Regulation of Business Enterprises: Price Controls

In examining whether the Due Process Clause allows the regulation of business prices, the Supreme Court, almost from the inception of the Fourteenth Amendment, has devoted itself to the examination of two questions: (1) whether the clause restricted such regulation to certain types of business, and (2) the nature of the regulation allowed as to those businesses.

Types of Businesses That May be Regulated.—For a brief interval following the ratification of the Fourteenth Amendment, the Supreme Court found the Due Process Clause to impose no substantive restraint on the power of states to fix rates chargeable by any industry. Thus, in *Munn v. Illinois*,[139] the first of the "*Granger Cases*," maximum charges established by a state for Chicago grain elevator companies were challenged, not as being confiscatory in character, but rather as a regulation beyond the power of any state agency to impose.[140] The Court, in an opinion that was largely *dictum*, declared that the Due Process Clause did not operate as a safeguard against oppressive rates, and that, if regulation was permissible, the severity of it was within legislative discretion and could be ameliorated only by resort to the polls. Not much time elapsed, however, before the Court effected a complete withdrawal from this position, and by 1890[141] it had fully converted the Due Process Clause into a restriction on the power of state agencies to impose rates that, in a judge's estimation, were arbitrary or unreasonable. This state of affairs continued for more than fifty years.

Prior to 1934, unless a business was "affected with a public interest," control of its prices, rates, or conditions of service was viewed as an unconstitutional deprivation of liberty and property without due process of law. During the period of its application, however, the phrase, "business affected with a public interest," never acquired any precise meaning, and as a consequence lawyers were never able to identify all those qualities or attributes that invariably distinguished a business so affected from one not so affected. The most coherent effort by the Court was the following classification prepared by Chief Justice Taft:[142] "(1) Those [businesses] which are carried on under the authority of a public grant of privileges which

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[139] 94 U.S. 113 (1877). *See also* Davidson v. New Orleans, 96 U.S. 97 (1878); Peik v. Chicago & N.W. Ry., 94 U.S. 164 (1877);

[140] The Court not only asserted that governmental regulation of rates charged by public utilities and allied businesses was within the states' police power, but added that the determination of such rates by a legislature was conclusive and not subject to judicial review or revision.

[141] Chicago, M. & St. P. Ry. v. Minnesota, 134 U.S. 418 (1890).

[142] Wolff Packing Co. v. Industrial Court, 262 U.S. 522, 535–36 (1923) (citations omitted).