**Louisiana Law Review**

Volume 1 | Number 4
*May 1939*

# Constitutional Law - State Regulation of Business - Theaters

F. S.

state and federal governments to tax reciprocally income received either as governmental salary or as interest on governmental obligations. The instant case seems to remove any doubt of the constitutionality of this legislation as applied to salaries. In fact, however, it is notorious that the federal government anticipates comparatively little revenue from this source.[14] Since Congress can withdraw the immunity of federal securities,[15] the main battle over such legislation will concern federal taxation of income derived from state securities. The *Gerhardt* case and the present *O'Keefe* case are merely preliminary skirmishes; they indicate a trend in favor of the tax-collector. Recognition of this trend is expressed by Mr. Justice McReynolds, dissenting from the majority opinion in the instant case: ". . . safely it may be said that presently marked for destruction is the doctrine of reciprocal immunity that by recent decisions here has been so much impaired."[16]

*F. S. C., Jr.*

---

CONSTITUTIONAL LAW—STATE REGULATION OF BUSINESS—THEATERS—In order to aid independent exhibitors of motion pictures, North Dakota enacted a statute[1] designed to prohibit the operation of motion picture theaters "owned, managed or operated in whole or in part, by any producer or distributor of motion picture films or in which any such producer or distributor has any interest, direct or indirect, legal or equitable, through stock ownership or otherwise."[2] The plaintiffs were producers and distributors of films and through a subsidiary corporation they owned ten theaters in the state. In a suit to enjoin the enforcement of the act it was *held,* (1) that the act does not violate the Fourteenth Amendment as its policy bears a reasonable relation to a proper public purpose; it is not palpably in excess of legislative power, and the means provided for enforcement of the policy declared by the act are neither arbitrary nor unreasonable; (2) that since the act relates only to the operation of motion picture

14. Government experts estimate that the revenue from federal income tax on 2,600,000 state and municipal employees will be $16,000,000. The taxes to be paid by the 1,200,000 government workers will depend on state taxation. Wood, High Court Permits Taxes on Salaries, State and Federal, N.Y. Times, March 28, 1939, p. 1, col. 1.

15. Van Allen v. The Assessors, 70 U.S. 573, 18 L.Ed. 229 (1866).

16. 59 S.Ct. 595, 604, 83 L.Ed. 577 (1939).

1. N.D. Laws 1937, c. 165.

2. Id. at § 3.

theaters within the state and not to the distribution of films in interstate commerce it only remotely affects such commerce. *Paramount Pictures v. Langer,* 23 F. Supp. 890 (D.C. N.D. 1938).[3]

The general proposition that a state, under its police powers, may regulate all kinds of businesses[4] is settled by a wealth of cases dealing with almost every type of enterprise, trade, occupation and profession.[5] Such regulation is invalid only where it amounts to an arbitrary or unwarranted interference with the right of the citizen under the Fourteenth Amendment to pursue lawful business.[6] To what lengths this power of regulation may go is conjectural; each case stands on its on merits.

Generally, statutes designed to foster local industry or to aid the independent operator in his struggle with chain competition have been upheld as valid tax measures.[7] The power of

3. The case was taken to the United States Supreme Court by appeal, and the temporary injunction was maintained. The Supreme Court by a *per curiam* order, on March 27, 1939, granted a motion to reverse, and remanded the cause with directions to dismiss the proceedings on the ground that the cause had become moot. (1939) C.C.H., p. 4578. The case retains its importance, however, as other states have been contemplating the passage of acts similar to this North Dakota statute.

4. Slaughter-House Cases, 83 U.S. 36, 21 L.Ed. 394 (1873); Chicago B. & Q. Ry. Co. v. Illinois, 200 U.S. 561, 26 S.Ct. 341, 50 L.Ed. 596 (1906); Pacific Gas & Electric Co. v. Police Court, 251 U.S. 22, 40 S.Ct. 79, 64 L.Ed. 112 (1919).

