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CONSTITUTIONAL LAW - REGULATION OF SMALL BUSINESS

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COMMENTS

CONSTITUTIONAL LAW — REGULATION OF SMALL BUSINESS — Ever since the development of the guild system the small tradesman or shopkeeper has attempted in various ways to reduce the number of his competitors. The time-honored method, in theory at least, has been to give better service for less money. The more modern method is to select a delegation from the trade itself whose duty it will be to proceed to the state capitol, there to urge the passage of "protective legislation." As a result, legislators have found themselves beseiged

by lobbyists who show altruistic concern for the health, safety, and welfare of the general public. Strangely enough, the lawmakers are told that the public can be adequately protected only by legislation which in turn protects this particular lobbyist's trade or occupation. In those instances where these small pressure groups have succeeded, the protection afforded invariably takes the form of a state board or commission with power to exclude newcomers from entering the field.

The purpose of this comment is to examine the attitude of state courts toward such legislation and especially to inquire whether the trend toward this type of petty bureauracy is being curbed by the judiciary. Minimum attention will be given to laws which are solely regulatory, nor will supervision incident only to revenue purposes be considered. The subject may be presented most conveniently by a consideration, first, of the type of factual situation involved in recent legislation and litigation, and secondly, of the constitutional basis upon which such laws are held valid or invalid by the courts.

I.

Typical of the laws enacted under the circumstances described above was the bill passed by the Maryland legislature in 1935 regulating paper hangers in Baltimore City.[1] It created a five-man board with power to adopt rules and regulations for the examination of paper hangers and to issue licenses after application, examination and payment of fees. Authority was also given the board to revoke licenses for any violation of the act or "for any other cause" which it might "deem sufficient." The purpose apparently was to create a monopoly by restricting the number of persons who could enter the paper hanging business. Challenging the act on the ground that it violated the due process clause of the Maryland[2] and federal[3] constitutions, its opponents carried the case to the Maryland Supreme Court.[4] The court declared the restrictions of the act arbitrary and unreasonable in these forceful terms:

> "there is no possible justification for the regulation of the paper hanger's trade or vocation, on the ground that such regulation is necessary to the protection of the public health or safety, any more than there would be for regulating the business of a carpenter or a bricklayer, or any other harmless and useful calling. It would, indeed, be impossible to imagine any occupation, no matter

[1] Md. Acts (1935), c. 377.

[2] Md. Declaration of Rights, art. 23.

[3] United States Constitution, Fourteenth Amendment.

[4] Dasch v. Jackson, 170 Md. 251, 183 A. 534 (1936); see note in 84 UNIV. PA. L. REV. 1024 (1936).

how harmless or common, which is not attended by some danger. The prick of a needle, the scratch of a pin, a bit of ice on the sidewalk, a misplaced chair, contact with some common electrical appliance, may cause suffering or death, but such perils are too remote, and their causes so much a part of everyday life that if they afforded a basis for regulating the activities of men, the promise of the right to liberty and the pursuit of happiness held out by the Constitution would be an ironical mockery. There must of necessity be somewhere a limit to the right of the state to regulate the common useful and harmless activities of life, beyond which the state may not go without destroying those guarantees, and this statute has passed that limit."[5]

The photographers of North Carolina, however, were more successful. In *State v. Lawrence*[6] the state supreme court upheld an act[7] establishing a state board of photographic examiners with power to examine those desiring to practice photography and to license those who, after payment of fees, should meet the standards established by the board. Proof was required even as to the moral character of the applicant. This act was likewise challenged as violative of due process, but the majority of the North Carolina court, in upholding the act, declared that the legislature was the proper body to determine the instances in which regulation of a business was in the public interest, and that if the act contained proper standards of classification and was not arbitrary, due process was accorded. In answering the argument that the provision in the bill requiring licenses to be issued "to any one who shall qualify as to competency, ability, and integrity" was an unlawful delegation of legislative authority to the board, the court simply said, "These are laudable standards. They are not too vague and indefinite."[8] Interesting, however, was the dissenting opinion of two justices, which revealed that at least a part of the court realized the danger involved in such legislation. The principal objection to laws of this character was expressed in these words by Justice Barnhill:

"The power to exclude men from the ordinary and usual trades and callings common to all communities is the power to deprive men of the right to earn an honest livelihood. . . . This is essentially class legislation put forward by a particular group of tradesmen to the end that those now within the trade may limit newcomers seeking to enter the field of their livelihood. . . . the

[5] Id., 170 Md. 251 at 269.
[6] 213 N. C. 674, 197 S. E. 586 (1938).
[7] N. C. Code (1935), § 7007.
[8] State v. Lawrence, 213 N. C. 674 at 680, 197 S. E. 586 (1938).

