to legislative irresponsibility? Although his language seems inconsistent with his vote in both the barmaids case and the river pilots case, the late Mr. Justice Murphy has made answer to these questions:

Looking through the form of this plea to its essential basis, we cannot fail to recognize it as an argument for invalidity because this Court disagrees with the desirability of the legislation. We rehearse the obvious when we say that our function is thus misconceived. We are not equipped to decide desirability; and a court cannot eliminate measures which do not happen to suit its tastes if it seeks to maintain a democratic system.\textsuperscript{142}

\begin{itemize}
\item \textsuperscript{139} Göesaert v. Cleary, 335 U. S. 464 (1948).
\item \textsuperscript{140} Kotch v. Board of River Port Pilot Com’rs of New Orleans, 330 U. S. 552 (1947).
\item \textsuperscript{141} \textit{Id.} at 565.
\end{itemize}