5. Munn v. Illinois, 94 U.S. 113, 24 L.Ed. 77 (1877) (grain elevators); Gundling v. Chicago, 177 U.S. 183, 20 S.Ct. 633, 44 L.Ed. 725 (1900) (sale of cigarettes); German Alliance Ins. Co. v. Lewis, 233 U.S. 389, 34 S.Ct. 612, 58 L.Ed. 1011 (1914) (insurance companies); Brazee v. Michigan, 241 U.S. 340, 36 S.Ct. 561, 60 L.Ed. 1034 (1916) (employment agencies); Lehon v. Atlanta, 242 U.S. 53, 37 S.Ct. 70, 61 L.Ed. 145 (1916) (private detectives); Merchants' Exchange v. Missouri, 248 U.S. 365, 39 S.Ct. 114, 63 L.Ed. 300 (1919) (public weighers of grain); La Tourette v. McMaster, 248 U.S. 465, 39 S.Ct. 160, 63 L.Ed. 362 (1919) (insurance agents); Bloch v. Hirsh, 256 U.S. 135, 41 S.Ct. 458, 65 L.Ed. 865, 16 A.L.R. 165 (1921) (housing); Bratton v. Chandler, 260 U.S. 110, 43 S.Ct. 43, 67 L.Ed. 157 (1922) (real estate brokers); Graves v. Minnesota, 272 U.S. 425, 47 S.Ct. 122, 71 L.Ed. 331 (1926) (dentists); Hayman v. Galveston, 273 U.S. 414, 47 S.Ct. 363, 71 L.Ed. 714 (1927) (physicians); Hodge Drive-It-Yourself Co. v. Cincinnati, 284 U.S. 335, 52 S.Ct. 144, 76 L.Ed. 323 (1932) (renting of automobiles); Nebbia v. New York, 291 U.S. 502, 54 S.Ct. 505, 78 L.Ed. 940 (1934) (milk); Board of Barber Examiners v. Parker, 190 La. 214, 182 So. 485 (1938) (barbers); Dillon v. Erie R. Co., 19 Misc. 116, 43 N. Y. Supp. 320 (1897) (railroads); Abbye Employment Agency v. Robinson, 166 Misc. 820, 2 N.Y.S. (2d) 947 (1938) (employment).

6. Ribnik v. McBride, 277 U.S. 350, 48 S.Ct. 545, 72 L.Ed. 913 (1928); Williams v. Standard Oil Co., 278 U.S. 235, 49 S.Ct. 115, 73 L.Ed. 287 (1929); New State Ice Co. v. Liebmann, 285 U.S. 262, 52 S.Ct. 371, 76 L.Ed. 747 (1932); Kent Stores of New Jersey v. Wilentz, 14 F. Supp. 1 (D.C. N.J. 1936); Replogle v. Little Rock, 166 Ark. 617, 267 S.W. 353 (1925); People v. Havnor, 149 N.Y. 195, 43 N.E. 541 (1896).

7. E.g., American Sugar Refining Co. v. Louisiana, 179 U.S. 89, 21 S.Ct. 43, 45 L.Ed. 102 (1900); Brown-Forman Co. v. Kentucky, 217 U.S. 563, 30 S.Ct. 578, 54 L.Ed. 883 (1910); Armour & Co. v. Virginia, 246 U.S. 1, 38 S.Ct. 267, 62 L.Ed. 547 (1918); Tax Commissioners v. Jackson, 283 U.S. 527, 51 S.Ct. 540, 75 L.Ed. 1248 (1931); A. Magnano Co. v. Hamilton, 292 U.S. 40, 54 S.Ct. 599, 78

the state to deal with practices and situations which may reasonably be deemed promotive of monopoly and restraint of trade has also been consistently upheld.[8] The inherent difference between corporations and natural persons has been recognized as sufficient to sustain a separate classification for the purpose of imposing restrictions or prohibitions upon the former.[9]

Discrimination in favor of a certain class does not make a statute arbitrary if the discrimination is based upon a reasonable distinction.[10] In a case analogous to the one under discussion, a Missisippi statute forbidding the ownership of cotton gins by corporations interested in the manufacture of cottonseed oil was held to be constitutional, when the facts showed that such ownership tended to give these corporations a monopoly on ginning.[11] Similarly, the court in the instant case concluded that the differences between exhibitors affiliated with distributors and producers and those exhibitors operating independently, justified a separate classification and treatment.[12]

