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LEGISLATION

MILK REGULATION: A PROBLEM IN ECONOMICS, LEGISLATION, AND ADMINISTRATION

The *Nebbia* case\(^1\) has focused attention upon the legislative and administrative difficulties attendant upon an economic crisis in the milk industry. Producers, distributors, and consumers have sought legal sanctions in an endeavor to protect their economic security and advantage. The producer found that the distributor's competition in the face of excessive production was unavailing, and so he was forced by his antagonist to accept a price for his commodity far below the cost of production.\(^2\) During this struggle the consumer has enjoyed a part of the distributor's spoils, and has been heard to complain only when the producer has sought to correct his economic wrongs by strikes and violence. The problem was most acute in metropolitan areas where the concentration of population placed the distributor in an even greater position of advantage. Regulation was imminent, and in many states legislative committees as early as 1929 sought a remedy. It was soon apparent that the source of the difficulty was the overproduction of milk.\(^3\) A portion of the surplus was purchased by large distributors in order to meet variations in consumer demands. This overplus of milk is technically known as "reserve milk"\(^4\); which the large distributor purchased at "fluid milk"\(^5\) prices. Small distributors with small reserve requirements purchased milk at a mean between fluid and surplus prices and thus undersold their larger competitors, with all the attendant in-

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\(^1\) *Nebbia v. New York*, — U. S. —, 54 S. Ct. 505 (decided March 5, 1934).


\(^3\) Ibid.

\(^4\) "Reserve milk may be defined as an amount of milk with which dealers must provide themselves in order to meet the needs brought about by sudden variations in production and consumption, and amounts of which cannot be predicted. Surplus milk (more properly termed market surplus) may be defined as that amount which is sold as manufactured milk during each month. Surplus milk will thus include that amount of the reserve milk which is turned into manufactured use." *An Economic Study of the Milwaukee Milk Market, Wisconsin Research Bulletin* 113 (1932), pp. 18-19.

\(^5\) By this term is meant the wholesale prices paid the producer for milk to be sold only for fluid consumption, as distinguished from milk going into manufactured by-products, such as butter, condensed milk, etc., which commands a lower price. *Erdman, The Marketing of Whole Milk* (1921) 194.
evidences of price-cutting. As usual, the loss was shifted to the producer. In some localities the importation of milk from adjacent territories lent aid to the further destruction of the price structure. Producers and distributors organized into bar-gaining groups; but the strength of the distributor's bargaining power was so overwhelming, that even though the producer operated at a loss, the distributor still received normal or even excessive profit. The key position of the distributor permitted him to determine his own cost, and to include excessive operating overhead both of his own organization and of many holding companies. Although there was a disproportionate ratio between distributors and consumers, each distributor demanded an excessive margin of profit. Producers saw their taxes go unpaid, and their buying power shrink to negligible proportion. Their protests, illuminated by violent strikes, reverberated throughout the nation. The need for regulation was apparent. Legislative committees were appointed, and experimental legislation was provided in an effort to control this situation. Health authorities in some localities cleverly refused to inspect "foreign milk" in order to prevent

