

DUE PROCESS OF LAW AND ECONOMIC LEGISLATION—NORTH CAROLINA STYLE

I. Introduction

A. *The Present Position of the United States Supreme Court*

Since the presentation of and struggle over the Roosevelt "court plan" in 1938, there has been a decided shift in the application by the United States Supreme Court of the "due process" clauses of the United States Constitution to state and Federal legislation in economic and public welfare fields. During the period prior to 1938 the United States Supreme Court had often used the "due process" sections of the Fifth and Fourteenth Amendments to the United States Constitution to invalidate economic legislation on the ground that the particular legislation under attack, in its substance and not merely its procedures, denied "due process of law".¹ With the advent of the "court plan"—possibly because of it—there was a decided shift in emphasis by the Court in economic matters, the Court refusing to look into the substance of economic legislation, with the result that from 1938 up until the present the United States Supreme Court has failed to upset the considered judgment of either a state legislature or the Congress of the United States in legislation pertaining to economic matters on grounds of failure of such legislation to comply with the "due process" requirements of the United States Constitution.

B. *The Importance of State Court Interpretations of Due Process Clauses in State Constitutions.*

The deference of the United States Supreme Court to the legislatures in the fields of economics and public welfare, however, has not given state legislatures a completely free rein in passing economic legislation. The supreme courts of the several states, while bound by Federal decision in

¹ *McCune, The Nine Young Men*, Ch. III (1947). For pre-1938 decisions see, e.g., *Tyson & Bros. v. Benton*, 273 U.S. 418 (1927); *Adkins v. Children's Hospital*, 261 U.S. 525 (1923); *New State Ice Co. v. Liebman*, 285 U.S. 262 (1931); *Adams v. Tanner*, 244 U.S. 590 (1917). For post-1938 cases see, e.g., *Olsen v. Nebraska*, 313 U.S. 236 (1941); *Daniel v. Family Security Life Insurance Co.*, 336 U.S. 220 (1949).

Federal matters, have the final word in interpreting clauses of their own state constitutions. A state constitution may contain clauses identical to the Fifth and Fourteenth Amendments of the United States Constitution, but the state supreme court may interpret the clauses of its state constitution without fear of having such interpretation overruled by another court in a way directly opposite to the United States Supreme Court's interpretation of the Fifth and Fourteenth amendments. Thus it is in the power of the state courts to invalidate state legislation as violative of some "due process" clause of the state constitutions when the same legislation is perfectly valid from the standpoint of Federal constitutional law. State legislatures may find that their attempts at economic legislation, while not under attack in the Federal courts on substantive "due process" grounds since 1938, are being struck down by state supreme courts as being violative, in substance and not just procedures, of some state constitutional "due process" provision. A recent article² makes an excellent general survey of state court decisions in recent years in the field of substantive "due process". It is the purpose of the present article to examine the decisions of the Supreme Court of North Carolina in this field in an effort to give a more particularized example of the course of decisions in a fairly typical state court.

C. Due Process Provisions of the North Carolina Constitution.

"Due process of law" is at most a nebulous concept, difficult to apply and almost impossible to define. The North Carolina Constitution contains no specific requirement that anything be according to "due process of law", but the North Carolina Supreme Court has examined the State Constitution and interpreted several of its provisions as guarantees of "due process". The provision most often so construed is Article I, section 17, which provides:

² Paulsen, *The Persistence of Substantive Due Process In The States*, 34 *Minnesota Law Review* 92 (1950).

"No person ought to be taken, imprisoned, or dis-seized of his freehold, liberties or privileges or outlawed or exiled or in any manner deprived of his life, liberty or property but by the law of the land".³

Other provisions interpreted as calling for "due process" are Article 1, section 1,⁴ asserting the equality and rights of man, Article 1, section 29,⁵ calling for a frequent recurrence to fundamental principles, and Article 1, section 31,⁶ decrying perpetuities and monopolies as contrary to the genius of a free state. While interpreting the several provisions of the State Constitution as guaranteeing "due process", the Court has failed to give, as have virtually all courts, any single definition or decision determining the exact requirements which legislation must meet to satisfy "due process". It seems the only way of making any fair examination of the extent to which the North Carolina Court has followed the United States Supreme Court in recognizing the validity of the legislative judgment in economic matters is to examine the facts and holdings in the particular cases since 1938 in which the North Carolina Court has construed the "due process" clauses of the State Constitution. For the purposes of examination, the cases have been divided into two groups: first, the cases involving licensing boards and commissions, and second, all other cases involving economic legislation, the latter grouping including such varied matters as stream pollution legislation, "Fair Trade" legislation, and labor legislation.