established photographers will be given a virtual monopoly of the trade and with it such incidentals as the power to control prices and the character of their services. The 'social interest' which this law would tend to protect is a very general one, so evanescent in its characteristics as to belong in the realm of metaphysics and psychic phenomena."[9]

This forceful dissent was cited with approval in *Bramley v. State*[10] by a Georgia court which refused to uphold an almost exact copy of the North Carolina Photographers Act. The limits to which such legislation may go is exemplified by article IV, section 10(b), of the Georgia act,[11] which provided that when making application for a license all photographers should submit a certificate from the board of health showing a negative Wasserman test. In a unanimous opinion the court declared the act unconstitutional as an unwarranted exercise of the state police power. To the contention that the statute was needed to protect the public against fraud the court replied that the average person has a certain capacity for discovering fraud and avoiding injury in business transactions, and, in addition, that the already existent remedies for fraud and misrepresentation afforded adequate relief.[12] Cited by the court was the case of *Territory v. Kraft*[13] wherein the photographers of Hawaii were defeated in a similar attempt to create a monopoly.

Encouraged, perhaps, by the success of the North Carolina photographers, the dry cleaners, dyers and pressers of that state secured in 1937 the passage of legislation designed to protect their trade.[14] The main features of the act followed a familiar pattern: a board consisting of five members, three of whom were selected from the trade itself, with unlimited power and discretion to make its own rules and regulations and to set its own standards as to who should be entitled to a license and thus admitted to the inner circle. Characteristic of this type of statute was the absence of any supervision or control over the activities of the board by any responsible branch of the government. No provision for audit was made except in those instances where items incidentally affected the state treasury. In other words, while the board was a creature of the legislature, customary parental authority ceased

[9] Id., 213 N. C. at 683, 684.

[10] 187 Ga. 826, 2 S. E. (2d) 647 (1939); see note in 2 GA. B. J. No. 2, p. 41 (1939).

[11] Ga. Laws (1937), p. 287.

[12] Bramley v. State, 187 Ga. 826, 2 S. E. (2d) 647 (1939).

[13] 33 Hawaii 397 (1935).

[14] N. C. Pub. Laws (1937), c. 30, as amended by N. C. Pub. Laws (1939), c. 337.

immediately after birth. Despite its decision in *State v. Lawrence*[15] the Supreme Court of North Carolina in a unanimous opinion[16] declared the act violative of the due process and anti-monopoly clauses of the North Carolina Constitution. Thus the state which had apparently left the door open for this type of protective class legislation has now repented and fallen in line with those courts declaring it to be man's right to earn a livelihood free from legislative restrictions unrelated in any substantial way to the public welfare.

While the cases just considered represent the most recent opinions and aptly illustrate the problems involved, it should be noticed that they by no means exhaust the decisions in this field. Various state courts have held invalid similar licensing statutes, including those affecting the rights of horseshoers,[17] private surveyors,[18] accountants,[19] plumbers,[20] real estate brokers and salesmen,[21] beauty culturists,[22] undertakers,[23] insurance brokers,[24] barbers,[25] cleaners, dyers, and pressers,[26] wholesale dealers in farm produce,[27] and electricians.[28]

2.

The constitutional issues raised by the legislation described in the foregoing section are many and complex. Certain it is that the problem is not merely one of regulation,[29] nor is it one of licensing for

[15] 213 N. C. 674, 197 S. E. 586 (1938).

[16] State v. Harris, 216 N. C. 746, 6 S. E. (2d) 854 (1940).

[17] Bessette v. People, 193 Ill. 334, 62 N. E. 215 (1901); People v. Beattie, 96 App. Div. 383, 89 N. Y. S. 193 (1904); In re Aubrey, 36 Wash. 308, 78 P. 900 (1904).

[18] Doe v. Jones, 327 Ill. 387, 158 N. E. 703 (1927).

[19] Frazer v. Shelton, 320 Ill. 253, 150 N. E. 696 (1926); annotation, 43 A. L. R. 1086 at 1095 (1926).

[20] Replogle v. City of Little Rock, 166 Ark. 617, 267 S. W. 353 (1924).

[21] Rawles v. Jenkins, 212 Ky. 287, 279 S. W. 350 (1926).

[22] Hoff v. State, (Del. 1938) 197 A. 75.

[23] People v. Ringe, 197 N. Y. 143, 90 N. E. 451 (1910).

[24] Chicagoland Agencies v. Palmer, 364 Ill. 13, 2 N. E. (2d) 910 (1936).

