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## ECONOMIC DUE PROCESS AND OCCUPATIONAL LICENSING IN CALIFORNIA

The right to work and earn a living is fundamental in the sense that it falls within the protection of the due process clause of the fourteenth amendment,<sup>1</sup> and its counterpart in state constitutions.<sup>2</sup> Under the police power of the states, economic affairs may be regulated in the interest of protecting the public health, welfare, morals, and safety.<sup>3</sup> Substantive due process acts as a general limitation on the police power by requiring that the legislative enactment be neither arbitrary nor unreasonable.<sup>4</sup>

During the first three decades of the century, the decisions of the United States Supreme Court displayed a marked tendency to declare state statutes regulating economic affairs unconstitutional as violations of the substantive commands of the due process clause of the fourteenth amendment.<sup>5</sup> In some of the earlier cases of this period, the Court invalidated state laws out of concern for freedom of enterprise and improper legislative motives.<sup>6</sup> In the

<sup>1</sup> U.S. CONST. amend. XIV, § 1: "No state . . . shall . . . deprive any person of life, liberty, or property without due process of law." In *Truax v. Raich*, 239 U.S. 33, 41 (1915), the Court said: "It requires no argument to show that the right to work for a living in the common occupations of the community is of the very essence of the personal freedom and opportunity that it was the purpose of the Amendment to secure."

<sup>2</sup> CAL. CONST. art I, § 13: "No person shall be . . . deprived of life, liberty, or property without due process of law." See *Bautista v. Jones*, 25 Cal. 2d 746, 749, 155 P.2d 343, 345 (1944): "The right to work, either in employment or independent business, is fundamental and, no doubt, enjoys the protection of the personal liberty guarantee of the Fourteenth Amendment to the federal Constitution, as well as the more specific provisions of our state Constitution."

<sup>3</sup> *Miller v. Board of Public Works*, 195 Cal. 477, 485, 234 Pac. 381, 383 (1925), where the court said:

In its inception the police power was connected with the preservation of the public peace, safety, morals, and health without specific regard for "the general welfare." The increasing complexity of our civilization and institutions later gave rise to cases wherein the promotion of the public welfare was held by the courts to be a legitimate object for the exercise of the police power. As our civil life has developed, so has the definition of "public welfare" until it has been held to embrace regulations "to promote the economic welfare, public convenience, and general prosperity of the community."

<sup>4</sup> *Larson v. Bush*, 29 Cal. App. 2d 43, 46, 83 P.2d 955, 956 (1938): "The limitations on this power are that the regulations cannot be arbitrary, discriminatory, or unreasonable."

<sup>5</sup> See generally, McCloskey, *Economic Due Process and the Supreme Court*, SUPREME COURT REVIEW 34 (1962); Hetherington, *State Economic Regulation and Substantive Due Process of Law*, 53 Nw. U.L. REV. 13-32, 226-51 (1958).

<sup>6</sup> *E.g.*, see *Lochner v. New York*, 198 U.S. 45, 64 (1905).

It is impossible for us to shut our eyes to the fact that many of the laws of this character, while passed under what is claimed to be the police power for the purpose of protecting the public health or welfare, are, in reality, passed from other motives. We are justified in saying so when, from the character of the law and the subject upon which it legislates, it is apparent that the public health or welfare bears but the most remote relation to the law.

In a dissenting opinion, Mr. Justice Holmes criticized the practice of reading the economic theory of *laissez faire* into the Constitution: "But a constitution is not intended

later cases of the period, however, the Court turned to a more moderate approach in which it weighed the expected benefits for the public against the restrictions on the individual, and gave consideration to reasonable alternatives.<sup>7</sup>

In the late nineteen thirties, the Supreme Court abandoned both the more extreme and the moderate approaches to economic due process.<sup>8</sup> Justice Stone, writing for the Court in 1938,<sup>9</sup> stated the principle which has been adhered to since, that judicial inquiries "where the legislative judgment is drawn in question, must be restricted to the issue whether any state of facts either known or which could *reasonably be assumed* affords support for it."<sup>10</sup> As a practical matter, this principle operates to raise a strong presumption of constitutionality.<sup>11</sup> It is a rare statute which does not have a single rational argument in its favor, and once this is established, judicial inquiry ceases although the law may have many useless and wasteful aspects.

