Michigan Law Review

Volume 48 | Issue 1

1949

CONSTITUTIONAL LAW-EQUAL PROTECTION-TRAFFIC REGULATION FORBIDDING ADVERTISING ON MOVING VEHICLES

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CONSTITUTIONAL LAW—EQUAL PROTECTION—TRAFFIC REGULATION FORBIDDING ADVERTISING ON MOVING VEHICLES—A traffic regulation of the City of New York provides that "[n]o person shall operate, or cause to be operated, in or upon any street an advertising vehicle; provided that nothing herein contained shall prevent the putting of business notices upon business delivery vehicles, so long as such vehicles are engaged in the usual business or regular work of the owner and not used merely or mainly for advertising."[1] Railway Ex-

[1] Railway Express Agency, Inc. v. New York, 336 U.S. 106 at 107-108, 69 S.Ct. 463 (1949), quoting N.Y.C. Traffic Reg., §124.

press Agency, Inc., which owns and operates about 1,900 trucks in New York City, sold the space on the exteriors of these trucks for advertising unconnected with its own business. It was convicted in a magistrate's court of violating the above quoted traffic regulation. The conviction, sustained by a divided court in the New York Court of Appeals,[2] was brought to the United States Supreme Court, appellant Express Agency contending in part that the regulation violated the equal protection clause of the Fourteenth Amendment. *Held,* affirmed. Exemption of vehicles having upon them advertisements of products sold by the owner does not render the regulation a denial of equal protection of the laws. *Railway Express Agency, Inc. v. New York,* 336 U.S. 106, 69 S.Ct. 463 (1949).

The guiding principle underlying the equal protection clause of the Fourteenth Amendment is that all persons shall be treated alike, under like circumstances and conditions, both in the privileges conferred and in the liabilities imposed.[3] It is well settled that a state may classify persons and objects for the purpose of legislation, and pass laws applicable only to persons or objects within a designated class.[4] However, such classification "must be reasonable, not arbitrary, and must rest on some ground of difference having a fair and substantial relation to the object of the legislation. . . ."[5] The principal case is one of a group dealing with the general police power of the state, in which the state seeks to limit what public policy identifies as undesirable social conduct by prohibiting acts on the part of a certain designated class primarily responsible for the consequences which are sought to be avoided.[6] In this type of case, it is not enough to invalidate the law that others may do the same thing and go unpunished if, as a matter of fact, it is found that the danger is characteristic of the class named.[7] The fact that such a situation may reasonably be conceived of as existing[8] prevents the given classification from being merely arbitrary, and gives it the required fair and substantial relation to the object of the classifica-

[2] N.Y. v. Railway Express Agency, 297 N.Y. 703, 77 N.E. (2d) 13 (1948).

[3] 12 AM. JUR., Constitutional Law, §469 (1938).

[4] Id., §476.

[5] Colgate v. Harvey, 296 U.S. 404 quoted at 423, 56 S.Ct. 252 (1935).

[6] Central Lumber Co. v. South Dakota, 226 U.S. 157, 33 S.Ct. 66 (1912); Patsone v. Pennsylvania, 232 U.S. 138, 34 S.Ct. 281 (1914) and cases cited. Cf. Packer Corp. v. Utah, 285 U.S. 185, 52 S.Ct. 273 (1932); Bradley v. Public Utilities Comm., 289 U.S. 92, 53 S.Ct. 577 (1932); Colgate v. Harvey, supra, note 5; cases cited in principal case at 116.

[7] Patsone v. Pennsylvania, supra, note 6, at 144. As Justice Holmes states the rule in a case of this type, "if a class is deemed to present a conspicuous example of what the legislature seeks to prevent, the Fourteenth Amendment allows it to be dealt with although otherwise and merely logically not distinguishable from others not embraced in the law." Central Lumber Co. v. South Dakota, supra, note 6, at 160-161.

[8] Lindsley v. Natural Carbonic Gas Co., 220 U.S. 61, 31 S.Ct. 337 (1910). While this presumption to support classification may be rebutted by showing that the classification fails to conform to the statutory purpose and creates an arbitrary distinction where in fact none exists [Asbury Hospital v. Cass County, 326 U.S. 207, 66 S.Ct. 61 (1945)], the evidence adduced by appellant in the principal case was apparently insufficient to overcome the presumption. See principal case at 110.

tion.[9] Justice Jackson, while not expressly rejecting this treatment of the principal case, views the two classes of advertisers as presenting identical dangers.[10] He upholds the classification, however, on a theory often used to sustain highway regulation, the presence or absence of hire.[11] In his concurring opinion he concludes that where individuals contribute to an evil or danger in the same way and to the same degree, those who do so for hire may be prohibited from acting in furtherance of such evil or danger, while those who do so for their own commercial ends but not for hire may be allowed to continue.[12] Consideration of this question would seem unnecessary in view of earlier cases upholding legislative classifications where it is not clearly shown by the party attacking the legislation that the classification creates an arbitrary distinction where in fact none exists.[13] In addition, "identical" dangers are rare; the identity of the dangers in the principal case with respect to the impact of owner-advertisers and non-owner-advertisers on traffic safety is hypothetical in the mind of Justice Jackson, and non-existent in the minds of the majority of the Court.[14] It is suggested that the opinion of the majority is in accordance with the greater probability as to fact, and is placed upon the safer ground; that the state may direct its law against what it deems the evil as it actually exists, without covering the whole field of possible abuses.[15]

W. M. Myers, S.Ed.

[9] See text at note 5, supra.
[10] Principal case at 114.
[11] Id. at 116.
[12] Id. at 115.
[13] See 87 A.L.R. 735 (1933); 109 A.L.R. 551 et seq. (1937), and cases cited. Cf. Patsone v. Pennsylvania, supra, note 6; Central Lumber Co. v. South Dakota, supra, note 6; Asbury Hospital v. Cass County, supra, note 8.
[14] Principal case at 110, where it is said: "The local authorities may well have concluded that those who advertised their own wares on their trucks do not present the same traffic problem in view of the nature or extent of the advertising which they use." See note 8, supra.
[15] Central Lumber Co. v. South Dakota, supra, note 6.