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Public Utilities I. The Quest for a Concept

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I. The Quest for a Concept — Another Word.

THOMAS P. HARDMAN

For many years judges, lawyers and law teachers generally said or assumed that legal precepts, i.e., those authoritative generalizations which we usually call rules, principles, standards, are the only "legal" elements in common-law decisions. The ratio decidendi of a case, the authoritative premise for future judicial and juristic reasoning, we were told, was something that could (normally, at least) be generalized into some articulate precept or precepts. And under this theory of "law" these authoritative precepts, when properly formulated, interpreted and applied, were considered self-sufficient for deciding future cases.

Recently, however, many of our leading judges and legal educators have broken, to some degree at least, with this theory of the nature of the judicial process, admitting, sometimes frankly, that judges in deciding cases quite commonly and correctly utilize other elements than legal precepts. Among the elements so

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1 As to the distinction between these three kinds of legal precepts and also as to legal "conceptions", see POUND, AN INTRODUCTION TO THE PHILOSOPHY OF LAW (1922) 115 et seq. See also Pound, Law and the Science of Law in Recent Theories (1934) 43 YALE L. J. 525.

2 As to one class of cases in which the courts leave the major premise largely inarticulate, see Kales, "Due Process", the Inarticulate Major Premise and the Adamson Act (1917) 26 YALE L. J. 519. Cf. Frankfurter, Hours of Labor and Realism in Constitutional Law (1916) 29 HARV. L. REV. 355.

3 See, e.g., SALMOND, JURISPRUDENCE (7th ed. 1924) 201: "A precedent, therefore, is a judicial decision which contains in itself a principle. The underlying principle which thus forms its authoritative element is often termed the ratio decidendi. The concrete decision is binding between the parties to it, but it is the abstract ratio decidendi which alone has the force of law as regards the world at large." See also 18 HALSBURY, LAWS OF ENGLAND (1911) 210: "It may be laid down as a general rule that that part alone of a decision of a court of law is binding upon courts of coordinate jurisdiction and inferior courts which consists of the enunciation of the reason or principle upon which the question before the court has really been determined. This underlying principle which forms the only authoritative element of a precedent is often termed the ratio decidendi."

4 See Pound, Mechanical Jurisprudence (1908) 8 COL. L. REV. 605.

5 Mr. Justice Cardozo and Dean Pound have played leading roles in this regard. CARDOZO, THE NATURE OF THE JUDICIAL PROCESS (1921), and Pound, The Theory of Judicial Decision (1923) 36 HARV. L. REV. 641, 802, 940, are illustrative.
utilized is one which Dean Pound in a recent stimulating article\(^8\) has characterized as "the ideal element", i.e., the ideals, economic, politico-economic, etc., (e.g., laissez-faire; competition is the life of trade) which, though not formulatable into rules or other precepts, are frequently just as authoritative as precepts in shaping the progress of the law.\(^7\) In somewhat similar vein an eminent English jurist, in an enlightening article entitled "Economic Theories in English Case Law,"\(^8\) has rather recently adventured into this "borderland", as he called it, "between economics and law".\(^9\) To the latter commentator, however, this field seems to be extra-legal territory. Quaere, though, is this a "borderland" between the legal and the extra-legal, or is it, rather, a newly recognized legal hinterland? Perhaps, as Dean Pound indicates in the leading article in this issue of the Quarterly,\(^8\) there may be something in our reports and in their settings, some elemental ore, as it were, which was rejected by our first legal "miners" but which must be worked over, if we are to get all the gold from our legal mines. Perhaps we must employ a new method in "mining", if we are to be able to dig straight through the "debris" in the reports and other materials and pick out all the "legal" elements that go into the making of our judicial decisions.

