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FREEDOM OF OCCUPATION

FRALEY N. WEIDNER

THERE is no express constitutional provision protecting freedom of occupation. However, enactments affecting occupation, to be constitution, must be found not to violate due process as required by the Fifth Amendment in the case of Federal legislation and of the Fourteenth Amendment in the case of State legislation.

PROOF OF FITNESS

May certain fitness or training be required in order to engage in a particular business? The obvious answer is "Yes," as licenses for doctors,¹ color blindness tests for locomotive engineers,² the fact that a law prohibiting all employment of children under the age of sixteen was constitutional.³ In such type of case the restriction must be a regulation to establish fitness for the position and must not be an arbitrary prohibition. Thus, an act providing that only freight brakemen could become freight conductors was unconstitutional, for it set up no standards that the brakemen must meet, and it ruled out other persons who could just as well be freight conductors,⁴ and an act requiring that all the stockholders of a corporation operating a drugstore must be registered pharmacists was held unconstitutional.⁵ Although the right to work is considered an absolute right and not a privilege, it may be taxed.⁶

With this introduction we can consider some specific problems:

1. HOURS—*Can a law limit the number of hours of employment?* Such laws have been held constitutional as regards employment in underground mines⁷ and in manufacturing establishments⁸ because they are hazardous occupations, and likewise, an eight-hour day for railroad employees was valid as an enactment in control of interest to commerce.⁹ Acts limiting the hours of labor of women are constitutional, because women are frail creatures and consequently need the protection

¹ Reetz v. People of the State of Michigan, 188 U.S. 505, 23 Sup. Ct. 390, 47 L.Ed. 563 (1903); Dent v. West Virginia, 129 U.S. 114, 9 Sup. Ct. 231, 32 L.Ed. 623 (1889).

² Nashville, C. & St. L. R. Co. v. Alabama, 128 U.S. 96, 9 Sup. Ct. 28, 32 L.Ed. 352 (1888).

³ Sturges & Burn Mfg. Co. v. Beauchamp, 231 U.S. 320, 34 Sup. Ct. 60, 58 L.Ed. 245 (1913).

⁴ Smith v. State of Texas, 233 U.S. 630, 34 Sup. Ct. 681, 58 L.Ed. 1139 (1914).

⁵ Liggett v. Baldridge, 278 U.S. 105, 49 Sup. Ct. 57, 73 L.Ed. 204 (1928).

⁶ Carmichael v. Southern Coal & Coke Co., 301 U.S. 495, 57 Sup. Ct. 868, 81 L.Ed. 1245 (1937); Charles C. Stuart Machinery Co. v. Davis, 301 U.S. 548, 57 Sup. Ct. 883, 81 L.Ed. 1279 (1937).

⁷ Holden v. Hardy, 169 U.S. 366, 18 Sup. Ct. 383, 42 L.Ed. 780 (1898).

⁸ Bunting v. Oregon, 243 U.S. 426, 37 Sup. Ct. 435, 61 L.Ed. 830, Ann. Cas. 1918 A 1043 (1916).

⁹ Wilson v. New, 243 U.S. 332, 37 Sup. Ct. 298, 61 L.Ed. 755 (1917).

of the law.¹⁰ Acts limiting the hours of labor on public contracts are constitutional because the State is one of the contracting parties, and, as such, may define the terms of its contract.¹¹ However, an act which limited the employment of men in bakeries was held unconstitutional, this because employment in bakeries is not a particularly hazardous occupation and men are able to protect themselves.¹² It is interesting to note that the hour provision of the NRA codes and of the original Bituminous Coal Act were held invalid because of an unconstitutional delegation of legislative power.¹³ Otherwise, would they have been constitutional? As recently as May, 1940, the Motor Carriers' Act of 1935¹⁴ was before the Supreme Court. This act authorized the Interstate Commerce Commission to regulate maximum hours for employees. In order to uphold the law the court found that the term "employee" was limited to employees whose activities affected the public safety, and thus held the law constitutional.

2. WAGES—Akin to the question of hours is that of wages. Laws have been held constitutional which in many respects affect wages, such as those requiring redemption in cash of store orders,¹⁵ forbidding the payment of seamen's wages in advance,¹⁶ requiring semi-monthly payment of wages,¹⁷ and regulation of commissions of insurance agents,¹⁸ whereas a law forbidding employment agencies to receive any compensation whatsoever was held invalid.¹⁹ Again the *Schechter* case and the *Carter Coal* case held the wage provisions of the codes and the Coal Act an unconstitutional delegation of legislative power.²⁰

One of the best known phases of this subject is that of minimum wage laws. Many states had passed minimum wage laws, particularly for women. In the famous case of *Adkins v. Children's Hospital*,²¹ such a law of the District of Columbia was held unconstitutional. This was decided in 1923 and was followed in a decision of June, 1936 in which a similar New York law was held unconstitutional.²² In March

¹⁰ *Reilly v. Commonwealth of Massachusetts*, 232 U.S. 671, 34 Sup. Ct. 469, 58 L.Ed. 788 (1914).

