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Constitutional Law—Equal Protection and Seattle's Juke Box Ordinance

Dick Steincipher

erty agreement.[10] No matter how strong the independent desire to terminate may be, there must be an agreement.

What is left unclear is whether this agreement must be in writing or whether an oral mutual termination will suffice. The statute[11] clearly requires written amendment or alteration, but is silent on the subject of revocation or termination. If the court continues its attitude of reluctance to allow doubt to be cast upon the recorded agreement, surely it will be hesitant to accept an oral termination.

C. DAVID SHEPPARD

CONSTITUTIONAL LAW

Equal Protection and Seattle's Juke Box Ordinance. In 1958 the Seattle City Council promulgated Ordinance No. 83784,[1] which regulated the ownership and operation of juke boxes within the city. By the terms of this ordinance, one could own a juke box only upon the acquisition of a "juke box operator's license." Yet the ordinance authorized fewer consents than were already outstanding, and its prospective effect was such as to exclude all but existing licensees from the juke box field.[2] Thus, when L. D. Ragan applied for an "operator's license" his application was denied. Ragan sought a judgment declaring this ordinance unconstitutional, and from an adverse ruling by the trial court, prosecuted an appeal. *Ragan v. City of Seattle*[3] affords an opportunity to explore the equal protection problems which arise upon a municipal corporation's exercise of regulatory power.

[10] The community property agreement statute, RCW 26.16.120, controls the disposition of community property only. An agreement which controls the character of the ownership of property theretofore or thereafter acquired is a case law development outside the scope of the statute. Once all or a part of the property of the spouses is changed to community property by this type of agreement, the statutory agreement will control its disposition. The inter vivos effect of the common law community property agreement on the property acquired after a separation, where the parties have terminated the marital relationship in fact, though not in law, may be terminated by the conduct of the parties under the result reached by the court in *In re* Janssen, 56 Wn.2d 150, 351 P.2d 510 (1960); *In re* Armstrong, 33 Wn.2d 118, 204 P.2d 500 (1949); Togliatti v. Robertson, 29 Wn.2d 844, 190 P.2d 575 (1948). Thus, the statutory agreement, in such a situation, would have less to operate upon; but it would operate unless terminated by agreement.

[11] RCW 26.16.120, set out at note 4 *supra*.

[1] Seattle, Wash., Ordinance 87384, July 24, 1958.

[2] Ragan v. City of Seattle, 158 Wash. Dec. 777, 782, 364 P.2d 916, 919 (1961). The court points out that by the terms of this ordinance, no one can own a juke box without an operator's license, and a holder of such a license has the legal right to own up to one hundred and fifty machines which he may lease to others. The number of such licenses is limited to one for every 10,000 Seattle residents according to the last available federal census. Thus, with a 1960 census of 557,087, only 55 "operator's licenses" were authorized; in October of 1959, 69 licenses were outstanding.

[3] 158 Wash. Dec. 777, 364 P.2d 916 (1961).

The starting point of the appellant's argument was an insistence that though the city possessed the power reasonably to regulate juke boxes in order to control volume and obscene and vulgar selections, "the operation of centralized music systems and the use of coin operated instruments in proper manner are rights that everyone is entitled to have in connection with his business.... They are not privileges that may be arbitrarily limited in number."[4]

In opposition to this theory, the intervening respondent—Washington Music Merchants, Inc.—cited the judicially sanctioned regulation and restriction of pool halls, pawnbrokers, dance halls, bowling alleys, pinball machines, gambling, taverns, and taxicabs. These supported its contention that the city council can regulate "any business or activity which has potentially detrimental influences on the public welfare."[5] The court accepted this contention and predicated its review upon a recognition that juke box ownership could not only be regulated, but could be entirely prohibited.[6] The constitutional issue was then addressed solely in terms of reasonableness, since the court interpreted the appellant's position to be, "if it is not reasonable, it is not constitutional."[7]