In the more or less recent past, in legal writings at least, we have generally ignored the ideal element in the judicial technique, partly, perhaps, because this element is at times largely inarticulate, partly, no doubt, because we have generally thought of this element as "extra-legal". But in this age of realism we can no longer justify closing our eyes to any of the operative realities in the judicial process — to the authoritative part played by these

\(^8\)Pound, The Ideal Eelement in American Judicial Decision (1931) 45 HARV. L. REV. 136; also Pound, op. cit. supra n. 5; also Pound, A Comparison of Ideas of Law (1933) 47 HARV. L. REV. 1.

\(^7\)See People ex rel. Rodgers v. Coler, 166 N. Y. 1, 59 N. E. 716 (1901): The ideal that that "government governs best which governs the least . . . . was an idea that was always present to the minds of the men who framed the Constitution, and it is proper for the courts to bear it in mind when expounding that instrument."

\(^8\)Parry, Economic Theories in English Case Law (1931) 47 L. Q. REV. 183. Speaking of the influence of such theories in English law, Mr. Parry says: "Of all doctrines it is the political and economic doctrine of laissez-faire that has made the deepest and most enduring marks upon our judge-made law . . . . For a century and a half the doctrine of laissez-faire has determined the general attitude of the Bench towards the law."

\(^9\)See Parry, supra n. 8, at p. 183.

\(^8\)Pound, New Possibilities of Old Materials of American Legal History (1934) 40 W. VA. L. Q. 205.
ideals in the adjudication of cases. As to this Dean Pound says:"

"The existence of such ideals as legal materials — as one authoritative form which legal materials may take, or as sources in Professor Gray's sense, i.e., authoritative raw materials of judicial decision — should be recognized. Their history should be traced as we trace the history of legal precepts. Their operation in action should be studied as we study the operation in action of legal precepts. In the past philosophical jurisprudence has been concerned with the ethical and philosophical bases of legal institutions and legal precepts and the principles and method of criticism of legal institutions and precepts with reference to those bases. Today we should be employing philosophical method in jurisprudence to set off and criticize the ideal element in systems of developed law, to organize that element, as in the last century we organized the precept element, to give it definiteness, and to work out a critique no less assured and thorough than that to which the apparatus of rules and doctrines has long been subjected."

This realistic view of the nature of the judicial process challenges our consideration in connection with the question, what constitutes a public utility, or, more accurately perhaps, what businesses or business activities are subject to price-fixing control?

In a former issue of the Quarterly the writer discussed some aspects of the part played, or supposedly played, by a precept element in the judicial determination of this question. An attempt was then made to point out the futility of the long-continued judicial and juristic quest for a concept which would solve this ever-recurring problem. At that time there were some signs of the proverbial shadow that coming events cast before them, some signs that the long-continued dissents of Holmes, Brandeis and others were beginning to bear fruit. For several years, prior to 1930, the majority of the Supreme Court, applying a "jurisprudence of conceptions," invalidated a series of price-fixing statutes on the theory that the business sought to be subjected to

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11 Pound, The Ideal Element in American Judicial Decision, supra n. 6, at p. 148.
23 Hardman, Public Utilities. I. The Quest for a Concept (1931) 37 W. VA. L. Q. 250.
23 As to what has been called a jurisprudence of conceptions and the part that it has played in American judicial decision see, e.g., Pound, op. cit., supra n. 4.
this sort of governmental regulation did not fall in the category of businesses "affected with a public interest," it being thought by a majority of the court that business was either "public" or "private", and whether it was the one or the other depended on whether it would fit into the concept of "publicness". It will be noted that the period covered by these cases was, in the main, one of general prosperity when laissez-faire was in vogue. Soon after the beginning of the present economic depression, however, the ideal of laissez-faire lost much of its favor, it being felt that, within reasonable limits of course, governmental regulation was socially desirable. Largely as a result of this change in ideals, beginning in 1930 with the case of Tagg Brothers & Moorehead v. United States, we have a series of decisions sanctioning price-fixing control. True, there is one Supreme Court case in this period which does not fit into the picture, and that is the famous New State Ice Company case in which it was held (Brandeis and Stone dissenting; Cardozo taking no part in the decision) that the manufacture, sale and distribution of ice in Oklahoma could not be subjected to price-fixing control. But much can be said against the validity of the majority opinion. At any rate the case is far more famous for its dissent than for its decision, the philosophy of the dissenting opinion having since then been adopted, in large part, by the majority of the court.