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6 Supra n. 2, at 16.
7 KING, THE PRICE OF MILK (1920) 85.
8 In a recent study made in Wisconsin, it was found that while the profits of the dairy distributors over this period had been maintained at former levels, profits in other industries had been downward with but few exceptions. In the same period, the prices paid to Wisconsin farmers for their product decreased considerably more than the prices of commodities which the farmers bought. The dairy companies, i.e., the distributors, which were investigated, showed substantial profits during the years of the depression, 1930, 1931, and a few months of 1932. Some Facts Regarding Profits of the Distribution of Milk, WISCONSIN DEPARTMENT OF AGRICULTURE AND MARKETS (1932) 3. Cf. Munn v. Illinois, 94 U. S. 113, 24 L. Ed. 77 (1886); Stafford v. Wallace, 255 U. S. 405, 42 S. Ct. 397 (1922); Packers and Stockyards Act (1921) (49 Stat. at L. 159, Ch. 64 U. S. C. Title 7, §§ 181); Minnesota v. Blasius, ___ U. S. ___ , 54 S. Ct. 34, 78 L. Ed. 19 (1933).
9 "One of the worst features connected with the history of the dairy companies during the past few years is the result of mergers and consolidations which have been taking place in the dairy industry. It was argued in 1929 and 1930 when these mergers and consolidations occurred that they would effect economies with benefits to producers and consumers. The actual facts as revealed by the department's investigations show clearly that those who really were benefited were the operators and the stockholders." Further, "it appears also that while the combined incomes of operators, officers, executives and stockholders of other industries have been declining, the combined salaries and incomes of operators, officers, executives and stockholders of the dairy distributing companies have been definitely on the increase during the years 1929, 1930, and 1931. Thus, in spite of the fact that general business conditions have been consistently getting worse and that milk prices for these years have been among the lowest on record, the dairy companies found it possible to maintain profits and receive increased incomes." Ibid. p. 2. See also REPORT OF THE JOINT LEGISLATIVE COMMITTEE TO INVESTIGATE THE MILK INDUSTRY, New York (1933) at pp. 20, 22.
10 Supra n. 2, at p. 13.
the flow of milk from adjacent territories at lower prices. Legislation empowering state milk control boards was the next step. Even the federal government through the Agricultural Adjustment Act thought it necessary to lend assistance to the industry. After these economic and legislative beginnings, the regulation of the industry has come to the courts for their review. The decision in the Nebbia case marks the initial judicial sanction of minimum price regulation in the milk industry. Constrained by the narrowness of the contested administrative order, the decision of the United States Supreme Court is also narrow. The order pertained only to the fixing of a minimum price for milk after it had left the control of the producer. Price regulation placed two constitutional hurdles in the path of the validity of the legislation. The first, "equal protection of the law", was passed lightly and easily. The board's order, allowing a differential of one cent per quart between distributors' and store-keepers' retail price was declared a reasonable classification. The second, a more difficult obstacle, was "due process". To surmount this, it was necessary

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21 Ruth L. Cohen, A Survey of Milk Marketing Scheme and Price Policies (1933), UNIVERSITY OF CAMBRIDGE DEPARTMENT OF AGRICULTURE, REPORT No. 20, p. 26. A similar device was attempted in West Virginia. Guyan Creamery v. Board of Health (federal district court, Huntington), In the process of adjudication, this matter was dismissed.

22 The following statutes have been enacted: California, Sen Bill No. 1218, Chap. 1029 (1933); Assembly Bill No. 829, Chap. 384 (1933); Assembly Bill No. 1981, Chap. 488 (1933); Connecticut, §4 of Chap. 226 Public Acts of 1933; Florida, Joint Com. Substitute for Senate Bill No. 786 (1933); New Jersey, Chap. 169 Law of 1933; New York, House Bill No. 1204, Chap. 296 (1933); Ohio, House Bill No. 671 (1933); Oregon, (S. B. 44) (1933); Penna., Act of General Assembly No. 37 (1934); Vermont, No. 8 (H.2.) (1933); Wisconsin, No. 235, A. (1933).

23 The relation between federal and state regulation over the same subject matter is interesting from the standpoint of the conflict of authority. Federal regulation of interstate milk business may be a necessary adjunct to a well-rounded intrastate regulation. California, by statute, supra n. 12, to accomplish this result, accepted the standards prescribed by the administrative devices set up under the Federal Agricultural Adjustment Act.

24 This was especially emphasized in the course of the dissenting opinion rendered by McReynolds, J., who pointed out that there is no relation between the fixation of retail prices and the enhancement of the producer's profit. The distributor was still warranted in paying the producer any price, in spite of the fact that the minimum retail price was regulated to the consumer.

