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CASE COMMENTS

Constitutional Law—Equal Protection in Class Legislation—Colorado Sunday Closing Statute Upheld

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Plaintiffs, automobile dealers, were precluded by a Colorado statute[1] from selling automobiles on Sundays. Other businesses, including filling stations, motor repair shops, auto accessory businesses and farm machinery dealers were allowed to operate on Sundays. Plaintiffs sought a declaratory judgment that the statute violated both the Colorado constitution's prohibition of "special laws"[2] and the equal protection clause of the Federal Constitution's fourteenth amendment.[3] The Colorado Supreme Court initially held the act unconstitutional[4] but on rehearing declared it constitutional. *Mosko v. Dunbar*, 309 P.2d 581 (Colo. 1957).

Since judicial construction has given the federal equal protection clause the same meaning as the Colorado constitution's "special laws" provision, consideration of one is necessarily consideration of both. The Supreme Court of Colorado has considered the issue of the constitutionality of Sunday closing laws several times before. The previous cases, like the instant case, concerned legislation directed at particular segments of the business community rather than all-inclusive Sunday closing laws. In *Denver v. Bach*,[5] an 1899 case, the supreme court held an ordinance which prohibited the sale of clothing on Sunday to be unconstitutional as class legislation prohibited by the Colorado constitution. A similar question arose several years later in *McClelland v. Denver*,[6] dealing with an ordinance which forbade barbering on Sundays. The high court in this instance declared the ordinance constitutional. Two years later *Mergren v. Denver*[7] questioned the constitutionality of an ordinance precluding Sunday operation of meat markets and grocery stores. The supreme court, following the Bach case, found this ordinance to be class legislation forbidden by the state constitution.[8] Then, in a 1938 case,[9] the Colorado court ruled on a Denver ordinance which prohibited the sale of new and used automobiles on Sundays. The ordinance was upheld against a contention that it was discriminatory special or class legislation. It should be noted that the ordinance upheld in 1938 was substantially identical to the statute involved in the *Mosko* case.

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[1] Colo. Rev. Stat. Ann. § 13-20-1 to 3 (Supp. 1955).
[2] Colo. Const. art. 5, § 25 (1876).
[3] U. S. Const. amend. XIV, § 1.
[4] 8 Colo. Bar Ass'n Adv. Sh. 16 (1956).
[5] 26 Colo. 530, 58 Pac. 1089 (1899).
[6] 36 Colo. 486, 86 Pac. 126 (1906).
[7] 46 Colo. 385, 104 Pac. 395 (1909).
[8] *Accord:* Allen v. Colorado Springs, 101 Colo. 498, 75 P.2d 141 (1937) (invalidated similar ordinance of Colorado Springs).
[9] Rosenbaum v. Denver, 102 Colo. 530, 81 P.2d 760 (1938).

The opinion in the instant case declared that the new and used automobile business is a business separate and distinct from any other business, and that the statute treats equally all within the business. Thus the court found that the act afforded all auto dealers the equal protection of the laws. In so holding, the Colorado court adopted from its previous decisions the criterion that where the legislature enacts a Sunday closing law applicable to a legitimate occupation or business, it will be upheld if there is any reasonable basis for distinguishing businesses affected from businesses allowed to remain open. The court relied heavily on its finding that the sale, ownership and use of automobiles have been the subjects of numerous legislative enactments which have treated automobile law as a separate and distinct category. In support of this finding the court cited *Gundaker Motors v. Gassert*,[10] a late 1956 New Jersey case upholding a statute which outlawed the sale of automobiles on Sundays, but allowed other businesses to remain open. In an opinion by Chief Justice Vanderbilt, the New Jersey court had held that the automobile business constitutes a "class" differing from any other class, and since the statute treated persons within that class fairly and impartially, it did not violate the fourteenth amendment. The courts of Nebraska[11] and Illinois[12] have upheld Sunday closing laws for auto dealers. On the other hand, the Florida court invalidated a general Sunday law which expressly exempted newspapers, theatres, filling stations, restaurants, grocery and drug stores, hotels, parking lots and transportation companies, but not auto dealers and garages.[13] That classification was considered arbitrary.

Those opposed to classification like that in the principal case have objected that although the business regulated may differ factually from other businesses, mere factual difference should not be the determinant. They argue that, in order to be held constitutional, a classification must not only be reasonable and not arbitrary, but must rest upon a difference having a fair and substantial relation to the *object of the legislation*. This test was laid down by the United States Supreme Court in *Old Dearborn Distributing Co. v. Seagram Distillers Corp.*[14] In other words, the fact that all within a business or occupation are included within the terms of an act should not be enough to validate the act. The validity of classification should be determined by considering the objective of the legislation. For example, if the objective is to limit the number of hours worked, the classification should be broad enough to bring within

[10] 127 A.2d 565 (N. J. 1956).
[11] Stewart Motor Co. v. Omaha, 120 Neb. 776, 235 N. W. 332 (1931).
[12] Humphrey Chevrolet Co. v. City of Evanston, 7 Ill. Bluebook 2d 402, 131 N. E.2d 70 (1955).
[13] Henderson v. Antonacci, 62 So.2d 5 (Fla. 1952).
[14] 299 U. S. 183 (1936).