[25] Schneider v. Duer, 170 Md. 326, 184 A. 914 (1936).

[26] Becker v. State, 7 W. W. Harr. (37 Del.) 454, 185 A. 92 (1936). However, in Robinson v. Florida Dry Cleaning and Laundry Board, 141 Fla. 899, 194 So. 269 (1940), the court upheld an act establishing a commission with broad powers to license cleaners, pressers, dyers and launderers.

[27] State v. Chisesi, 187 La. 675, 175 So. 453 (1937).

[28] Holding invalid a municipal ordinance, Richardson v. Coker, 188 Ga. 170, 3 S. E. (2d) 636 (1939).

[29] "It will simplify discussion if we bear in mind that the controversy in this case does not concern the propriety of minor regulations of business and occupations which may be, and are, imposed generally on the principle *sic utere tuo ut alienum non laedas*, or to the still broader field of regulation under the police power which does not involve the question of exclusion from the business, trade, or occupation made the

revenue purposes where the sole purpose of the license is to obtain a fee.[30] Rather, the problem involves the right of a state to say to an individual, "You shall not pursue your harmless and worthwhile calling until you have passed an examination conducted by other businessmen already engaged in that field."

It is of course recognized that there are some instances where the safety and health of the general public demand that those practicing certain trades or professions be licensed. Thus, lawyers, doctors, and others engaged in occupations requiring a special degree of technical knowledge or skill must prove their proficiency by examination before offering their services to the public.[31] Likewise, it is generally conceded that barbers[32] and plumbers[33] are engaged in a trade which might be injurious to the public health unless proper regulation is maintained. But beyond this field regulation should not go,[34] and some courts have not been hesitant in denouncing legislation enacted on the flimsy excuse that the public needs protection against the fraud and graft of uncontrolled business. In declaring unconstitutional a law requiring real

subject of regulation. There is a great body of decision upon that subject altogether too general for satisfactory application to the question before us." State v. Harris, 216 N. C. 746 at 755, 6 S. E. (2d) 854 (1940).

[30] "A license may be issued as an aid to regulation under the police power, or it may be for revenue, and in both aspects it is the exercise of a governmental function." Page v. Regents of University System of Georgia, (C. C. A. 5th, 1937) 93 F. (2d) 887 at 893. See also Dasch v. Jackson, 170 Md. 251, 183 A. 534 (1936).

[31] State v. Harris, 216 N. C. 746, 6 S. E. (2d) 854 (1940). As to the licensing of lawyers, see In re Applicants for License to Practice Law, 143 N. C. 1, 55 S. E. 635 (1906); annotation, 10 L. R. A. (N. S.) 288 (1907); Creditors' Service Corp. v. Cummings, 57 R. I. 291, 190 A. 2 (1937). As to the licensing of doctors, see Louisiana State Board of Medical Examiners v. Fife, 162 La. 681, 111 So. 58, 54 A. L. R. 594 at 600 (1926), affirmed Fife v. Louisiana State Board of Medical Examiners, 274 U. S. 720, 47 S. Ct. 590 (1927).

[32] Ex parte Herrin, (Okla. 1939) 93 P. (2d) 21; *contra*, Timmons v. Morris, (D. C. Wash. 1921) 271 F. 721. In State v. Paille, (N. H. 1939) 9 A. (2d) 663, a municipal ordinance which limited the hours during which barber shops could stay open was held invalid.

[33] People ex rel. Nechamcus v. Warden of City Prison, 144 N. Y. 529, 39 N. E. 686 (1895); State v. Stark, 100 Mont. 365, 52 P. (2d) 890 (1935). *Contra*, Replogle v. City of Little Rock, 166 Ark. 617, 267 S. W. 353 (1924). See Hanft and Hamrick, "Haphazard Regimentation under Licensing Statutes," 17 N. C. L. REV. 1 (1938), for a comprehensive survey of other trades and callings subjected to licensing under the police power.

[34] "But the power to require that the work of the plumber's craft, or that of any other avocation which men have the common and natural right to pursue, shall be conducted in such manner as not to endanger the public health or safety is one thing, while the power to prohibit individuals from engaging in such handicrafts and occupations is entirely another and different thing." Replogle v. City of Little Rock, 166 Ark. 617 at 630, 267 S. W. 353 (1924).

estate brokers and salesmen to prove their moral fitness before obtaining a license the Kentucky Court of Appeals said:

