Michigan Law Review

Volume 34 | Issue 2

1935

CONSTITUTIONAL LAW - REGULATION OF EMPLOYMENT AGENCIES - DENIAL OF LICENSE WHERE FIELD IS OVERCROWDED

CONSTITUTIONAL LAW — REGULATION OF EMPLOYMENT AGENCIES — DENIAL OF LICENSE WHERE FIELD IS OVERCROWDED — A Minnesota statute [1] required the Industrial Commission to refuse to license an employment agency whenever the Commission should find "that the number of licensed employment agents . . . in the community in which the applicant for a permit proposes to operate is sufficient to supply the needs of employers and employees." [2] Plaintiff's application was denied because the Commission found that sufficient agencies existed in the city of Duluth. In an appeal from a mandamus proceeding the Supreme Court of Minnesota *held,* Deveny, C. J., dissenting, that the statute denied plaintiff due process of law. The court reached this conclusion with reluctance, on the basis of decisions of the Supreme Court of the United States. *Engberg v. Debel,* (Minn. 1935) 260 N. W. 626.

That private employment agencies are often characterized by flagrant abuses harmful to the public welfare has become almost a truism.[3] The prevalence of excessive fees, frequently for services never rendered, unreliable information, collusion between foremen and agencies, and fee-splitting has been discussed at length.[4] It has logically been recognized, therefore, that employment agencies are subject to regulation by the state in the exercise of the police power, and cer-

[1] Minn. Laws 1929, c. 293 (Mason's Minn. Stat. Supp. 1934, § 4254-3), amending Minn. Laws 1925, c. 347, § 3 (Mason's Minn. Stat. 1927, § 4254-3).

[2] Quoted, (Minn. 1935) 260 N. W. 626 at 627.

[3] The results of early investigations are reviewed by Mr. Justice Brandeis in his dissenting opinion in Adams v. Tanner, 244 U. S. 590 at 597, 37 S. Ct. 662 at 665 (1917), and later studies are discussed by Mr. Justice Stone in the dissent in Ribnik v. McBride, 277 U. S. 350 at 359, 48 S. Ct. 545 at 547 (1928).

[4] See 38 YALE L. J. 225 (1928).

tificates of character, licenses, bonds, and publication of fee-schedules have been required.[5] In *Brazee v. Michigan*,[6] one of the few employment agency cases to reach the United States Supreme Court, it was held proper to require licenses and to prescribe reasonable regulations. But in *Adams v. Tanner*[7] a statute making the charging of any fee by an employment agency a criminal offense was declared invalid as a deprivation of the right to earn a livelihood by engaging in a useful business, while in *Ribnik v. McBride* supervision of fees was held to violate the due process clause as price-fixing in a business not "affected with a public interest."[8] The effect of *Adams v. Tanner* could, however, have been avoided without difficulty by the court in the principal case, for the statute in the latter involved a regulation by limiting the number of competing agencies, not a prohibition of the entire business. *New State Ice Co. v. Liebmann*,[9] holding invalid an analogous statute requiring a certificate of public convenience and necessity for participation in the retail ice business, is of course direct authority for the result in the principal case; but the *New State Ice* case and *Ribnik v. McBride* proceed

[5] See in addition to the cases in notes 2 and 5 the following state decisions: Moore v. Minneapolis, 43 Minn. 418, 45 N. W. 719 (1890); Moore v. St. Paul, 48 Minn. 331, 51 N. W. 219 (1892); People ex rel. Armstrong v. Warden of City Prison, 183 N. Y. 223, 76 N. E. 11 (1905); Clark v. McBride, 101 N. J. L. 213, 127 A. 550 (1925); 56 A. L. R. 1340 (1928). In Raabe v. State, 7 Ohio App. 119 (1917), a statute regulating employment agencies was held not unconstitutional because it contained no standard to determine the good moral character made a prerequisite to obtaining a license. Cf. Wilson v. City and County of Denver, 65 Colo. 484, 178 P. 17 (1919); In re Smith, 193 Cal. 337, 223 P. 971 (1924). For a typical statute see Mich. Comp. Laws 1929, § 8584 et seq.

[6] 241 U. S. 340, 36 S. Ct. 561 (1916). The majority opinion in Ribnick v. McBride attributes the scarcity of Supreme Court cases construing these statutes to their not being enforced [277 U. S. 350 at 359, 48 S. Ct. 545 at 547 (1928)], whereas the dissenting Justice thinks that their validity has never been seriously questioned (277 U. S. 350 at 372, 48 S. Ct. 545 at 551).

