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Supreme Court in Nebbia: "An Ominous Fork in the Road"

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The immense pressures inflicted on the United States by the Great Depression of the 1930s forced the Supreme Court on several occasions to confront the scope of a state's police power to regulate economic activity in the name of the general welfare.

In the landmark case of *Nebbia v. New York* (1934), the Court, in a sharply divided 5-4 decision, saved the American dairy industry when it upheld the state's milk-control law that created a board to establish minimum retail prices.

The dairy industry, like the rest of the agricultural sector, was in crisis. In Wisconsin, dairy farmers had dumped milk in the streets rather than selling it for less than the cost of production. The New York assembly, fearing a similar reaction, which would lead to the collapse of the dairy market and widespread chaos, empowered a board to set reasonable prices—nine cents a quart, as it happened.

The state fined a Rochester grocer, Leon Nebbia, five dollars for undercutting the market when he sold two quarts of milk and a loaf of bread for eighteen cents. The state courts upheld his conviction under the milk-control act, and Nebbia, who said he had intentionally violated the statute as a test of his "liberty" under the 14th Amendment Due Process Clause, appealed to the U.S. Supreme Court.

The Court faced what Arthur Krock, the legendary columnist for the New York Times, called an "ominous fork in the road." The Justices might strike down the law as a violation of Nebbia's property rights under the 14th Amendment and thus promote the principle of laissez-faire, but such a decision would likely destroy the dairy industry as desperate farmers either dumped their milk or sold it for mere pennies. Or the Court could uphold the milk-control statute as a reasonable exercise of the state's police power, perhaps following the precedent in *Munn v. Illinois* (1873), which empowered a state to regulate a business "affected with a public interest," with the aim of saving the industry.

Justice Owen Roberts, who had previously embraced the "public interest" test, wrote the opinion for the Court in *Nebbia* and proceeded to obliterate it. Roberts, it has been said, agonized over the prospect of abandoning the "public interest" standard so soon after upholding it, and paced the floor late into the night, before deciding that it was too restrictive. Roberts's opinion broadened the police power to make it equal to the needs of the general welfare. Roberts stated, "Neither property rights nor contract rights are absolute." The Constitution, moreover, "does not secure to any one liberty to conduct his business in such fashion as to inflict injury upon the public at large."

Nebbia exposed a deep chasm within the Court. The five-man majority, led by Justice Roberts, did not believe the Justices should consider the wisdom of the milk-control act. "With the wisdom of the policy adopted," Roberts wrote, "with the adequacy or the practicability of the law enacted to forward it, the courts are both incompetent and unauthorized to deal." This position reflected the Court's historical tradition, one greatly influenced by Chief Justice John Marshall who, in *McCulloch v. Maryland* (1819), wrote

that "the relative wisdom of a measure" is beyond the Court's inquiry.

Justice James McReynolds, who wrote for the four dissenters, disagreed. "I think," he observed, "this Court must have regard to the wisdom of the enactment." That is, the Court, under the 14th Amendment, must act as a super-legislature. In McReynolds' view, Nebbia enjoyed a fundamental right to set his own price, a right that could not be curbed by the state's police power. "Facile disregard of the Constitution," he wrote, "will inevitably lead to its destruction."

Justice Roberts transformed the Court's attitude toward the legality of price regulation by eliminating the category of a "business affected with a public interest," upon which price-fixing had been grounded. As Justice Felix Frankfurter observed, "Roberts had written the epitaph on the misconception, which had gained respect through repetition, that legislative price-fixing as such was at least presumptively unconstitutional." In the days since Nebbia, price-regulation would be upheld when the Court found a reasonable relationship between it and the social interests that may be vindicated by the exercise of the police power.