Although the Supreme Court has said it no longer sits as a "super-legislature"<sup>12</sup> over state economic regulation, the doctrine of economic due process continues to enjoy a vigorous life in the states.<sup>13</sup> California early aligned itself with the federal position. In 1936, the California Supreme Court up-

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to embody a particular economic theory, whether of paternalism and the organic relation of the citizen to the State or of *laissez faire*." *Id.* at 75.

<sup>7</sup> See *Weaver v. Palmer Bros. Co.*, 270 U.S. 402 (1926), where the fact that a reasonable alternative method was available entailing less deprivation was a factor the court considered in invalidating a statute prohibiting the use of shoddy in the manufacture of mattresses. *Cf. Dean Milk Co. v. City of Madison*, 340 U.S. 349 (1951).

<sup>8</sup> The case of *Nebbia v. New York*, 291 U.S. 502 (1934), is generally regarded as the precursor for the withdrawal. In the field of price regulation, earlier federal decisions had held that the states could regulate prices only in businesses "affected with a public interest," a phrase which was narrowly construed to include only businesses in the nature of public utilities. The Court in the *Nebbia* case discarded this restriction, saying, "The phrase 'affected with a public interest' can, in the nature of things mean no more than that an industry, for adequate reason, is subject to control for the public good." *Id.* at 536. The traditional economic due process cases began to topple soon afterward. The most notable cases were: *West Coast Hotel v. Parrish*, 300 U.S. 379 (1937), overruling *Adkins v. Children's Hospital*, 261 U.S. 525 (1923), and upholding minimum wage regulation; *Olsen v. Nebraska*, 313 U.S. 236 (1941), overruling *Ribnik v. McBride*, 277 U.S. 350 (1928), and upholding regulation of employment agency rates.

<sup>9</sup> *United States v. Carolene Prods. Co.*, 304 U.S. 144 (1938).

<sup>10</sup> *Id.* at 154 (emphasis added). For more recent cases applying this principle see *Day-Brite Lighting Inc. v. Missouri*, 342 U.S. 421 (1952); *Williamson v. Lee Optical Co.*, 348 U.S. 483 (1955).

<sup>11</sup> Hetherington, *supra* note 5, at 32, describes it as an almost conclusive presumption of validity. It is significant that not since 1938 has the Supreme Court declared a statute regulating commercial matters unconstitutional on due process grounds.

<sup>12</sup> "Our recent decisions make it plain that we do not sit as a super-legislature to weigh the wisdom of legislation nor to decide whether the policy which it expresses offends public welfare." *Day-Brite Lighting, Inc. v. Missouri*, 342 U.S. 421, 423 (1952).

<sup>13</sup> See Paulsen, *The Persistence of Substantive Due Process in the States*, 34 MINN. L. REV. 91 (1950). See also Comment, *Substantive Due Process in the States Revisited*, 18 OHIO ST. L.J. 384 (1957), a sequel to Professor Paulsen's article; Note, *Counterrevolution in State Constitutional Law*, 15 STAN. L. REV. 309 (1963).

held the Fair Trade Act<sup>14</sup> and shortly thereafter, the Unfair Practices Act.<sup>15</sup> The language and tenor of these cases manifest that it is primarily a legislative and not a judicial function to determine economic policy, and that the court would be reluctant to invoke economic due process to declare legislative unconstitutional.<sup>16</sup>

The only case to cast doubt on California's position on economic due process is *State Bd. of Dry Cleaners v. Thrift-D-Lux*,<sup>17</sup> decided in 1953, in which the minimum price provisions of the Dry Cleaners Act<sup>18</sup> were invalidated. The act established a board which, upon petition of seventy-five per cent or more of the dry cleaners from a given area, was empowered to conduct a survey to determine minimum costs necessary to "enable cleaners, dyers, or pressers in that city or county or other area to furnish modern, proper, healthful and sanitary services, using modern appliances and equipment so as to minimize the danger to public health and safety incident to such services."<sup>19</sup> The court concluded that the objective of the act was not the purported one of promotion of public health and safety, since other statutes regulating the industry, such as those for fire protection and workman's safety, provided adequate health and safety protection.<sup>20</sup> The court refused to accept a reasonable alternative purpose (prevention of injurious competition) because the statute "in no way purports to prevent destructive and unfair competition or to suppress violence."<sup>21</sup> The court then turned to the public welfare aspect of the act and resurrected the case of *In re Kazas*.<sup>22</sup> In *Kazas*, the district court of appeal had invalidated a city ordinance regulating barber prices because barbering was not a business "affected with a public interest." Thus armed with the "affected with a public interest" rationale, the court in *Thrift-D-Lux* concluded: "The effect of the statute here involved is to protect the industry only—a small segment of the general public."<sup>23</sup>