In the first of the above-mentioned series of price-fixing cases, the United States Supreme Court held that persons buying and selling live stock at a stock-yard on a commission could have their charges subjected to price-fixing control. It is true that the Court did not enunciate any new ideal element. But for that matter courts do not always articulate the precept element

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14 Wolff Packing Co. v. Court of Industrial Relations, 263 U. S. 522, 43 S. Ct. 630 (1923); Tyson & Bro. v. Banton, 273 U. S. 418, 47 S. Ct. 426 (1927); Ribnik v. McBride, 277 U. S. 350, 48 S. Ct. 545 (1928); Williams v. Standard Oil Co., 278 U. S. 235, 49 S. Ct. 115 (1929). In the first of these cases, however, while the court purports to declare such a "theory", there is much in the opinion that sanctions a different theory. This point has been sufficiently discussed in the writer's first article on this question.
17 See particularly Appalachian Coals, Inc. v. U. S., 288 U. S. 344, 53 S. Ct. 471 (1933) and Nebbia v. People of State of New York, supra n. 16, discussed infra in the body of this article.
18 Tagg Bros. & Moorehead v. U. S., supra n. 15.
for which a decision may be cited as a precedent. Also, in the
next case, O'Gorman & Young v. Hartford Fire Insurance Com-
pany, decided the following year, in which it was held that the
commissions of fire insurance agents could be subjected to price-
fixing control, there is no declaration of a new ideal. Moreover,
the ice case, decided the next year, could probably be said to
repudiate any change in ideals, were it not for the fact that, in
the light of the Nebbia case, hereinafter discussed, the ice case
would possibly be decided the other way to-day. The ice case, how-
ever, like the Nebbia case, involves a somewhat different ideal from
that involved in Tagg Brothers & Moorehead v. United States
and in O'Gorman & Young v. Hartford Fire Insurance Company
in that in the ice case it was sought to regulate the business by
requiring, among other things, that persons wishing to engage in
such business should procure a certificate of convenience and
necessity, and by providing that, if the facilities already licensed
were sufficient to meet the public needs, the certificate might be
denied. What is the ideal as to competition in essential services
is, therefore, directly involved. Accordingly it is to the ice case,
particularly to the dissenting opinion in that case, and to other
sources, that we must look for data as to this ideal. A few

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25 See Goodhart, Determining the Ratio Decidendi of a Case (1930) 40
Yale L. J. 161.
26 Supra n. 16.
27 Supra n. 18.
28 See, e.g., Stephenson v. Binford, 287 U. S. 251, 53 S. Ct. 181 (1932); Appalachian Coals, Inc. v. U. S., supra n. 18; Public Service Comm. v. Great
Northern Utilities Co., 289 U. S. 130, 53 S. Ct. 546 (1933); and Nebbia v.
People of State of New York, supra n. 18. In the Nebbia case the Court
says: "The law-making bodies have in the past endeavored to promote free
competition by laws aimed at trusts and monopolies. The consequent inter-
ference with private property and freedom of contract has not availed with
the courts to set these enactments aside as denying due process. Where the
public interest was deemed to require the fixing of minimum prices, that
expedient has been sustained. If the lawmaking body within its sphere of
government concludes that the conditions or practices in an industry make
unrestricted competition an inadequate safeguard of the consumer's inter-
ests, produce waste harmful to the public, threaten ultimately to cut off the
supply of a commodity needed by the public, or portend the destruction of
the industry itself, appropriate statutes passed in an honest effort to cor-
rect the threatened consequences may not be set aside because the regulation
adopted fixes prices reasonably deemed by the Legislature to be fair to those
engaged in the industry and to the consuming public. An this is especially
so where, as here, the economic maladjustment is one of price, which threatens
harm to the producer at one end of the series and the consumer at the other.
The Constitution does not secure to any one liberty to conduct his business
in such fashion as to inflict injury upon the public at large, or upon any
substantial group of the people. Price control, like any other form of reg-
ulation, is unconstitutional only if arbitrary, discriminatory, or demonstrably
irrelevant to the policy the Legislature is free to adopt, and hence an un-
necessary and unwarranted interference with individual liberty."
excerpts from Mr. Justice Brandeis' dissent in the ice case will suffice to indicate the nature of the ideal that was beginning to influence the liberal members of the court:*