³ "The 'law of the land' is equivalent to 'due process of law'." *State v. Collins*, 169 N. C. 323, 84 S. E. 1049 (1915).

⁴ *N. C. Constitution*, Art. I, §1: "That we hold it to be self evident that all persons are created equal; that they are endowed by their creator with certain inalienable rights; that among those are life, liberty and the enjoyment of the fruits of their own labor, and the pursuit of happiness."

⁵ *N. C. Constitution*, Art. 1, § 29: "A frequent recurrence to fundamental principles is absolutely necessary to preserve the blessings of liberty."

⁶ *N. C. Constitution*, Art. 1, § 31: "Perpetuities and monopolies are contrary to the genius of a free state and ought not to be allowed."

II. Examination of Cases

A. *Licensing Boards and Commissions.*

Over the years the North Carolina General Assembly has passed legislation providing for the regulation and licensing of at least 22 professions and occupations under supervision of boards composed of members of the particular professions or occupations regulated.⁷ The statutes setting up the various licensing boards have, from time to time, come under attack in the North Carolina Supreme Court, and it was in a case attacking one of the many licensing board statutes that the North Carolina Court was presented its first opportunity after the "court plan" of passing on the validity of state economic legislation under the "due process" provisions of the North Carolina Constitution. In 1935 the North Carolina General Assembly passed the Photography Act⁸ providing for the establishment of a State Board of Photographic Examiners to be appointed by the Governor, and providing that all commercial photographers with a few exceptions such as newspaper photographers, must be licensed by the Board to practice photography. All photographers who had not practiced their trade for more than a year prior to the passage of the act were required to take an examination prepared by the Board before obtaining a license, the Board giving licenses to those who qualified as to competency, ability and integrity. The Act was to apply only in cities of a population of 2500 or more. In 1938 one Lawrence was indicted for violating the provisions of the Act, and, a jury having found that the defendant had engaged in commercial photography in a town of more than 2500 people without having been licensed by the Photography Board, the trial judge ruled that the defendant was guilty of no crime on grounds of the invalidity of the statute. The State appealed under a provision of the North Carolina Code⁹ providing for appeal by the State from a special verdict in a criminal case, whereupon the Supreme

⁷ State v. Lawrence, 213 N. C. 674, 197 S. E. 586 (1938).

⁸ N.C.G.S. 91-8.

⁹ N.C.G.S. 15-179.

Court reversed¹⁰ and upheld the Photography Act in an opinion by Justice Clarkson. The majority opinion pointed out that there was a public interest in fire protection, protection against fake pictures, protection against misuse of pictures in trials, causing photography to be a matter for regulation for the protection of the public interest under the "police power" and said:

"The matter is largely in the discretion of the General Assembly as to what professions and occupations are within the police power of the state and subject to regulation . . . It is equally well settled that no act of the General Assembly ought to be declared violative of any constitutional provision unless the conflict is so clear that no reasonable doubt can arise . . . Taking the act and considering it as a whole, we cannot say that it is arbitrary or unreasonable or an unconstitutional delegation of legislative authority. We think the conclusion in the brief of the State is correct: 'It is submitted that the Legislature of the State of North Carolina is the proper division of the State's government to determine in the first instance the need of regulating a given occupation.'"

Thus, in the same year as the "court plan", the North Carolina Court seemed to be following the United States Supreme Court in its reasoning as well as in its holdings in a case involving the constitutionality of economic legislation challenged as violative of state constitutional "due process" provisions.