¹¹ *Atkins v. State of Kansas*, 191 U.S. 207, 24 Sup. Ct. 124, 48 L.Ed. 148 (1903).

¹² *Joseph Lochner v. The People of the State of New York*, 198 U.S. 45, 25 Sup. Ct. 539, 49 L.Ed. 937 (1905).

¹³ *A. L. A. Schechter Poultry Corporation v. United States*, 295 U.S. 495, 55 Sup. Ct. 837, 79 L.Ed. 1570 (1934).

¹⁴ *United States v. American Trucking Associations Inc.*, 60 Sup. Ct. 1059 (1940).

¹⁵ *Knoxville Iron Co. v. Harbison*, 183 U.S. 13, 22 Sup. Ct. 1, 46 L.Ed. 55 (1901).

¹⁶ *Patterson v. The Bark Eudora*, 190 U.S. 169, 23 Sup. Ct. 821, 47 L.Ed. 1002 (1903).

¹⁷ *Erie Railroad Co. v. Williams*, 233 U.S. 685, 34 Sup. Ct. 761, 58 L.Ed. 1155 (1914).

¹⁸ *O'Gorman & Young v. Hartford Fire Insurance Company*, 282 U.S. 251, 5 Sup. Ct. 130, 75 L.Ed. 324, 72 A.L.R. 1163 (1931).

¹⁹ *Adams v. Tanner*, 244 U.S. 590, 37 Sup. Ct. 662, 61 L.Ed. 1336 (1916).

²⁰ *Supra*, note 13.

²¹ 261 U.S. 525, 43 Sup. Ct. 394, 67 L.Ed. 785, 24 A.L.R. 1238 (1923).

²² *Moorehead v. New York ex rel. Tipaldo*, 298 U.S. 587, 56 Sup. Ct. 918, 80 L.Ed. 1347, 103 A.L.R. 1445 (1936).

of 1937 the court in the case of *West Coast Hotel v. Parrish*,²³ said that it was time to reconsider the *Adkins* decision and proceeded to overrule it, holding minimum wage acts for women constitutional. While it cannot be said that the decision rests solely on the fact that the law affected women, there again is some talk about women needing the law's protection.

In April of 1940 the authority of the Secretary of Labor to make minimum wage determinations under the Walsh-Healey Public Contract Act was held constitutional. Again this was on the basis that the government as a contracting party could set the terms of its contracts, the court taking pains to expressly point out that the act is not an exercise by Congress of regulatory power over private business or employment.²⁴

Keeping in mind the rules of constitutional construction established by the above cases and other rules of constitutional law, is the Federal Wage and Hour Law constitutional? To hold so the court will have to go beyond any of its decided cases and possibly overrule some of them. Two cases involving this Act are now before the Supreme Court.²⁵

3. ALIENS—Another subject which is of particular interest at this time in view of the defense and war hysteria which is being forced upon us, is whether or not employment may be prohibited to aliens. In 1915 an Arizona law requiring employers of more than five employees to have at least 80 per cent of them citizens was held unconstitutional,²⁶ the aliens being entitled to the same constitutional protection of due process and equality as citizens. In the same year a New York law providing that only citizens should be employed on public contracts and that citizens of New York were to be favored, was held constitutional, this again on the basis that the State as a contracting party can name the terms of its contract.²⁷ In 1923 an act prohibiting the ownership of land by aliens other than by those who have declared an intention to become citizens of the United States was held constitutional.²⁸

4. UNIONS—Another phase of this subject which is constantly before us is that of union activity. The constitutional law student will immediately remember the cases of *Adair v. The United States*²⁹ and

²³ 300 U.S. 379, 57 Sup. Ct. 578, 81 L.Ed. 703 (1936).

²⁴ *Perkins v. Lukins Steel Co.*, 60 Sup. Ct. 869, 84 L.Ed. 743 (1940).

²⁵ *Darby Lumber Co. v. United States*. Petition for certiorari filed May 18, 1940. Jurisdiction noted June 3, 1940. U.S.D.C., S.D. Ga. held the Act unconstitutional as applied to the employees of a local lumber company. *Opp Cotton Mills, Inc. v. Administrator, Wage and Hour Division, Dept. of Labor*. Petition for certiorari filed August 13, 1940. Wage order sustained by the fifth C.C.A. 111 F. (2d) 23 (C.C.A. 5th, 1940).

²⁶ *Truax v. Raich*, 239 U.S. 33, 36 Sup. Ct. 7, 60 L.Ed. 131 (1915).

²⁷ *Heim v. McCall*, 239 U.S. 175, 36 Sup. Ct. 78, 60 L.Ed. 206 (1915).

²⁸ *Terrace v. Thompson*, 263 U.S. 197, 44 Sup. Ct. 15, 8 L.Ed. 255 (1923).