The Supreme Court of the United States in the oft-quoted *Nebbia case*[13] stated that ". . . the guaranty of due process . . . demands only that the law shall not be unreasonable, arbitrary, or capricious, and that the means selected shall have a real and substantial relation to the object sought to be attained." Furthermore, in the same case, the Court laid down the broad doctrine that, upon proper occasion and by appropriate measures, the state may regulate a busines in any of its aspects; the courts are both incompetent and unauthorized to deal with the wisdom of the policy adopted by the state and the measures taken to carry it

---

L.Ed. 1109 (1934); Great Atl. & Pac. Tea Co. v. Grosjean, 301 U.S. 412, 57 S.Ct. 772, 81 L.Ed. 1193 (1937).

8. E.g., Smiley v. Kansas, 196 U.S. 447, 25 S.Ct. 289, 49 L.Ed. 546 (1905); National Cotton Oil Co. v. Texas, 197 U.S. 115, 25 S.Ct. 379, 49 L.Ed. 689 (1905); Waters-Pierce Oil Co. v. Texas, 212 U.S. 86, 29 S.Ct. 220, 53 L.Ed. 417 (1909); Hammond Packing Co. v. Arkansas, 212 U.S. 322, 29 S.Ct. 370, 53 L.Ed. 530 (1909); Grenada Lbr. Co. v. Mississippi, 217 U.S. 433, 30 S.Ct. 535, 54 L.Ed. 826 (1910); International Harvester Co. v. Missouri, 234 U.S. 199, 34 S.Ct. 859, 58 L.Ed. 1276 (1914); Crescent Cotton Oil Co. v. Mississippi, 257 U.S. 129, 42 S.Ct. 42, 66 L.Ed. 166 (1921).

9. Hammond Packing Co. v. Arkansas, 212 U.S. 322, 29 S.Ct. 370, 53 L.Ed. 530 (1909); Baltic Mining Co. v. Massachusetts, 231 U.S. 68, 34 S.Ct. 15, 58 L.Ed. 127 (1913).

10. Brown-Forman Co. v. Kentucky, 217 U.S. 563, 30 S.Ct. 578, 54 L.Ed. 883 (1910); Tax Commissioners v. Jackson, 283 U.S. 527, 51 S.Ct. 540, 75 L.Ed. 1248 (1931).

11. Crescent Cotton Oil Co. v. Mississippi, 257 U.S. 129, 42 S.Ct. 42, 66 L.Ed. 166 (1921).

12. Paramount Pictures v. Langer, 23 F. Supp. 890, 902 (D.C. N.D. 1938).

13. Nebbia v. New York, 291 U.S. 502, 525, 54 S.Ct. 505, 78 L.Ed. 940 (1934).

out.[14] The function of the courts is to determine in each case whether circumstances are sufficiently strong to sustain the challenged regulation as a reasonable exertion of governmental authority.

Applying the criteria of the *Nebbia* decision, the court in the principal case concluded that the policy declared by the North Dakota statute had a reasonable relation to a proper legislative purpose, finding a wealth of precedent for the enactment of laws which require a separation of the ownership, management and control of certain classes of business.[15] The court was unable to find any unfair trade practices but the existence of the unusual power of the affiliated exhibitor to deal unfairly with competitors was thought a sufficient basis for guarding against the possibility of future exercise of such power, especially in view of evidence showing unfair practices in the past.[16]

The contention that the statute would be a burden on interstate commerce was briefly dismissed by the statement that the burden was too remote.[17] The fact that state regulation affects interstate commerce does not of itself render it invalid.[18] Moreover, the operation of motion picture theaters can be said to be local and subject to the state's police power.[19]

The motion picture industry is controlled by eight major companies (five of which are engaged in all three branches of the industry—production, distribution and exhibition—two in production and distribution, and the last in distribution alone) yet it has been stated that there is no monopoly in the distribution.[20] However, the independent competitor is left little room for free-

14. 291 U.S. at 537.

15. Paramount Pictures v. Langer, 23 F. Supp. 890, 901-902 (D.C. N.D. 1938).

16. 23 F. Supp. at 900.