it every business and avocation in order to prevent any person or business from exceeding the limitations. If the object is to protect Sunday as a day of rest, the statute should preclude all from working on Sundays. Of course, in those jurisdictions which have enacted all-inclusive Sunday laws, certain works of necessity and charity have been exempted for practical reasons.[15]

Unfortunately neither the state nor the federal courts have followed the rationale of the *Old Dearborn* case. It is apparent from the cases previously mentioned that the Colorado court has not applied this principle,[16] but instead has rested its decisions on whether a classification has brought within the operation of the law those whose businesses were reasonably distinguishable from the businesses of other outside the statute, and whether it has forbidden all competitors to remain open. However, a well written dissent in the instant case indicated that Mr. Justice Sutton may have recognized the distinction in rationales.[17]

Mr. Justice Holmes, in *Patersone v. Pennsylvania*,[18] declared,

> "(A) state may classify with reference to the evil to be prevented, and . . . if the class discriminated against is or reasonably might be considered to define those from whom the evil mainly is to be feared, it properly is picked out. A lack of abstract symmetry does not matter. The question is a practical one, dependent upon experience. . . . 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."[19]

Mr. Justice Holmes' statement could be paraphrased to express the reasoning of the Colorado court in the *Mosko* case, dealing with the dangers which experience has shown to be particularly peculiar to the automobile selling business so as to "mark the class." The

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[15] See, e. g., Ross v. State, 9 Ind. App. 35, 36 N. E. 167 (1894).
[16] See also, Smith Brooks Printing Co. v. Young, 103 Colo. 199, 35 P.2d 39 (1938); Rifle Potato Growers v. Smith, 78 Colo. 171, 240 Pac. 937 (1925); Consumer's League v. Southern R. R. Co., 53 Colo. 54, 125 Pac. 577 (1912).
[17] 309 P.2d at 597.
[18] 232 U. S. 138 (1913).
[19] *Id* at 144. Cf. West Coast Hotel Co. v. Parrish, 300 U. S. 379 (1937); Bayside Fish Flour Co. v. Gentry, 299 U. S. 422 (1936); People v. Zimmerman, 278 U. S. 63 (1928).

United States Supreme Court has stated, in other cases, that a law which hits the evil where it is most felt is not to be overthrown because there are other instances to which it might have applied.[20] That Court has not passed upon the validity of Sunday closing laws regulating automobile dealers. However, it upheld a Minnesota statute which prohibited barbering on Sundays[21] and it appears from prior decisions that the Court will uphold the kind of classification inherent in auto dealer Sunday closing laws.

Related to the question whether Sunday closing laws are discriminatory class legislation, is the question whether legislature enacting such laws are within their police power. Chief Justice Moore raised this question in a dissent in the principal case.[22] In any case which involves class legislation, a consideration of whether the legislature enacted the questioned statute in the interest of the public health, welfare, safety and morals, is necessary. A law making body has no power under the guise of police regulation to arbitrarily invade the personal rights and liberties of an individual citizen.[23] The Colorado Supreme Court, in the cases considered, either expressly or impliedly held the enactment of Sunday closing laws to be within the police power. That all-inclusive Sunday laws are within the police power seems unquestionable, and, assuming this, the argument that particular Sunday closing laws are void because of exceeding the police power is merely begging the question of class legislation.

It is interesting to note that the Supreme Court of the United States in 1834 declared it to be the practice of that Court not to hold statutes unconstitutional by a bare majority.[24] Ohio,[25] Nebraska[26] and North Dakota[27] have constitutional provisions to the effect that statutes cannot be declared unconstitutional by a bare majoriy decision. The reasoning behind these provisions is particularly interesting in regard to the instant case, in light of the initial holding by a four to three decision that the statute was unconstitutional, and the final holding, again four to three, that it was constitutional.

In Colorado as elsewhere a statute must be plainly, palpably and beyond a reasonable doubt unconstitutional before a court may invalidate it.[28] Can a statute which three out of seven judges consider valid, be plainly, palpably and beyond a reasonable doubt unconstitutional?

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[20] Pearson v. Probate Court, 308 U. S. 518 (1939); Silver v. Silver, 280 U. S. 117 (1929).
[21] Petit v. Minnesota, 177 U. S. 164 (1899).
[22] 309 P.2d at 593.
[23] Chenoweth v. State Board, 57 Colo. 574, 141 Pac. 132 (1913).
[24] City of New York v. Miln, 11 U. S. (8 Pet.) 43 (1834).
[25] Ohio Const. art. 4, § 2 (1912).
[26] Neb. Const. art. 5, § 2 (1875).
[27] N. D. Const. art. 4, § 89 (1918).
[28] Eachus v. People, 124 Colo. 454, 238 P.2d 885 (1951); McClain v. People, 111 Colo. 271, 141 P.2d 685 (1943); People ex rel v. Barksdale, 104 Colo. 1, 87 P.2d 755 (1939); People ex rel v. Letford, 102 Colo. 284, 76 P.2d 274 (1938).