Louisiana Law Review

Volume 11 | Number 3
March 1951

Substantive Due Process - Statute Setting Minimum Mark Up Held Unconstitutional Because of Failure to Carry Out Legislative Policy

Chapman L. Sanford

presumably is a stranger with no knowledge of the vendor's character, and the wife, a policy protecting the third party appears equitably justified. But if the vendee has knowledge of the marital status of the husband and chooses to rely solely on statements recorded in the sale, the equities might favor the wife, for in such a case the vendee is not, in fact, "innocent."

It is impossible to say definitely that the *Royal* decision favors the rules of recordation over those protecting community rights, or that the decision is based solely on its peculiar facts and equities. For this reason, the case creates uncertainty in an area of law which had heretofore appeared certain,[17] and which should be certain. A definite statement of policy is clearly needed concerning the extent to which the doctrine of *McDuffie v. Walker* has priority over the rights of the community of acquets and gains. This uncertainty in the law is a proper subject for the forthcoming revision of the Civil Code. It might have been desirable for the court to announce a clearer interim policy.

WADE V. SMITH

SUBSTANTIVE DUE PROCESS—STATUTE SETTING MINIMUM MARK UP HELD UNCONSTITUTIONAL BECAUSE OF FAILURE TO CARRY OUT LEGISLATIVE POLICY

Louisiana Act 360 of 1948[1] provided for wholesale minimum mark ups above cost of 15 per cent on liquor, 20 per cent on cordial liqueurs and specialties, and 25 per cent on sparkling and still wines; and for retail mark ups of 33⅓ per cent on liquor, 45 per cent on cordials, liqueurs and specialties, and 50 per cent on sparkling and still wines. Schwegmann Brothers failed to comply with these requirements, and on revocation of their license instituted suit to enjoin enforcement of the act, alleging denial of due process. The Louisiana Supreme Court affirmed an order granting the injunction: ". . . the provisions of Act 360 of 1948 which relate to the mandatory minimum mark ups (Sections 1[s], 24 and 26) do not tend in a degree that is perceptible and clear, toward the accomplishment of the announced purpose of the statute, namely, the regulation and control of the liquor traffic so that it 'may not cause injury to the economic, social

17. The policy stated in *Succession of James* had been applied as early as Dixon v. Dixon's Executors, 4 La. 188, 23 Am. Dec. 478 (1832), nearly a hundred years before. Since the *James* case, its decision was cited with approval in Johnson v. Johnson, 213 La. 1092, 1101, 36 So. 2d 396, 399 (1948).

1. La. R.S. (1950) 26:1 et seq.

and moral well-being of the people of the State.' "[2] *Schwegmann Brothers v. Louisiana Board of Alcoholic Beverage Control*, 216 La. 148, 43 So. 2d 248 (1949).

The argument urged in support of constitutionality was that the act was a valid exercise of the police power for the protection of the health and morals of the public. The approach taken was natural in the light of the historical development of the police power, which has long been associated with the "health and morals" concept. Early courts were unwilling to uphold price-fixing legislation except in "businesses affecting the public interest," and they limited this category to include only public utilities.[3] But during the depression and the New Deal era, the attitude of the United States Supreme Court began to change, and in the case of *Nebbia v. New York*[4] the court went to great lengths to show that the regulatory power of the legislatures was not limited to a single category of industries. "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. The courts are without authority either to declare such policy, or, when it is declared by the legislature, to override it. If the laws passed are seen to have a reasonable relation to a proper legislative purpose, and are neither arbitrary nor discriminatory, the requirements of due process are satisfied. . . ."[5]

The rule of the *Nebbia* case recognized economic legislation under the police power. The legislature became free to make its own policy. "If the law-making body within its sphere of government concludes that the conditions or practices in an industry make unrestricted competition an inadequate safeguard of the consumer's interests, produce waste harmful to the public, threaten ultimately to cut off the supply of a commodity needed by the public, or portend the destruction of the industry itself, appropriate statutes passed in an honest effort to correct the

2. 216 La. 148, 43 So. 2d 248, 259 (1949).

3. Although the courts used the words "affected with public interest" in classifying businesses whose charges might be regulated, the category was limited. The fixing of wages (Adkins v. Children's Hospital, 261 U.S. 525 [1923]), prices on theater tickets (Tyson & Bros. v. Banton, 273 U.S. 418 [1927]), employment agency rates (Ribnik v. McBride, 277 U.S. 350 [1928]), gasoline prices (Williams v. Standard Oil Co., 278 U.S. 235 [1929]), were declared a denial of due process.

4. 291 U.S. 502 (1934).

