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Article 9

Constitutional Law; Police Power; Classification; Licenses

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Chief Justice Marshall deemed it important to find that *Marbury* had an absolute right to his office. The importance is that an absolute right had to be established in *Marbury* before there could be a controversy before the court in which the constitutionality of a Congressional act could be ascertained. Consequently this opinion holds that the finding in *Marbury v. Madison* to the effect that an inferior officer could not be removed by the President was germane to the issue of that case and as such should be controlling in this case. The opinion also stresses the holding of *Shurtleff v. United States*,[13] which in effect is that Congress may determine the conditions of removal of inferior officers when it places the appointment of such officers in the hands of the President. Considerable weight is laid to the fact that "if the framers of the Constitution had intended the executive power in art. 2, par. 1, to include all power of an executive nature, they would not have added the carefully defined grants of par. 2." This is to show that the inherent power of the executive is not all inclusive, and that by art. 2, sec. 2, par. 2, his power is specifically limited as to inferior officers, and that the President has only those powers which are conferred by the Constitution itself.[14]

The opinion of Justice Brandeis follows much along the lines of the preceding opinion going more into detail as to specific instances of Congress limiting the power of removal by legislative act. In conclusion of his opinion, Justice Brandeis states that the excepting clause of art. 2, sec. 2, par. 2, limits the executive power of removal as to inferior officers; and that all proposals to give the President uncontrollable power to remove were rejected at the Constitutional Convention of 1787; "and protection of the individual, even if he be an official from the arbitrary or capricious exercise of power was then believed to be an essential of free government."

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Constitutional Law; Police Power; Classification; Licenses. The Supreme Court, in a splendid fit of generosity, reviews as part of its decision in *State v. Levitan*[1] the Wisconsin doctrine of classification under the police power only to declare Sec. 99, 32 of the Wis. Stats. invalid for indefiniteness in the use of the word "principally" as applied to wholesale dealers who buy produce "for re-sale principally to others than consumers," etc.[2] In holding that it was proper for the legislature to distinguish between wholesalers and retailers of produce to require the former to be licensed the court reviewed that line of cases which declare that the classification may be unwise from the popular viewpoint; "it may be unscientific or illogical; . . . . it need not be all-inclusive, or extend to all cases which it might legitimately include; but it must "apply equally to each member of a class."[3]

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[13] 189 U. S. 311.

[14] p. 58. Justice McReynolds quoting from a speech of Mr. Clay upon the powers of the President.

[1] 210 N. W. 111.

[2] Stat. 1925, Sec. 99.32 (1) (Laws 1925, c. 389).

[3] *Kreutzer v. Westfahl*, 187 Wis. 463, 482, 204 N. W. 595, 603; *State v. Evans*, 130 Wis. 381, 110 N. W. 241; *Borgnis v. Falk Co.*, 147 Wis. 327, 133 N. W. 209,

Inasmuch as the wholesaler (said the court) sells much of the produce by sample, and frequently never sees the consignment sold, the opportunities for fraud clearly distinguish his position from that of the retailer whose established business gets its life from honest dealing and personal contacts. The statute, insofar as it makes this distinction in an endeavor to protect the public against fraud, was held not objectionable.

Perhaps, when it used the word "principally" the Legislature had in mind the decision in *Borgnis v. Falk Co.*,[4] which states that there may be some on one side of the line whose situation is practically the same as that of some on the other side, but there must be a distinction between classes as classes, whether they are characteristics which persist in a greater degree through the one class than in the other, which justify legal discrimination between them. But when the Legislature provided that violations of Sec. 99.32 should be deemed misdemeanors, it should have made the persons to whom the section applied reasonably definite. "Principal business" is a relative term; it might be the value of the products consigned, or the gross amount of the sales, or the gross profits or the net profits, or the number of articles handled. Since these words involved a vital part of the statutory definition, they vitiated the whole act.

The statute[5] was also held invalid in that it limited an exemption of local co-operative organizations to those composed of members residing in the same county. As applied to organizations formed in cities which are located in part in different counties, in each of which may be members, the attempted exemption is a denial of equal protection of the law. If the organization were moved a few miles either way and the membership were to change with the change in locality the same organization might be exempt. This is as much class legislation as would be an exempting from the operation of a Horse License Act "All piebald Indian ponies whose neigh is not a true E-flat monotone."

But the classification was held not improper because wholesale grain dealers subject to the jurisdiction of the Wisconsin Grain and Warehouse Commission[6] are exempt from the license provisions of Sec. 99.32, although grain dealers not under that control would be subject to the provisions of Sec. 99.32. This would appear to be an invalid class within a class but the court held contra, not because of differences in the nature of the work of the two classes of grain merchants but because of a means of protecting the public other than licenses recognized by the Legislature as differentiating the Superior Grain Merchants from the

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37 L. R. A. (N. S.) 489; *Peterson v. Widule*, 157 Wis. 641, 147 N. W. 966, 52 L. R. A. (N. S.) 778, Ann. Cas. 1016 B, 1040; *Trading Stamp Cases*, 166 Wis. 613, 166 N. W. 54, Ann. Cas. 1918 D, 707; *Pinkerton v Beuch*, 173 Wis. 433, 181 N. W. 125; *Ladd v. Minneapolis, St. P. and S. S. M. R. Co.*, 142 Wis. 165, 125 N. W. 468; *In re: Income Tax Cases*, 148 Wis. 456, 134 N. W. 673, 135 N. W. 164, L. R. A. 1915 B 569, 616; *Maercker v. City of Milwaukee*, 151 Wis. 324, 139 N. W. 199, L. R. A. 1915 F 1196; *Mehlos v. City of Milwaukee*, 156 Wis. 591, 146 N. W. 882, 51 L. R. A. (N. S.) 1009.

[4] *Supra.*

[5] St. 1925, Sec. 99.32 (Law 1925, c. 389).

[6] St. 1925, Secs. 126.01 to 126.74.

general run of wholesale produce dealers, i. e., the strict supervision of the Grain and Warehouse Commission. Such sub-classification does not raise a new question in Wisconsin. The exemption of "employees working in shops and offices" from the operation of a law imposing upon railway carriers liabilities peculiar to all their other employees was held not so unreasonable a sub-classification as to be beyond the power of the Legislature. "No court is justified in declaring classification baseless unless it can say without doubt that no one could reasonably conclude that there is any substantial difference justifying different legislative treatment. Nor is classification to be condemned . . . . because the situation of certain individuals in *one* class may not differ materially from the situation of certain individuals in another class. The class, must posses the distinguishing differences." The shop and office employees, as a class, are "in less danger from the negligence of co-employees, and perform duties less directly connected with the public safety than train employees and track repairers." This constitutes a "substantial difference."

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