The year 1940, however, saw a reversal by the Court of its position in the licensing board field and a limitation of some of the broad language of the Court in *State v. Lawrence*. Chapter 30 of the 1937 Public Laws of North Carolina had provided for the establishment of a State Dry Cleaners Licensing Commission, and the Court ruled¹¹ the statute unconstitutional as discriminatory in exempting 14 counties, as failing to set proper standards for licensing by the Board and, important for the purposes of this paper, as violative of Article 1, section 31 and Article 1, section

¹⁰ *State v. Lawrence*, note 7. The statute was attacked under Article 1-1, 1-17, 1-29, and 1-31.

¹¹ *State v. Harris*, 216 N. C. 746, 6 S. E. 2d 854 (1940).

29 of the State Constitution. The Court said that dry cleaning was one of the ordinary occupations not so affected with a public interest as to make it subject to exclusionary licensing provisions under the guise of the exercise of the police power. Referring to a legislative statement of reasons for the necessity of the statute, the Court said:¹²

“The Legislature cannot by preamble or fact finding declaration attribute to a business or occupation a characteristic which it does not have according to common knowledge and experience and thus withdraw the legislation from judicial review.”

The Court expressed the view on “common knowledge” that dry cleaning involved no special danger to public health or welfare. In interpreting Article 1, section 29,¹³ the Court said that the frequent recourse to fundamental principles required by that section of the Constitution was intended to give the individual greater freedom than he would otherwise have and thus restrain the police power, the idea of the Court seemingly being that the licensing involved in the case was something in the nature of a deprivation of civil rights. Justice Clarkson, concurring on other grounds, restated¹⁴ the view expressed by the Court in upholding the Photography Act and seemingly reproached the majority for its position as to review of the legislative judgment on the necessity of regulation of the dry cleaning business. Although the invalidity of the Dry Cleaners Act as denying “due process” was an alternative holding rather than the sole ground for the decision of the Court, the language used by the Court seems to indicate a shift by the Court from its position of almost complete deference to the Legislature in economic legislation as stated in the *Lawrence* case, to a position where the Court will look into the substance of such legislation, at least in the field of licensing.

¹² *Supra*, note 12, at p. 760.

¹³ See note 5.

¹⁴ *Supra*, note 11, Clarkson concurring: “If the dry cleaning business, considering the proportions to which it has grown in the life today, is affected with a public interest, the courts may not deny the power of the Legislature to impose regulations upon it. The decision as to what is affected with a public interest is primarily for the Legislature, though always open to judicial inquiry.”

The next major case involving the constitutionality of a licensing board,¹⁵ and the most recent case in which the North Carolina Court has passed upon the constitutionality, under the "due process" clauses, of economic legislation, was the 1948 case of *State v. Ballance*.¹⁶ The facts in the Ballance case were virtually identical to those in the original 1938 case upholding the Photographer's Act:¹⁷ an unlicensed photographer was charged with violation of the Photographer's Act and convicted on the strength of the 1938 case. On appeal the Court held the statute invalid as violating Article 1, sections 1, 17, 29 and 31 of the State Constitution. The opinion of the Court, by Justice Ervin, seems to state the present position of the Court on the Photographer's Act and also seems to indicate the extent to which the Court will go in substituting its own views as to the reasonableness or necessity for the substance of licensing statutes for the judgment of the Legislature:

"When all is said, photography is one of the many usual legitimate and innocuous vocations by which men earn their daily bread. It is, in essence, a private business unaffected in a legal sense with any public interest . . . When Chapter 92 of the General Statutes is laid alongside the relevant legal authorities and principles, it is plain that it is not a valid exercise of the police power of the state, and that it violates the constitutional guaranties securing to all men the rights to "liberty, the enjoyment of the fruits of their own labor, and the pursuit of happiness" and providing that no person is to be deprived of "liberty or property but by the law of the land." It unreasonably obstructs the *common right of all men to choose and follow one of the ordinary lawful and harmless occupations of life as a means of livelihood*,¹⁸ and bears no rational, real or substantial rela-

¹⁵ *Motley v. State Board of Barber Examiners*, 228 N. C. 337, 45 S. E. 2d 250 (1947).