[7] 244 U. S. 590, 37 S. Ct. 662 (1917).

[8] 277 U. S. 350, 48 S. Ct. 545 (1928). Tyson v. Banton, 273 U. S. 418, 47 S. Ct. 426 (1927), in which the business of dealing in theater tickets was held not affected with a public interest, was thought to require this result. A person engaging in such a business is an intermediary or broker; an employment agency is also an intermediary: therefore, an employment agency is not subject to price regulation, *quod erat demonstrandum*. The fallacy in this all too common type of reasoning is well expressed by Mr. Justice Stone. "Ticket brokers and employment brokers are similar in name: in no other respect do they seem alike to me. To overcharge a man for the privilege of hearing the opera is one thing; to control the possibility of his earning a livelihood would appear to be quite another." 277 U. S. 350 at 373. The historic case allowing price fixing, Munn v. Illinois, 94 U. S. 113 (1876), bears a closer resemblance to the employment agency cases than does Tyson v. Banton.

Ex parte Dickey, 144 Cal. 234, 77 P. 924 (1904), holding limitations on employment agency charges unconstitutional, calls it "a harmless and beneficial business." The court entertained paternal fears over the sad plight of the butcher, baker et al., whose business the legislature would doubtless next proceed to destroy if it were allowed to meddle with the employment agency.

[9] 285 U. S. 262, 52 S. Ct. 371 (1932).

upon the basis of a more or less fixed category of businesses "affected with a public interest," an example of mechanical jurisprudence based upon historical error.[10] The more recent Supreme Court decision in *Nebbia v. New York*[11] may be said to discard that concept. Whatever the business, when existing conditions make it a matter of public concern it should be subject to reasonable regulation in any way best adapted to the purpose, whether this be by price-fixing, the requirement of a certificate of public convenience and necessity, or the more usual restrictions of employment agencies mentioned above. The choice of remedy should reside in the legislature, not in the judiciary.[12] The only limitation set up in the Fourteenth Amendment is that the regulation should bear a substantial relation to the end in view and must not be unreasonable, arbitrary or capricious.[13] It cannot be doubted that there is at present an intense public interest in the unemployment situation and in means of alleviating it; the need for experiment stressed in Mr. Justice Brandeis' notable dissent in the *New State Ice Co.* case is very apparent. A monopoly kept under intelligent control can hardly be said to be unreasonable *per se*.[14] It is significant that both the majority and the dissenting opinions in the Minnesota case express thorough dissatisfaction with the result which the majority felt obliged to reach on the federal question involved.[15]

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[10] See the dissenting opinion in New State Ice Co. v. Liebmann, 285 U. S. 262 at 302, 52 S. Ct. 371 at 383 (1932). McAllister, "Lord Hale and Business Affected With a Public Interest," 43 HARV. L. REV. 759 (1930); Hamilton, "Affectation With Public Interest," 39 YALE L. J. 1089 (1930); Finkelstein, "From Munn v. Illinois to Tyson v. Banton, A Study in the Judicial Process," 27 COL. L. REV. 769 (1927).

[11] 291 U. S. 502, 54 S. Ct. 505 (1934). See comment in 32 MICH. L. REV. 832 (1934); 32 MICH. L. REV. 63 (1933).

[12] Powell v. Pennsylvania, 127 U. S. 678, 8 S. Ct. 992 (1888).

[13] McCrary v. United States, 195 U. S. 27, 24 S. Ct. 769 (1904); C., B. & Q. Ry. v. McGuire, 219 U. S. 549, 31 S. Ct. 259 (1911); Green v. Frazier, 253 U. S. 233, 40 S. Ct. 499 (1920).

[14] "The existence of such power in the legislature seems indispensable in our ever-changing society." Dissent in New State Ice Co. v. Liebmann, 285 U. S. 262 at 304, 52 S. Ct. 371 (1932).

[15] "Those who operate private employment agencies either will not or cannot eliminate the fraud and other abuses which so long and so flagrantly have characterized the business. . . . We cannot agree that it should be beyond legislative power to declare the business so much a matter of public interest as to subject it, not only to ordinary regulation, but also to price fixing and, where needed, to such limitations as are sought to be imposed by the statute upon which defendants base their position." But the majority continued, "We are in the field of federal constitutional law. Our duty is to apply the law as declared by its final arbiter, the Supreme Court of the United States." Engberg v. Debel, (Minn. 1935) 260 N. W. 626 at 627.