17. Paramount Pictures v. Langer, 23 F. Supp. 890, 895 (D.C. N.D. 1938). Support for this holding is found in the unwillingness of the Supreme Court to invalidate state anti-trust legislation. Cf. Crescent Cotton Oil Co. v. Mississippi, 257 U.S. 129, 42 S.Ct. 42, 66 L.Ed. 166 (1921); Great Atl. & Pac. Tea Co. v. Grosjean, 301 U.S. 412, 57 S.Ct. 772, 81 L.Ed. 1193 (1937).

18. Missouri Pac. Ry. Co. v. Kansas, 216 U.S. 262, 30 S.Ct. 330, 54 L.Ed. 472 (1910); Great Northern Ry. Co. v. Washington, 300 U.S. 154, 57 S.Ct. 504, 81 L.Ed. 573 (1936); State v. Kansas City Stockyards Co., 94 Kan. 96, 145 Pac. 831 (1915); Baltimore & O. R. Co. v. Public Service Comm., 81 W.Va. 457, 94 S.E. 545 (1917).

19. Mutual Film Co. v. Industrial Comm., 236 U.S. 230, 35 S.Ct. 387, 59 L.Ed. 552 (1915); United States v. Interstate Circuit, 20 F. Supp. 868 (N.D. Tex. 1937).

20. See Whitman, Anti-Trust Cases Affecting the Distribution of Motion Pictures (1938) 7 Fordham L. Rev. 189. Cf. note 24, infra.

dom of activity by the present practices[21] of the motion picture industry. These will continue unless halted by state or federal legislation. The present federal anti-trust laws have been ineffectual to date due to the difficulty of obtaining sufficient proof of a conspiracy in restraint of trade.[22] State legislation as to the distribution of films must run the gauntlet of invalidity on the ground of unduly burdening interstate commerce, for distribution clearly involves interstate commerce.[23] Although the North Dakota statute herein involves an intrastate activity, it does bear some relation to interstate commerce. Whether it unduly burdens interstate commerce will be decided by the Supreme Court of the United States in the near future.[24] The Supreme Court may possibly find—and properly so—that exhibition, although among the activities which are themselves intrastate commerce, has a direct and important relation to interstate commerce and is susceptible of both state and federal regulation.

*F. S.*

---

FEDERAL RULES OF CIVIL PROCEDURE—DIVERSITY OF CITIZENSHIP—THIRD PARTY PRACTICE—The plaintiff, a resident of Pennsylvania, brought an action in a Pennsylvania court against McGwinn, a nonresident, to recover for personal injuries sustained in an automobile collision. On the petition of this defendant, the case was removed into the federal court which thereupon

21. Unless affiliated with one of these companies or an independent circuit, the independent exhibitor is (1) faced with inferior bargaining power, (2) harassed by "block" booking contracts which force him to take poor pictures along with good ones, (3) subjected to clearance schedules which prevent him from obtaining the best pictures for a specified time after the first run, and (4) discriminated against in obtaining contracts. See Comment (1938) 33 Ill. L. Rev. 424; Note (1936) 36 Col. L. Rev. 635.

22. The courts have laid great emphasis on the determination of whether or not the distributors have acted in concert or as a result of an understanding among themselves in the adoption of a particular type of contract provisions. Very little consideration has as yet been given to what provisions in the contract are reasonable and why they indirectly affect but do not burden interstate commerce. Cf. Paramount Famous-Lasky Corp. v. United States, 282 U.S. 30, 51 S.Ct. 42, 75 L.Ed. 145 (1930); United States v. First National Pictures, 282 U.S. 44, 51 S.Ct. 45, 75 L.Ed. 151 (1930); Federal Trade Comm. v. Paramount Famous-Lasky Corp., 57 F. (2d) 152 (C.C.A. 2nd, 1932).

23. Binderup v. Pathe Exchange, 263 U.S. 291, 44 S.Ct. 96, 68 L.Ed. 308 (1923); Majestic Theatre Co. v. United Artists Corp., 43 F. (2d) 991 (D.C. Conn. 1930).

24. There is now pending in the federal courts an action filed by the United States Department of Justice against the eight major producers and distributors for violation of the Sherman Act, seeking to compel them to relinquish their ownership or interests in theaters. United States v. Paramount Pictures (Equity 87-273, S.D. N.Y. 1938).