25 But if it were shown that the appellant is compelled to buy from a distributor, the difference in the retail price he is required to charge his customers, from that prescribed for sales by distributors is not on its face arbitrary or unreasonable, for there are obvious distinctions between the two sorts of merchants which may well justify a difference of treatment, if the legislature possesses the power to control the prices to be charged for fluid milk." Nebbia v. New York, supra n. 1, 54 S. Ct. 505, 509.
to sustain legislative competence to regulate price.\textsuperscript{26} By a brave 
leap, the majority discarded the empty concept of "business 
affected with a public interest" as the test of price regulation, 
for an enlarged concept of the police power.\textsuperscript{27} Apparently, 
"price" will now be included with other police power regulation 
when its control is vital to the status of a large economic class or 
of society itself.\textsuperscript{28} Due process remains only to insist that the 
regulation "shall not be unreasonable or arbitrary", and that the 
means shall be related to the ends. Once this is ascertained, the

\textsuperscript{26} For a general discussion of the historical and analytical aspect of the 
problem of the regulation of price see: Hamilton, \textit{Affectation with Public 
Interest} (1930) 39 \textit{Yale L. J.} 1089; McAllister, \textit{Business Affecting with a 
Public Interest} (1930) 43 \textit{Harv. L. Rev.} 769; Merrill, \textit{The New Judicial 
Approach to Due Process and Price Fixing} (1929) 18 \textit{Ky. L. J.} 3; Alton, 
\textit{Early American Price-Fixing Legislation} (1926) 25 \textit{Mich. L. Rev.} 15; Keezer, 
The "Public Interest"\textsuperscript{2} Doctrine (1927) 25 \textit{Mich. L. Rev.} 596, 603; Keenan, 
\textit{Legislative Price Control} (1929) 7 \textit{Tenn. L. Rev.} 193; Howard, \textit{Supreme 
Court and State Action Under the Fourteenth Amendment, 1931-1932} (1933) 
81 U. of Pa. L. Rev. 505; Finkelstein, \textit{From Monopoly to Tycoon v. 
Hanton} (1927) 27 \textit{Col. L. Rev.} 769; Manley, \textit{Constitutionality of Regulating 
Milk as a Public Utility} (1933) 18 Conn. L. Q. 410. As to New York particu- 
larly, a regulative measure has been upheld which declared an emergency 
in the coal industry, and allowed the control of supply and price. — People 
v. Moynihan, 181 Misc. Rep. 34, 200 N. Y. Supp. 434 (1923); and a recent 
statute making the charge of employment agencies contingent upon their 
success in obtaining employment for applicants, was upheld as a reasonable 
regulation. — \textit{National Employment Exchange v. Gerharty, 60 F.} (2d) 918 
(1932). Milk as a particular commodity has been subject to the spreading 
growth of price regulation. In Winnipeg, Canada, the Public Utility Board 
not only controls the price of milk to producers, distributors, and consumers, 
but also controls the supply. It is interesting to note that this same board 
controls, among other things, power, water, light, traction and municipal 
finance. As far back as 1917, the United States Food Administration re- 
quired the licensing of importers, manufacturers, stores, and distributors of 
milk and milk products. After the war, federal milk commissions were set 
up as arbitration boards, settling the strife between producers and dealers. 
Although the commission possessed no direct power to fix the price of milk, 
nevertheless, assuming the part of mediator carried with it some power of 
control.

\textsuperscript{27} Note the similarity in the approach of Brandeis, J., in his dissent in 
"... whatever the nature of the business, whatever scope or character of 
the regulation applied, the source of the power invoked is the same, and 
likewise the constitutional limitation upon that power. The source is the 
police power. The notion of a distinct category of business 'affected with a 
public interest', employing property 'devoted to a public use' rests upon 
historical error." It is to be noted that the term 'police power', just as 
the shibboleth 'business affected with a public interest', is also a variable, 
and serves only as a conclusion, and not as a logical tool to determine a 
certain course of action. See Felix Cohen, \textit{Ethical Basis of Legal Criticism} (1932) 
41 \textit{Yale L. J.} 215: "The periodic attempts of students of the common law 
to put forward logical formulae for discovering the 'rule of the case' all 
betray an elementary ignorance of the logical fact that no particular pro- 
position can imply a general proposition".

\textsuperscript{28} A similar point of view is suggested by the dissenting opinion of Stone, 
court will maintain a *laissez-faire* attitude toward judicial review.

The *Nebbia* case, sanctioning a single order under the New York Milk Control Act, emphasizes this narrowness. The decision does not pass upon the problem of maximum price. No regulation has been provided to protect the consumer or the producer.\(^\text{19}\) As large distributors eliminate their competitors, retail milk price will advance. At that moment, maximum retail price regulation will be necessary. As yet, no legislative or administrative preventives have been devised. Likewise the nucleus of the problem, overproduction, goes unregulated. No certificates of convenience and necessity such as were proposed in the *Liebmann* case have been provided. Production control will long remain the major source of difficulty.