¹⁶ *State v. Ballance*, 229 N. C. 764, 51 S. E. 2d 731 (1949). For other cases invalidating similar statutes in the same field see *Buehman v. Bechtel*, 57 Ariz. 363, 114 P. 2d 227 (1941); *Sullivan v. DeCerb*, 156 Fla. 496, 23 So. 2d 571 (1945); *Bramley v. State*, 187 Ga. 826, 2 S. E. 2d 647 (1939); *Territory v. Kraft*, 33 Haw. 397; *State v. Cromwell*, 72 N. D. 565, 9 N. W. 2d 914 (1943); *Wright v. Wiles*, 173 Tenn. 334, 117 S. W. 2d 736 (1938); *Moore v. Sutton*, 185 Va. 481, 39 S. E. 2d 348 (1946).

¹⁷ *Supra*, note 10.

¹⁸ Italics added.

tion to the public health, morals, order or safety, or the general welfare. Instead, it is addressed to the interests of a particular class rather than the good of society as a whole, and tends to promote a monopoly in what is essentially a private business."

The Ballance Case indicates that in the field of licensing boards the North Carolina Supreme Court will not hesitate to invalidate the judgment of the General Assembly as to the reasonableness or necessity of the legislation and that the Court will set aside such legislation because it substantively violates "due process" of law.

B. *Other Economic Legislation.*

Turning from the field of licensing boards and commissions to other economic fields, we find a much greater obedience of the Court to the considered judgment of the legislature. In the year following the Supreme Court's approval of the Photography Act in *State v. Lawrence*, economic legislation in another field was brought under attack in the State Court on the ground of violation of "due process" provisions of the State Constitution. The North Carolina General Assembly passed a "Fair Trade Act", setting minimum prices for certain "brand" products, and the Lilly Co., a drug wholesaler, sought to enforce the provisions of the act against a retail firm selling "brand" products below the "fair trade" price. The Supreme Court upheld¹⁹ the act as neither violative of Article 1, section 17 nor Article 1, section 31 of the North Carolina Constitution and said in part: "We have nothing to do with the expediency of an economic experiment . . .", pointing out that such was within the legislative power of the General Assembly. The views expressed by the Court were very similar to the views presently expressed by the United States Supreme Court in regard to economic matters. After the upholding of the "Fair Trade" Act, the Court upheld as "reasonable" legislation not violative of "due process" clauses of the State Constitution, a statute applying unemployment compensation laws to a person owning three places of business

¹⁹ *Lilly Co. v. Saunders*, 216 N. C. 163, 4 S. E. 2d 528 (1939); cf. 63 *Harv. L. Rev.* 546 (1950) (discussing fair trade).

employing more than eight persons in the aggregate,²⁰ and statute relieving an employer from liability for assignment of wages of employees unless the assignment was accepted in writing by the employer,²¹ but the words of the opinions shed no light on whether the Court found the substance of the legislation not violative of the "due process" clauses of the Constitution or whether the Court was leaving the substance of the legislation up to the General Assembly.

As did fifteen other states at about the same time, the North Carolina General Assembly passed in 1947 a so-called "Right to Work" act,²² forbidding employer-union contracts providing for closed shop conditions and check-off of union dues. Whitaker, an employer, and DeBruhl, an officer and agent of a union, were indicted for entering into a closed shop agreement and were convicted and fined fifty dollars (\$50.00) apiece. Upon appeal the State Supreme Court upheld the conviction and the Act; the Court, in an opinion²³ written by Justice Seawell, one of the dissenting justices in the 1938 upholding of the Photographer's Act, made statements indicating that the position of the North Carolina Court and the United States Supreme Court in general economic matters is the same today:²⁴

"We are not called upon here to determine the wisdom of the Legislature's action in adopting Ch. 328. Our sole concern must be whether the Legislature has acted within the limitations imposed upon it by the Fourteenth Amendment to the Federal Constitution and Article 1, section 17 of the State Constitution. In determining that question we believe that Article 1, section 17, should be viewed in the same light as Justice Holmes regarded the Fourteenth Amendment: "There is nothing I more deprecate than the use of the Fourteenth Amendment beyond the absolute compulsion of its words to prevent the making social experiments

²⁰ *State v. Willis Barber and Beauty Shop*, 219 N. C. 709, 151 S. E. 2d 4 (1941).