> "If occasional opportunity for fraud is to be the test, then there is no reason why every grocer, every merchant, every automobile dealer, every keeper of a garage, every manufacturer, and every mechanic who deals more frequently with the public in general, and whose opportunities for fraud are far greater than those of the real estate agent or salesman, may not be put on the same basis. If that be done then only those who, in the opinion of certain boards or the courts, have the necessary moral qualifications will be permitted to engage in the ordinary occupations of life. The result will be that all others who fail to establish their moral fitness will not only be deprived of their means of livelihood, but will become a burden either on their families and friends or the community at large. In our opinion, the right to earn one's daily bread cannot be made to hang on so narrow a thread. Broad as is the police power its limit is exceeded when the state undertakes to require moral qualifications of one who wishes to engage or continue in a business which as usually conducted is no more dangerous to the public than any other ordinary occupation of life." [35]

Admitting, then, that in some instances regulation may be a valid exercise of the police power, it is clear that where regulation amounts to prohibition of a harmless business the due process clauses of the federal and of state constitutions should afford protection.[36] The holding has been general that property, within the meaning of these constitutional guarantees, "includes the right to engage in those common occupations or callings which involve no threat to the public welfare, to exercise a choice in the selection of an occupation, and to pursue that occupation" so long as there is no interference with the rights of others.[37] Laws designed to curb competition by placing in the hands of a chosen few arbitrary and unlimited power to exclude newcomers from entering that particular field amount not only to a delegation of legislative authority but also to a deprivation of a most valuable property right. It is conceivable that some possible basis might be found for regulating the activities of paper hangers and photographers,[38] but to foster monopoly by limiting the number who may enter the field is govern-

[35] Rawles v. Jenkins, 212 Ky. 287 at 292, 279 S. W. 350 (1926).

[36] State v. Harris, 216 N. C. 746, 6 S. E. (2d) 854 (1940). It is generally conceded that those businesses which are nuisances or may become nuisances may be prohibited without denial of due process of law. See 16 C. J. S. 1432 (1939).

[37] Dasch v. Jackson, 170 Md. 251 at 263-264, 183 A. 534 (1936).

[38] Use of inflammable or poisonous chemicals might warrant some supervision. It has been suggested that because paper hangers often remove and replace electrical fixtures they should be required to know something of the properties of electricity.

mental interference with private business at its worst. Fortunately, the trend is toward a realization of this viewpoint. The re-emphasis placed upon the rights of the individual by the Supreme Court of the United States in some of its recent decisions[39] finds its counterpart in the apparent determination of state courts to hold in check any unwarranted extension of the state police power. In the *Harris* case the court used these significant words:

> "There is nothing in government more dangerous to the liberty and rights of the individual than a too ready resort to the police power. . . . 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 of the people who did all that was humanly possible to secure them in a written constitution."[40]

But while the trend may be in the direction of a narrowing of the police power and consequent widening of the protection afforded by the state and federal constitutions, the problem is still unsettled. Despite the decisions of the United States Supreme Court mentioned above, certain other cases decided by that tribunal indicate a reluctance on its part to interfere where state legislatures have thought economic control of some sort was necessary, even though such control might violate due process as interpreted, at least, by the North Carolina court.[41] Whether the federal judiciary, as well as other state courts, would sustain legislation which went as far as that declared void in the *Harris* case, however, is doubtful.[42] The gap between regulation according to prescribed standards and outright prohibition as repre-

[39] As illustrated by Hague v. Committee for Industrial Organization, 307 U. S. 496, 59 S. Ct. 954 (1939) (freedom of speech and of assembly); Schneider v. New Jersey, 308 U. S. 147, 60 S. Ct. 146 (1939) (freedom of speech); Thornhill v. Alabama, 310 U. S. 88, 60 S. Ct. 736 (1940) (freedom of speech and peaceful picketing).

[40] State v. Harris, 216 N. C. 746 at 763, 6 S. E. (2d) 854 (1940). For a like warning of the dangers of an increasing extension of the police power, see Territory v. Kraft, 33 Hawaii 397 (1935).

[41] For example, in Nebbia v. New York, 291 U. S. 502 at 537, 54 S. Ct. 505 (1934), it was said, "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."

[42] Certain monopolistic features of the New York Milk Control Act of 1934, 2B N. Y. Consol. Laws (McKinney, 1938), §§ 253 ff., were declared invalid in May-Flower Farms v. Ten Eyck, 297 U. S. 266, 56 S. Ct. 457 (1936).

sented by unlimited power in a few to set any basis for exclusion they may see fit, is so great that cases in one field are no reliable indication of probable decisions in the other. But in view of this somewhat divergent attitude taken by the Supreme Court the opponents of monopolistic legislation might well regard the state courts as more receptive to their arguments. No jurisdictional question arises, because whether the laws are alleged to be invalid under the state constitution or under the federal constitution, or under both, the state court has power to consider the problem.

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