In a vigorous dissenting opinion, Justice Traynor argued that there was a rational basis for the act in that there had been a history of destructive and ruthless competition in the dry cleaning business, resulting in a downgrading of services essential to the public health.<sup>24</sup>

An interesting analysis can be made of a 1963 district court of appeal

<sup>14</sup> CAL. BUS. & PROF. CODE §§ 16900-05, upheld in *Max Factor & Co. v. Kunsman*, 5 Cal. 2d 446, 55 P.2d 177 (1936), *aff'd* 299 U.S. 198 (1936).

<sup>15</sup> CAL. BUS. & PROF. CODE §§ 17000-101, upheld in *Wholesale Tobacco Dealers Bureau v. National Candy & Gum Tobacco Co.*, 11 Cal. 2d 634, 82 P.2d 3 (1938).

<sup>16</sup> See also, *Jersey Maid Milk Prods. v. Brock*, 13 Cal. 2d 620, 91 P.2d 577 (1939); *People v. Ryan*, 101 Cal. App. 2d 927, 226 P.2d 376 (1951). *But see Whitcomb v. Emerson*, 46 Cal. App. 2d 263, 115 P.2d 892 (1941).

<sup>17</sup> 40 Cal. 2d 436, 254 P.2d 29 (1953).

<sup>18</sup> Formerly CAL. BUS. & PROF. CODE §§ 9560-67, added by Cal. Stat. 1945, ch. 1517 § 1, p. 2847, repealed by Cal. Stat. 1957, ch. 1691 § 11, p. 306 (as to §§ 9560, 9562-67) and Cal. Stat. 1953, ch. 838 § 1, p. 2156 (as to § 9561).

<sup>19</sup> Formerly CAL. BUS. & PROF. CODE § 9564 (see *supra* note 18).

<sup>20</sup> 40 Cal. 2d at 441, 254 P.2d at 32.

<sup>21</sup> *Ibid.*

<sup>22</sup> 22 Cal. App. 2d 161, 70 P.2d 962 (1937).

<sup>23</sup> 40 Cal. 2d at 447, 254 P.2d at 35.

<sup>24</sup> *Id.* at 450, 254 P.2d at 37.

decision, *Doyle v. Board of Barber Examiners*.<sup>25</sup> Prior to 1957, Business and Professions Code section 6550 provided in effect that apprentice barbers<sup>26</sup> were to be employed at a ratio of one apprentice to every two registered barbers employed in a barbershop. In 1957 this section was amended to provide that each shop could employ "one apprentice to each registered barber working in the shop but *not to exceed two apprentices in each shop*."<sup>27</sup>

The appellant barbershop owner had employed three apprentices in his shop and as a result his license was suspended for violating the 1957 statute. He petitioned for a writ of mandate to annul the suspension on the ground that it violated the due process clause of the California and federal constitutions.

The court found that there were factors having a rational relation to the public interest, which the legislature might have considered when enacting the statute. Such factors were that limiting the number of apprentices to two permitted shop owners to personally supervise the training of apprentices. The reasoning was that if there were more than two apprentices in the shop, much of each apprentice's supervision would come from employee-barbers who would not be as assiduous to teach and correct an apprentice as would a shop owner. Thus, the statute insures that the apprentice will complete his training as a competent practitioner because he will have the benefit of supervision by the shop owner rather than the employee-barber. Secondly, there were seventeen other states which had statutes similar to the one in California.<sup>28</sup> Thirdly, the court on its own motion raised the point that the legislature might have passed the regulation to prevent exploitation of the public. The court pointed out that since most people do not know whether their hair is being cut by an apprentice or a journeyman, limiting the number of apprentices to two per shop provides the public with some assurance of journeyman service without eliminating on-the-job training.

A close analysis reveals that the reasons advanced by the court for upholding the statute are tenuous. The fact that seventeen other states have similar regulations is circumstantial evidence of reasonableness, but in none of the enumerated states has the constitutionality of the regulation been litigated. The argument that the statute might have been passed to give the public some assurance of journeyman service seems reasonable on the surface. But does the two apprentice restriction correct this evil? The legislature could prevent an owner from disguising his apprentices as journeymen much more effectively by requiring a posted notice identifying the apprentice, or perhaps by requiring all apprentices to wear green arm bands. The fact that more direct and efficient alternatives are available or possible

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<sup>25</sup> 219 A.C.A. 576, 33 Cal. Rptr. 349 (1963). Letter to this writer from counsel for appellant, Edward P. Friedberg, December 5, 1963: "Please be advised we did not appeal the matter further and the decision is final."