All of the present regulations purport to be temporary, — existing only so long as an emergency exists, and purporting to terminate for the most part, in 1935. But the majority's opinion in the *Nebbia* case with its surprising lack of emphasis upon the emergency aspect of the legislation, and the distributor demand for a continuation of the legislation, may provide impetus for the prolongation of the life of milk regulation.\(^\text{20}\)

The growth, indeed, the existence, of milk regulation generally will depend upon the far-sighted and sympathetic administration of the law by administrative boards and commissions that can gain the confidence of judicial tribunals. The infancy of milk regulation happily coincides with a public opinion conscious of and sympathetic to cooperation in business and by business with government. And thus upon its administration depends the life of the legislation which, viewed in its entirety, goes breathlessly beyond the frontier of *Munn v. Illinois*.\(^\text{21}\) The act envisages governmental regulation of the competition between two groups heretofore unequal in bargaining power. As the court intervened to strengthen the bargaining power of railway employees,\(^\text{22}\) this act attempts to raise the status of the empowered

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\(^{19}\) Cf. Armstrong Report, New York Insurance Investigation (1906); Canadian Royal Commission on Life Insurance (1904); Wisconsin, Report of Joint Commission on Life Insurance Company (1906).

\(^{20}\) Permanence of the New York Milk Control Act has already been demanded by the distributor group, against the protests of the producers. *N. Y. Times*, March 24, 1934, at 8, col. 2.

\(^{21}\) 24 U. S. 113, 24 L. Ed. 77 (1886).

producer, who has no actual freedom of contract,\textsuperscript{22} and who has been the prey of powerful distributors' organizations. If machinery is devised to protect the interests of the producer, the distributor, and the consumer, it is likely that the judiciary will have confidence both in the legislation and its administration.\textsuperscript{21} Toward this end, adequate judicial review will be of great assistance,\textsuperscript{25} although as in the case of the Interstate Commerce Commission, the fairness and thoroughness of the administrative determination will be the greatest factor in creating confidence in the process.\textsuperscript{26} It is within the power of those charged with the administration of milk control regulation to extend the usefulness of the beginnings made in the Nebbia case or to condemn that decision to undeserved obscurity.\textsuperscript{27}

—Julius Cohen.

\textsuperscript{22} "The opinion came to prevail that every man could protect himself through his right to contract, that the aggregate of terms of a multitude of bargains gave order to business activity, and that the industrial functions were best performed by being left to interested parties." The philosophers laid alternative foundations in natural rights and utilitarianism; the economists constructed theory of a self-regulating industrial order and political thinkers formulated the practical philosophy of laissez-faire.'" Hamilton, Freedom of Contract (1931) Enyc. of Social Sciences, vol. 6, p. 450. But see, Cohen, Legal Theories and Social Science (1916), Report of the New York State Bar Ass'n, vol. 38, 198: "To speak of a laborer making free his contract with a railway company, or an organization like the United States Steel Corporation is to do violence to facts well-known to every man on the street. Laborers make no free contracts under these circumstances. They obtain jobs on terms prescribed by the companies.'"

\textsuperscript{23} To obtain effective control the machinery must be coordinated, i. e., there must not be a conflict between such administrative devices as health regulation and taxation, as they directly or indirectly affect the price of milk.

\textsuperscript{24} For difficulties involved in judicial review of administrative orders in West Virginia, see Hodges v. Public Service Commission, 110 W. Va. 649, 159 S. E. 834 (1931), and Danielley, et al. v. City of Princeton, 167 S. E. 620 (W. Va. 1933).


\textsuperscript{26} Morris R. Cohen, Property and Sovereignty, (1927) 13 Corn. L. Q. 8, 27: "Certain things have to be done in a community, and the question whether they should be left to private enterprise, dominated by the profit motive, or to the government dominated by political considerations, is not a question of man versus the state, but simply a question of which organization and motive can best do the work.'"