Although the court's interpretation of the appellant's position was stated more in terms of due process than equal protection, the appellant had specifically cited the arbitrary nature of the regulation as being a violation of the equal protection clause of the fourteenth amendment, and article I, Section 12 of the state constitution. The latter provides that: "No law shall be passed granting to any citizen, class of citizens, or corporations other than municipal, privileges and immunities which upon the same terms shall not equally belong to all citizens or

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[4] Marine Corps League v. Benoit, 96 N.H. 423, 78 A.2d 513, 518 (1951), Brief of Appellant, p. 12. Yet this case did not limit the number of juke box licenses available; it merely established a license fee for the purpose of restricting the reproduction of recordings of a lewd or indecent nature.

[5] Brief of Intervening Respondent, Washington Music Merchants, Inc., p. 9. In Bungalow Amusement Co. v. City of Seattle, 148 Wash. 485, 491, 269 Pac. 1043, 1048 (1928), the court said, "It is well settled law that there are certain businesses and vocations subject to regulation by the exercise of the police power, to the extent of even entirely prohibiting them; this upon the ground of their potential evil consequences."

[6] 158 Wash. Dec. 777, 781, 364 P.2d 916, 918 (1961). "[W]e approach the consideration of the reasonableness of ordinance No. 87384 with the assumption that juke boxes may not only be regulated but prohibited in the public interest."

Three cases were cited which recognize the authority to prohibit juke boxes: Raymond v. Village of River Forest, 350 Ill. App. 80, 111 N.E.2d 848 (1953); Zinn v. City of Steelville, 351 Mo. 413, 173 S.W.2d 398 (1943); City of De Ridder v. Mangano, 186 La. 129, 171 So. 826 (1936).

[7] Ragan v. City of Seattle, 158 Wash. Dec. 777, 778, 364 P.2d 916, 917 (1961).

corporations."[8] Despite this reference, the court did not explicitly find that the equal protection clauses of the fourteenth amendment or article I, Section 12 of the state constitution, were not violated. Rather, the court limited its scope of review to a determination of whether the regulation had a reasonable and substantial relation to the accomplishment of some purpose fairly within the legitimate range of the "police power," and was not such as to violate any direct or positive mandate of the constitution.[9] As if in opposition to the majority, Judge Mallery dissented, stating: "it is not denied that ... [the ordinance] arbitrarily grants licenses as a special privilege to some persons upon terms which it will not grant to others."[10]

The question which arises, then, is whether the equal protection argument noted by Judge Mallery existed in those terms, and if so, whether the court's ultimate determination included and resolved it. The answer to this question lies in the position currently occupied by the equal protection clause in Washington (and federal) law.

At one time, the Washington court subscribed to the theory that the state "police power" was free of the limitations imposed by the fourteenth amendment.[11] Underlying this belief was the notion that the "police power" constituted a thing apart—an inherent attribute of state sovereignty which the state reserved upon the creation of the federal constitution—and was therefore free of its limitations and commands. This failure to acknowledge that "police power" is not a separate body of unbounded power, but is merely a label designating the regulatory authority of the state in relation to the public health, morals, and safety, has led to the fallacious conclusion that in exercising such authority the legislature is unhampered by the fourteenth amendment. As late as 1960 "the argument that the due process and equal protection clauses ... do not apply to statutes enacted in the exercise of the police power" was made before the Washington court, but was rejected.[12]

While the "police power" designation no longer constitutes a "delusive name for the supreme sovereignty of the state to be exercised free from constitutional restraint,"[13] the courts continue to use it as a "label." Yet even in this capacity, "police power" should be used with

[8] WASH. CONST. *art.* 1, § 12.

[9] As authority for the scope of their review, the court referred to Nebbia v. New York, 291 U.S. 502 (1934). This approach is more one of due process, upholding the legislation unless it is "palpably false," than it is an equal protection inquiry.

[10] Ragan v. City of Seattle, 158 Wash. Dec. 777, 786, 364 P.2d 916, 921 (1961).

[11] Shea v. Olson, 185 Wash. 143, 53 P. 2d 615 (1936).