"The economic emergencies of the past were incidents of scarcity. In those days it was preeminently the common callings that were the subjects of regulation. The danger then threatening was excessive prices . . . .

"The people of the United States are now confronted with an emergency more serious than war. Misery is widespread, in a time, not of scarcity, but of over-abundance. The long-continued depression has brought unprecedented unemployment, a catastrophic fall in commodity prices and a volume of economic losses which threatens our institutions . . . . Rightly or wrongly, many persons think that one of the major contributing causes has been unbridled competition.** . . . All agree that irregularity in unemployment — the greatest of our evils — cannot be overcome unless production and consumption are more nearly balanced."

Influenced by this ideal and by other "facts", Mr. Justice Brandeis concluded that the legislation in question, one effect of which was to control competition, was constitutional.

It was not, however, until the recent epochal decision in *Nebbia v. New York* that the Supreme Court ceased, for the most part, to camouflage its actions behind a smoke-screen of verbal "conventions". The salient facts in the case were as follows: The Legislature of New York declared the distribution of milk to be affected with a public interest and created an administrative board with power, among other things, to "fix minimum and maximum . . . prices to be charged" by distributors. The Board fixed nine cents as the price to be charged by a store for a quart of milk. The appellant, however, sold two quarts of milk and a five-cent loaf of bread for the price fixed for two quarts of milk, and was convicted for violating the Board's order. It

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This footnote is a collection of materials cited by Mr. Justice Brandeis.

*Supra* n. 18.
was an admitted fact that there was an oversupply of milk in the State of New York and that the milk dealers were engaged in price-cutting competition to such an extent as to threaten to impair the quality of the service to the consumer. Another effect of the price-cutting was found to be that it prevented the producer from receiving a fair price for the milk.

The appellant's major contention was that governmental control of rates or prices is unconstitutional "save as applied to businesses affected with a public interest". In holding this contention untenable, the majority of the court, per Mr. Justice Roberts, said: "We may as well say at once that the dairy industry is not, in the accepted sense of the phrase, a public utility." (Italics ours.)

Thereupon, ignoring "the accepted sense" in which the majority of the court had frequently used such phrases as "public utility" and "affected with a public interest", the court said, among other things:

"There is no closed class or category of businesses affected with a public interest, and the function of courts in the application of the Fifth and Fourteenth Amendments is to determine in each case whether circumstances vindicate the challenged regulation as a reasonable exertion of governmental authority or condemn it as arbitrary or discriminatory . . . . The phrase 'affected with a public interest' can, in the nature of things, mean no more than that an industry, for adequate reason, is subject to control for the public good. In several of the decisions of this court wherein the expressions 'affected with a public interest', and 'clothed with a public use', have been brought forward as the criteria of the validity of price control, it has been admitted that they are not susceptible of definition and form an unsatisfactory test of the constitutionality of legislation directed at business practices or prices. These decisions must rest, finally, upon the basis that the requirements of due process were not met because the laws were found arbitrary in their operation and effect. But there can be no doubt that upon proper occasion and by appropriate measures the state may regulate a business in any of its aspects, including the prices to be charged for the products or commodities it sells."