5. 291 U.S. 502, 537. This case is often approvingly quoted by the Louisiana courts in handling similar problems.

threatened consequences may not be set aside because the regulation adopted fixes prices reasonably deemed by the legislature to be fair to those engaged in the industry and to the consuming public. . . . Price control, like any other form of regulation, is unconstitutional only if arbitrary, discriminatory, or demonstrably irrelevant to the policy the legislature is free to adopt, and hence an unnecessary and unwarranted interference with individual liberty."[6]

The act involved in the case under consideration may, therefore, have been cited as a constitutional exercise of police power for a legitimate economic purpose—the aid to an industry in need. It is significant that the Louisiana court was willing to follow the very words of the *Nebbia* case[7] but found that the operation of the act did not fall under the *Nebbia* rule because it proved arbitrary; consequently, the case contains no denial of the legislative power of regulation.

With some exceptions, state courts, unlike the federal courts, have retained a comparatively high degree of control over legislation.[8] However, Louisiana has maintained an attitude similar to that of the United States courts. The last instance found in which a legislative act in exercise of the police power was declared unconstitutional for depriving due process in the substantive field was under the narrow facts of *State v. Lucas*,[9] decided in 1940.

In the case of *Board of Barber Examiners v. Parker*[10] the court, refusing to question the judgment of the legislature, upheld minimum price regulation of the barber industry on the ground of protection of the health of the people. The court has often used the expression: "Legislation which affects alike all persons pursuing the same business under the same conditions is not such class legislation as is prohibited by the constitution of the United States or of the State." [11] In *Ricks v. Department of State*

6. 291 U.S. 502, 538.

7. 216 La. 148, 175, 43 So. 2d 248, 257 (1949).

8. Paulsen, The Persistence of Substantive Due Process in the States, 34 Minn. L. Rev. 91 (1950).

9. State v. Lucas, 196 La. 299, 199 So. 126 (1940). License fee of $5,000 to be paid to each parish in which there was collection for rights, royalties or rents on copyrighted music books, etc., was held unconstitutional because the excessive charge was prohibitive and deprived everyone of his right to carry on a lawful business.

10. Board of Barber Examiners of Louisiana v. Parker, 190 La. 214, 182 So. 485 (1938).

11. City of Shreveport v. Cunningham, 190 La. 481, 492, 182 So. 649, 652 (1938).

Civil Service[12] the court said, "It is not the function of this court to charge the Legislature with making arbitrary or discriminatory classifications in the absence of clear manifestation that such was the case." [13] The resale price maintenance provisions of the Louisiana Fair Trade Act[14] and the Unfair Sales Act[15] have been upheld,[16] the court thereby recognizing as valid legislation designed to benefit the economic interests of a particular class.

Because of the similar attitudes of the federal and Louisiana courts on the question presented, a test of constitutionality may be devised which can be applied in either of the jurisdictions. It may be said that if there is room for honest arguments that the policy is intended for the *general welfare* of the public and if an honest argument can be made that the act also carries into effect this legislative policy, then the act will be upheld. The benefit granted to the particular industry must be balanced against the loss incurred by the public in order to determine its reasonableness as regards the public welfare.

In the present case the principal interest benefited can be ascertained by an examination of the nature of the demand for the commodity. Department of Revenue figures indicate that the demand for liquor in the given price range is relatively inelastic.[17] In such a case the principal benefit is to the business itself since a price increase on an item for which the demand is inelastic will result in greater total profit to the industry. Conversely, in an elastic market (if a decrease in consumption is considered to be in the public interest) the principal benefit would accrue to the health and morals of the people since consumption of the item would decrease more than proportionately with the price increase. However, even where the demand is inelastic a price increase will result in some decreased consumption. Whether or not the amount of decrease in such a case is sufficient to accomplish the purpose is for legislative determination, subject, of course, to the above test.

An important difference is to be noted between maximum

12. Ricks v. Department of State Civil Service, 200 La. 341, 8 So. 2d 49 (1942).

13. 200 La. 341, 360, 8 So. 2d 49, 55.

14. La. Act 13 of 1936 (La. R.S. [1950] 51:391 et seq.).

15. La. Act 338 of 1940 (La. R.S. [1950] 51:421 et seq.).

16. Pepsodent Co. v. Krauss Co., Ltd., 200 La. 959, 9 So. 2d 303 (1942) and Wholesale Distributors Ass'n v. Rosenzweig, 214 La. 1, 36 So. 2d 403 (1948) respectively.

17. Louisiana Department of Revenue figures show a decrease in consumption of only .501% for the twelve month period immediately following passage of the act over the preceding twelve month period.

and minimum price regulation. Maximum price regulation is generally designed to benefit the public as a whole in that reasonable prices under monopolistic conditions are guaranteed. Minimum price regulation, on the other hand, is designed primarily to benefit those engaged in selling the regulated item, except where public policy favors decreased consumption. Even where such policy considerations are present, if the demand is inelastic, the benefit accrues to the sellers. The present trend of the court has been to favor the interest of the public as a whole at the expense of individual groups where the two interests conflict. It was, therefore, not surprising that the court in this case was unwilling to hold as constitutional an act benefiting a particular group at the expense of the public in general where no economic need could be shown.[18]

CHAPMAN L. SANFORD

18. For a further discussion of this case, see The Work of the Louisiana Supreme Court for the 1949-1950 Term, 11 LOUISIANA LAW REVIEW 197 (1951).