[12] Peterson v. Hagan, 56 Wn.2d 48, 53, 351 P.2d 127, 130 (1960).

[13] Lochner v. New York, 198 U.S. 45, 48-49 (1905).

reservation or avoided entirely lest court and counsel fall back into their former error. In any case, if a violation of equal protection occurs in *Ragan,* it cannot be justified on the ground that the ordinance is an exercise of the "police power," for no such justification is possible. The United States Supreme Court, in recognizing the state's power to protect the public morals, health, and safety, admonishes that, "if by their necessary operation, its regulations looking to either of those ends amounts to a denial to persons within its jurisdiction of the equal protection of the laws, they must be deemed unconstitutional and void."[14]

Though the Washington court did not explicitly discuss *Ragan* in equal protection terms, its ultimate determination that the ordinance could not be characterized as being either unreasonable or oppressive or as having no substantial relation to the accomplishment of a purpose fairly within the scope of the "police power"[15]—resolved the equal protection issue. A conclusion that a particular enactment is not unreasonable in its operation or oppressive in the sense of being invidiously discriminatory, approximates a finding that equal protection has been afforded. Pursuit of this idea necessitates a departure from the confines of the *Ragan* analysis to more generally consider the possible equal protection issues as they are treated by the Washington court. In so doing, it must first be recognized that the equal protection clause of the fourteenth amendment and article I, Section 12 of the state constitution are considered substantially identical. Thus, the principles applicable to one are equally applicable to the other.[16]

As interpreted by the United States Supreme Court, the guarantee of equal protection constitutes a pledge that all persons will stand equal under the law, and that the laws themselves will be equal in their protection.[17] The requirement of equality does not mean that all laws must have universal application, or that the legislature must deal with the entire problem. Class legislation is not only permitted, but is essential to the legislative process. The problems arise, not from the fact of class legislation, but from the determination of who or what will compose the class to which the law applies.

In reaching a solution to this inquiry, a somewhat standardized, mechanical formula has been developed. This formula is based on the recognition that though "the municipality may classify subjects of

[14] Connolly v. Union Sewer Pipe Co., 184 U.S. 540, 558 (1901).
[15] Ragan v. City of Seattle, 158 Wash. Dec. 777, 785, 364 P.2d 916, 920 (1961).
[16] Texas Co. v. Cohn, 8 Wn.2d 360, 112 P.2d 522 (1941).
[17] Yick Wo v. Hopkins, 118 U.S. 356, 369 (1886).

legislation, . . . the law must treat alike all of a class to which it applies, and must bring within its classification *all who are similarly situated or under the same condition.*"[18] (Emphasis added.) The requirement that all who are similarly situated be included in the classification, constitutes a demand that a rational basis exist for distinguishing between those who come within the class, and those who do not.[19] To resolve this question, attention must be directed to the feature upon which the distinction is drawn, the trait which determines those within and without the classification. Equal protection is not satisfied merely because all those within the designated class possess the classifying trait. What is required is an evaluation of the relationship between the trait and the purpose of the legislation, to determine whether a rational connection exists between this trait and the result sought to be accomplished by the law.[20] Absent such a rational connection (ultimately a matter of value judgment) the classification itself is invalid and equal protection is denied.[21]

This formula was applied by the Washington court in *State ex rel. Bacich v. Huse,*[22] in evaluating a statute which granted the right to gill-net only to those persons who held gill-net licenses in 1932 or 1933. In terms of the previous discussion, since all within the designated class possessed the classifying trait (were licensees in 1932 or 1933) if this were the test, the classification in *Bacich* was reasonable. Yet, when the defining trait (holding a license in the designated years) is isolated to determine whether it has a rational connection with the purpose of the law (conservation) a different conclusion may be reached. As the court found, there is no rational connection between holding a license in a certain year and the conservation of fish. True, a limitation of the number of fishermen may limit the number of fish caught, but this is not a determination of the rational connection inquiry. In *Bacich* the court emphasized that

> the distinction giving rise to the classification must be germane to the purposes contemplated by the particular law and may not rest upon a

[18] City of Spokane v. Macho, 51 Wash. 322, 324, 98 Pac. 755, 756 (1909).