It should be noted, of course, that, looked at from the orthodox point of view as to the function of a precedent, the Nebbia case

27 At p. 513.
28 At pp. 515, 516.
is a precedent only as to minimum price-fixing control,\textsuperscript{29} whereas the normal price-fixing control exercised over so-called public utilities is as to maximum prices, that being the only kind of price control exercised at common law. But any distinction in this regard between maximum and minimum price regulation, must be based, it would seem, on the theory that legislative price-fixing control, maximum price-fixing control at any rate, can be constitutionally exercised only in regard to businesses or business activities that are, as the phrase goes, "affected with a public interest". The chief significance of the decision in the \textit{Nebbia} case, however, lies in the fact that it clearly disavows any such distinction, thereby in effect adopting the liberal views advocated by Mr. Justice Brandeis and others in their dissenting opinions in \textit{Tyson & Brother v. Banton},\textsuperscript{30} \textit{Ribnik v. McBride},\textsuperscript{31} and \textit{New State Ice Company v. Liebmann}.\textsuperscript{32} In \textit{Tagg Brothers & Moorehead v. United States}\textsuperscript{33} and \textit{O'Gorman & Young v. Hartford Fire Insurance Company},\textsuperscript{34} discussed \textit{supra}, while the court reached a liberal result in each case, the opinions, particularly in the first case, do not fully disclose the elements that influenced the court. Thus, in the \textit{Nebbia} case, the United States Supreme Court has for the first time come out openly in favor of the proposition that there is no business inherently "private" in the sense that the government cannot, under appropriate circumstances and by appropriate means, exercise price-fixing control over it. As the court puts it: \textquote{\"The private character of a business does not necessarily remove it from the regulation of charges or prices.\"} And again: \textquote{\"Neither property rights nor contract rights are absolute . . . . Subject only to constitutional restraint the private right must yield to public need.\"} Consequently, in case the public good,\textsuperscript{1}

\textsuperscript{29} It is generally said that unless the legal rule or other doctrine set forth in the opinion is necessary for the decision of the particular case it is \textit{obiter dictum} and not to be considered as authoritative in later cases. Professor Morgan expresses the orthodox view as follows: "Those portions of the opinion setting forth the rules of law applied by the court, the application of which was required for the determination of the issues presented, are to be considered as decision and as primary authority in later cases in the same jurisdiction." MORGAN, INTRODUCTION TO THE STUDY OF LAW (1926) 109. Hence, strictly speaking, the \textit{Nebbia} case is a precedent only as to minimum price regulation.

\textsuperscript{30} \textit{Supra} n. 14.

\textsuperscript{31} \textit{Supra} n. 14.

\textsuperscript{32} \textit{Supra} n. 17.

\textsuperscript{33} \textit{Supra} n. 15.

\textsuperscript{34} \textit{Supra} n. 16.

\textsuperscript{1} \textit{Nebbia} v. People of State of New York, \textit{supra} n. 16, at p. 515.

\textsuperscript{20} At p. 510.
i.e., the public or social interest to be subserved by a challenged price-fixing regulation is sufficiently strong to outweigh any conflicting individual interest, the regulation may be upheld pro bono publico. To put it another way, the decision seems to stand for the proposition that there is no difference, legally speaking, between the kind of control that is exercised over so-called businesses affected with a public interest and the control exercised over so-called private businesses. It is all a question of degree, all businesses, all activities, whether "public" or "private" being subject to price-fixing control to the extent that the public good, in the light of accepted ideals, demands. Mr. Justice Holmes expressed it in his inimitable way in his dissenting opinion in Tyson & Brother v. Banton, in which the learned justice said\textsuperscript{7} that the conception of a business affected with "a public interest . . . . is little more than a fiction intended to beautify what is disagreeable to the sufferers. The truth seems to me to be that, subject to compensation when compensation is due, the legislature may forbid or restrict any business when it has a sufficient force of public opinion behind it."