²¹ *Morris v. Holshouser*, 220 N. C. 293, 17 S. E. 2d 115 (1941).

²² Ch. 328, Session Laws of N. C. 1947, as supplementing N.C.G.S. Ch. 75.

²³ *State v. Whitaker*, 228 N. C. 352, 45 S. E. 2d 860 (1947). *Aff'd*, 335 U. S. 525 (1949). At p. 358 the N. C. Court points out that 15 states have adopted similar closed shop statutes.

²⁴ *Supra*, note 23 at page 370.

that an important part of the community desires in the insulated chambers afforded by the several States, even though the experiments may seem futile or even noxious to me and those whose judgment I respect.' ”

The Court also quoted from and cited a number of opinions of the United States Court handed down since 1938 and covering economic legislation. Outside the licensing field, the opinion is the latest one of the Court involving the validity of economic legislation under the “due process” clauses of the State Constitution, and it seems to indicate that the Court will now give great deference to the Legislature in economic matters. Since 1938, the only economic legislation outside the licensing field, which has been invalidated on grounds of lack of “due process” was a proviso²⁵ of the General Statutes exempting corporations chartered prior to March 4, 1915, from a proscription against emptying substances inimical to fish into streams within the State, the Court saying only that the distinction between corporations chartered before and after the prescribed date had no relation to the evil sought to be remedied and that the provisions of the statute invalidated violated Article 1, section 17 of the State Constitution.

III. Conclusion

In the most recent case in which the North Carolina Supreme Court has considered²⁶ the validity of economic legislation in relation to the “due process” clauses of the State Constitution, the Court inquired into the substance of the Legislation and found it violative of the “due process” provisions of the Constitution. The case, however, involved the validity of a statute creating a licensing board, a field where the Court has indicated that it considers that the civil rights of the free citizens of North Carolina, particularly the right to engage in one of the ordinary trades or occupations, are being unwarrantedly attacked. Outside the licensing field, the Court has shown, by its holdings and by the language of its opinions, that it is following the Supreme

²⁵ N.C.G.S. 113-172.

²⁶ *Supra*, note 16.

Court of the United States in shifting the emphasis on "due process of law" in the economic field from inquiry into the substance of legislation to inquiry into the question of whether the legislation under scrutiny by the judiciary satisfies procedural "due process" requirements. The North Carolina cases show that the North Carolina Supreme Court, like many other state courts,²⁷ while willing to give great deference to legislative opinion in economic matters, is not willing to completely strip itself of the power to use the "due process" clauses of the State Constitution to invalidate economic legislation for defects of substance. Whether the Court will continue its present course of deferring to the views of the legislature in economic matters in general, while closely scrutinizing the substance of economic legislation in the licensing field, is purely a matter of conjecture. It is submitted that the Court is not without justification in its seemingly anomalous position, in view of the extent to which licensing boards may be used to create monopolies or closed "guilds" in the most ordinary fields of human endeavor. The Court may find support for its present position not only in the North Carolina Constitution²⁸ which specifically expresses an abhorrence of perpetuities and monopolies, but also in the position taken by some of the more liberal members of the United States Supreme Court in cases involving the validity of licensing statutes. Mr. Justice Douglas, Mr. Justice Reed, and the late Justices Murphy and Rutledge have dissented in recent cases²⁹ upholding state exclusionary licensing statutes. While these dissents were based on grounds of violation of the Equal Protection Clause of the United States Constitution rather than the Due Process Clauses, they indicate a hostility of even the most liberal justices to state legislative action creating monopolies in the ordinary human occupations. If the Equal Protection Clause of the Federal Constitution is strong enough to support an argument against exclusionary licensing, Article 1, sec. 31 of the North Carolina Con-

²⁷ See note 2.

²⁸ *N. C. Constitution* Art. I-31.

²⁹ *Goesaert v. Cleary*, 335 U.S. 464 (1948), and *Kotch v. Board of River Port Pilot Com'rs of New Orleans*, 330 U. S. 552 (1947).

stitution declaring monopolies against the genius of a free state seems strong enough to support the North Carolina Court in invalidating licensing measures which tend to create monopolies in such innocuous fields as dry cleaning and photography.

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