[19] The Washington court is quick to point out, however, that "within the limits of these restrictive rules, the legislature has a wide measure of discretion, and its determination, when expressed in statutory enactment, cannot be successfully attacked unless it is manifestly arbitrary, unreasonable, inequitable, and unjust." State *ex rel.* Bacich v. Huse, 187 Wash. 75, 80, 59 P.2d 1101, 1104 (1936). See also Clark v. Dwyer, 56 Wn. 2d 425, 353 P.2d 941 (1960).

[20] Morey v. Doud, 354 U.S. 457, 465 (1957). See also, Tussman & tenBroek, *The Equal Protection of the Law,* 37 CALIF. L. REV. 341, 345-47 (1949).

[21] Morey v. Doud, 354 U.S. 457 (1957).

[22] 187 Wash. 75, 59 P.2d 1101 (1936).

> mere fortuitous characteristic or quality of persons, or upon personal designations. In short, the classification cannot be an arbitrary selection.[23]

Thus, had the purpose of the law been to protect licensees of 1932 or 1933 from competition by closing the class of gill-netters, there would have existed the required rational connection between the trait and the purpose of the law. However, even though the "formula" be satisfied, equal protection may still be denied if the court concludes that the purpose of the law—the creation of a closed class—is improper.[24] This, as shall be seen, is the ultimate question in *Ragan*.

In *Ragan* the appellant challenged what was labeled the arbitrary exclusion of persons other than present licensees from the exercise of a privilege. This attack was specifically directed to the establishment of a limit—by means of the population factor—so low that no other person could qualify.[25] Yet this classification was not a selection based upon a "characteristic or quality of persons." Indeed, there is no classifying trait as such; there is but an impersonal extrinsic factor which restricts the number of available licenses, creating a closed class. Since the "formula" is merely one method through which a value judgment as to the reasonableness of the ordinance may be made, the fact that it is inapplicable or unwieldy in a certain situation does not close the analysis.

Indeed, the United States Supreme Court has disparaged efforts to reduce the equal protection inquiry to such fine distinctions and formalization, on the theory that such an analysis may be either too superficial or too strict. In the opinion of the Supreme Court, "it is by . . . practical considerations based on experience rather than by theoretical inconsistencies that the question of equal protection is to be an-

[23] *Id.* at 84, 59 P.2d at 1105.

[24] A questionable case along this line is *In re* Camp, 38 Wash. 393, 397, 80 Pac. 547, 549 (1905), where a city ordinance prohibited all persons from peddling fruits, vegetables, etc., within the fire limits of Spokane, except farmers disposing of products grown by themselves. In declaring this ordinance unconstitutional the court said, "One class is permitted to indulge in a nuisance, and the others are unconditionally prohibited.... [W]e think the classification made by the ordinance grants special privileges, in violation of art 1, § 12, of the state constitution...." Compare this case with Continental Baking Co. v. City of Mount Vernon, 182 Wash. 68, 44 P.2d 821 (1935), and Mayflower Farms, Inc. v. Ten Eyck, 297 U.S. 266 (1936).

[25] Brief of Appellant, p. 19. Though this language was not cited by the appellant, State *ex rel.* Bacich v. Huse. 187 Wash. 75, 84, 59 P.2d 1101, 1105 (1936) states that while the state could legislate in order to accomplish the desired purpose, "such regulations should not only apply to all persons equally, but should be of such nature as that all persons would at least have an equal chance to conform thereto. The provisions of the present act draw a line and erect a barrier which prevents all persons, except a chosen few, from ever crossing them, or from qualifying themselves for the privilege within the dispensation of the state."

swered."[26] This is based on the realization that "the problem of legislative classification is a perennial one, admitting of no doctrinaire definition.... The prohibition of the Equal Protection Clause goes no further than the invidious discrimination."[27]