²⁹ 208 U.S. 161, 28 Sup. Ct. 277, 52 L.Ed. 436 (1907).

Coppage v. State of Kansas,³⁰ one involving a federal law and the other a state law. Both laws made it a crime to discharge an employee because of his union affiliations. Both laws were held unconstitutional as an invasion of the employers' freedom of contract. In 1930 the Railway Labor Act preventing interference by either party with the organization or designation of representatives by the other was held constitutional.³¹ The charge of impairing the employer's freedom of contract was made but the court in the light of the changed economic conditions discovered that the employees had a correlative right to organize. Further consideration was given to this same question in 1936. The lower court in the case of *Virginian Ry. Co. v. System Federation No. 40, et al.*,³² had entered a decree prohibiting the company from making an agreement with any other labor organization than the one certified.³³ The Supreme Court affirmed this, pointing out that it does not preclude individual contracts with individual employees and does not require any agreement at all. This same reason was applied in upholding the constitutionality of the National Labor Relations Act.³⁴ This is interesting in the light of the case of *Heinz Co. v. National Labor Relation Board*,³⁵ where the Board found it an unfair labor practice for the company, after having come to an agreement with the union, to refuse to enter into written contract. The Sixth Circuit Court of Appeals affirmed this ruling. Certiorari was granted by the Supreme Court.³⁶

Of special interest to Wisconsin lawyers is *Senn v. Tile Layers Protective Union, Local No. 5 et al.*³⁷ Senn was a small tile contractor employing one or two persons and necessarily laying tiles himself. The tile business in Milwaukee was done to a large extent by such small contractors. Because of the depression many union tile layers were out of work. The union prepared a uniform contract for all contractors to sign, one provision of which prohibited contractors from actually laying tile themselves. Senn had always done this and claimed that he would be forced out of business if he could not continue. The union picketed his place of business, claiming that he was unfair to organized labor and asking people not to patronize him. He sought an injunction to restrain such picketing, contending that under the Fourteenth Amendment he had the constitutional right to engage in any occupa-

³⁰ 236 U.S. 1, 35 Sup. Ct. 240, 59 L.Ed. 441 (1914).

³¹ *Texas & New Orleans Ry. Co. v. Brotherhood of Railway & Steamship Clerks*, 281 U.S. 548, 50 Sup. Ct. 427, 74 L.Ed. 1034 (1930).

³² 11 Fed. Supp. 621, *Affd.* 4th C.C.A., 84 F(2) 641 (1935).

³³ 300 U.S. 515, 57 Sup. Ct. 592, 81 L.Ed. 789 (1937).

³⁴ *National Labor Relations Board v. Jones & Laughlin Steel Corporation*, 301 U.S. 1, 57 Sup. Ct. 615, 81 L.Ed. 895 (1937).

³⁵ 110 F(2d) 843 (1940).

³⁶ 60 Sup. Ct. 1102, 84 L.Ed. 1394 (1940).

³⁷ 301 U.S. 468, 57 Sup. Ct. 857, 81 L.Ed. 1229 (1937).

tion and therefore to lay tile and that the Wisconsin Labor Law could not authorize the union to picket him in an endeavor to have him give up his constitutional right. The lower court refused the injunction; the State Supreme Court affirmed that,³⁸ and the United States Supreme Court said the matter was entirely one for the State; that there was no violation of any constitutional provision.

It is interesting to consider the development of the law from the *Adair* and *Coppage* cases to the *Virginian Railway* and *Jones-Laughlin* cases.

In the first two cases it was pointed out by the court that in exercising his right of freedom of contract the employer used no coercion in the physical sense; the only coercion was economic in discharging the employee. It was held permissible for the employer to use this force against the employee. In the *Senn* case the union was permitted to exercise its right of free speech in such a manner as to put the employer out of business. Again the court points out that no force or coercion was used in the physical sense, the only coercion being economic.

The law developed so that, as shown by the *Virginian Railway* and the *Jones-Laughlin* cases the employer's constitutional freedom of contract is now held to be qualified and the economic force of discharging the employee cannot be used to prevent him from joining a union. Thus, the employer may not now use the economic coercion permitted at the time of the *Adair* and *Coppage* cases. Will there be a similar development with respect to the rights of unions? Will the law develop so that the constitutional rights of unions will be qualified as are the constitutional rights of employers? Or will the law remain as it now is: i.e., the employer may not use economic force against his employees or unions but the union (even though none of his employees belong to it) may use economic force against the employer?

In conclusion, it may be stated that generally, complete prohibition of occupation is invalid, but a great amount of regulation of occupation is permitted under various theories of constitutional law and that the current trend of more and more regulatory laws in all fields is also evident in that of freedom of occupation and that there is, and will probably continue to be, a tendency on the part of the courts to uphold such regulatory laws.

³⁸ 222 Wis. 383, 268 N.W. 720 (1936).