The question therefore arises, what, if any, is the authoritative element which may be deduced from the Nebbia case? In attempting to answer this question one should bear in mind Dean Pound's observation that the common law is "essentially a mode of judicial and juristic thinking, a mode of treating legal problems rather than a fixed body of definite rules [precepts]."\textsuperscript{8} That observation applies with particular force to due process cases, such as the Nebbia case. Indeed, as Mr. Justice Holmes, speaking of such cases, once remarked:\textsuperscript{9} "General propositions do not decide concrete cases. The decision will depend on a judgment or intuition more subtle than any articulate major premise." At any rate, it seems quite clear from the language of the court in the Nebbia case that there is no "general proposition" — no "legal precept" (rule, principle, standard or conception) — which will determine whether, or to what extent, a given business or business activity is subject to price-fixing control or other governmental regulation. We can, of course, discover a mode of judicial thinking, a mode of treating legal problems, a judicial technique, which will serve at least as a partial

\textsuperscript{7} Tyson & Bro. v. Banton, supra n. 14, at p. 446.
\textsuperscript{8} Pound, The Spirit of the Common Law (1921) 1.
basis for a prophecy of "what the courts will do in fact" in analogous cases. Can we, in addition, find on the lines, or between the lines, or otherwise, any authoritative ideal element upon which we can, with an approach to reasonable assurance, base such a prophecy?

As everyone knows, though it can rarely be proved through the language technique of the courts, our judges were for years consciously or unconsciously swayed by the politico-economic ideal of "laissez-faire," and the related ideal that competition is the life of trade — a phenomenon which finds partial expression in the maxim, ex facto jus oritur. In his famous dissent in New State Ice Company v. Liebmann, Mr. Justice Brandeis, sensing that in this regard new social and economic facts were demanding recognition — that we are to-day giving way to new ideals — has, as we have seen, argued in effect that the way out of our present social and economic trouble lies not through laissez-faire and unregulated competition, but through recognition of the new ideals that are clamoring for expression — the ideal, among others, of what we may call regulated competition, it being felt that under existing social and economic conditions (whether one calls them "emergency" or what-not), competition, if destructive, in the long run, of essential services, is not a public good. Since the ice case the ideal espoused by Brandeis, concurred in by Mr. Justice Stone, has been gaining greater and greater force, both in the minds of the man in the street and in the minds of many on the bench, the Supreme Court having several times within recent months sanctioned a policy against anti-social competition, i.e., competition which if permitted would inflict a sacrifice of public or social interests that outweigh the individual interests involved. Quaere, then, in the light of these cases, including the principal case, can we assert, for the time being at least, that it is an accepted ideal, that it is an authoritative "legal" premise for future judicial and juristic reasoning? Certainly any "prophecy of

\[\text{See, e.g., Charleston Gas Co. v. Kanawha Gas Co., 58 W. Va. 22, 50 S. E. 876 (1905). But see Reynolds Taxi Co. v. Hudson, 103 W. Va. 173, 136 S. E. 333 (1927); and Monongahela West Penn Public Service Co. et al. v. State Road Comm., et al., 104 W. Va. 183, 139 S. E. 744 (1927). See also the quotation, supra n. 23, from the Nebbia case.}\]

\[\text{See the cases cited supra n. 23. See, discussing some earlier cases in point, Hardman, The Changing Law of Competition in Public Service (1927) 33 W. Va. L. Q. 219 and (1928) 34 id. 123.}\]
what the courts will do in fact” in this class of cases must be based in part on such ideal.

It will doubtless be objected by many, and it must be admitted with much force, that such a rationale of the Nebbia case is entirely too nebulous to be set forth as a “legal” major premise. Admittedly, it cannot be expressed in the form of a precept. But difficulty in isolating and articulating an authoritative legal element will not justify ignoring it. Nor is it a tenable objection that the recognition of such an ideal would make the law unpredictable to a degree; for, even in those classes of cases in which courts rely mainly on legal precepts, frequently one cannot predict with assurance as to what the courts will do in fact. If the science of law is to be realistic and progressive, it must take account not only of all precept elements that influence courts in deciding cases, not only of the technique of the courts in using these elements, but also, among other things, of any authoritative ideal, however tenuous or inarticulate, that plays a predictable part in the judicial process."

43 And this is not necessarily a vice. The utmost predictability, consistent with securing the most important interests involved, is desirable of course. But complete predictability and legal progress are incompatibles.