<sup>26</sup> CAL. BUS. & PROF. CODE § 6550: "No registered apprentice may independently practice barbering, but he may as an apprentice do any or all of the acts constituting the practice of barbering under the immediate personal supervision and employment of a registered barber. . . ."

<sup>27</sup> Amended by Cal. Stat. 1957, ch. 351 § 1, p. 994 (emphasis added).

<sup>28</sup> Fla., Ida., Kan., La., Me., Mich., Minn., N.J., N.M., Ore., Ohio, Okla., Pa., R.I., Tenn., Wis., Wyo.

has shaped decisions in the past.<sup>29</sup>

The only theory advanced by the court which is at all persuasive, is that the limitation permitted the shop owners to supervise the training of apprentices. By limiting the permissible number to two, the legislature assured each apprentice of obtaining adequate supervision from the shop owner, who is presumably more concerned and interested in his training than are employee-barbers. In light of the liberal economic due process doctrine, the court did not go further. It did not consider whether limiting the number of apprentices would actually result in closer supervision by the employer. The resulting economic discrimination against large shop owners, who must hire more journeymen in proportion to total employees than the small shop owner, was not considered. Nor was it mentioned that the statute tends to protect journeymen from job displacement by apprentices.<sup>30</sup> The court concluded: "If the judicial arm stops swinging upon postulation of any rationally acceptable hypothesis for the statute . . . there is little elbow room for balancing private burdens against public benefits. The process stops as soon as any public benefit is hypothesized."<sup>31</sup> So sweeping is this statement that under it only the most preposterous of statutes would fall. Surely there are statutes short of being preposterous and yet so burdensome and restrictive that they should be invalidated. The provision invalidated in the *Thrift-D-Lux* case would seem to be such a statute. It is especially significant that in *Thrift-D-Lux* the court relied on the older approach of carefully scrutinizing the statute and weighing the benefits against the burdens.

Although the contours of the California concept of economic due process cannot be precisely determined, there appears to be a close kinship to the federal position.<sup>32</sup> As said in the *Doyle* case: "[T]he . . . law may exact a needless, wasteful requirement in many cases. But it is for the legislature, not the courts, to balance the advantages and disadvantages of the new re-

<sup>29</sup> See *supra* note 7. This is essentially what was done in the *Thrift-D-Lux* case, where it was indicated that when other statutes meet the need which the legislation in question purports to meet, the ostensible purpose of the statute will at least be suspect. See also, *Edwards v. State Bd. of Barber Examiners*, 72 Ariz. 108, 231 P.2d 450 (1951), where it was found that other statutes were adequate to guard against the health menaces of barbershops, and therefore a statute fixing barbering prices could not be upheld on that basis.

<sup>30</sup> The court did take judicial notice of statistical records compiled by the Board of Barber Examiners demonstrating that the number of registered barbershops in California exceeds the number of registered apprentices, as proof that the two-apprentice limitation is "not an actual limitation on the total number of barber apprentices in California." 219 A.C.A. at 588, 33 Cal. Rptr. at 357. It could be argued, however, that these statistics disregard the factor that many shops may, as a matter of policy, not hire apprentices.

<sup>31</sup> 219 A.C.A. at 587, 33 Cal. Rptr. at 356.

<sup>32</sup> The case of *Serve Yourself Gasoline Stations Ass'n v. Brock*, 39 Cal. 2d 813, 249 P.2d 545 (1952), decided a few months before *Thrift-D-Lux*, appeared consistent with the early attitude of the court. Decisions subsequent to *Thrift-D-Lux* are also consistent with the early attitude. See *Scovill Mfg. Co. v. Skaggs Pay Less Drug Stores*, 45 Cal. 2d 881, 291 P.2d 936 (1955); *Allied Properties v. Department of Alcoholic Beverage Control*, 53 Cal. 2d 141, 346 P.2d 737 (1959). *But cf.* *Blumenthal v. Board of Medical Examiners*, 57 Cal. 2d 228, 18 Cal. Rptr. 501, 368 P.2d 101 (1962).