This approach entails a non-recognition of abstract identities (a failure often incident to the use of the "formula") and requires the recognition of differences which actually exist. Whether a particular statutory classification is an invidious discrimination is ultimately a matter of value judgment. If the classification creates a distinction or situation alien to one's ideals, it is an invidious discrimination and a denial of equal protection. In reaching this conclusion the court seeks to go beyond the letter of the law to its substance and operation. The factors of primary importance are the purpose of the law as well as the legislative motive.[28]

Though the ordinance considered in *Ragan* created a closed class of juke box licensees, this alone was not fatal, since "statutory discriminations creating a closed class have been upheld...."[29] "The fact that a statute discriminates in favor of a certain class does not make it arbitrary, if the discrimination is founded upon a reasonable distinction, ... or if any state of facts reasonably can be conceived to sustain it."[30] The critical inquiry then, is the end sought to be accomplished by closing the class.

This consideration is illustrated by *Mayflower Farms Inc., v. Ten Eyck*,[31] in which a New York statute allowed dealers of milk not having a well-advertised brand name, a price differential of one-cent below that of the well-advertised brands. The differential was, however, given only to those dealers in business at the date of the statute's promulgation. While the ostensible purpose of the differential was the preservation of competitive conditions, no reason was advanced for making this a closed class. The Court conceded that regulatory laws may have prospective operation and may except from their sweep those then

[26] Railway Express Agency v. New York, 336 U.S. 106, 110 (1949).
[27] Williamson v. Lee Optical of Oklahoma, 348 U.S. 483, 489 (1955).
[28] Tussman & tenBroeck, *The Equal Protection of the Laws*, 37 CALIF. L. REV. 341, 367 (1949): "Having accepted or discovered the elusive purpose the court must then, under the discriminatory legislation doctrine, make a judgment as to the purity of legislative motive, and, under substantive equal protection, determine the legitimacy of the end."
[29] Morey v. Doud, 354 U.S. 457, 467 (1957).
[30] Texas Co. v. Cohn, 8 Wn.2d 360, 370, 112 P.2d 522, 527 (1941). In the juke box area, City De Ridder v. Mangano, 186 La. 129, 171 So. 826, 828 (1936) ruled that "a law which discriminates against a particular business or class of individuals is not unconstitutional on that account if the discrimination is not arbitrary but well founded."
[31] 297 U.S. 266 (1936).

engaged in the activity to which it is directed, (*e.g.*, zoning laws, statutes licensing physicians and dentists):

> the challenged provision is unlike such laws, since, on its face, it is not a regulation of a business or an activity in the interest of, or for the protection of, the public, but an attempt to give an economic advantage to those engaged in a given business at an arbitrary date as against all those who entered the industry after that date.[32]

Thus, when a statute creates a closed class, the purpose must be related to the public health, morals, or welfare in order to escape condemnation as an invidious discrimination.

As this applies to *Ragan,* the avowed purpose of the ordinance is found to be the prevention of a nuisance and a restriction of criminal activity. At the same time it avoids divesting any persons' existing property interests. Further, the limitation of the number of owners facilitates policing juke box operations.[33] Thus, the ordinance in question avowedly serves a purpose relating to the public health, safety and morals, and in the words of the Washington court, "we are not permitted to speculate on the motives prompting the city council in the enactment of the ordinance, so long as we find it reasonable upon its face and within the city's power."[34] This should satisfy the invidious discrimination value judgment, for in the cases involving a closed class,

> the mere fact that consents were granted to owners of premises somewhat similarly situated does not in itself show that consent was arbitrarily refused to this applicant. The question is not whether someone else has been favored. The question is whether the petitioner has been illegally oppressed. Exercise of discretion in favor of one confers no right upon another to demand the same decision.[35]

It remains to be mentioned that in such cases the specific limit imposed is usually of little significance. For example, in *Ford Hopkins v. Iowa City,*[36] the city council limited the number of available cigarette-vendor's licenses to 51. In sustaining the limitation, the court did not ask why the number was set at 51 instead of 50. In *Ragan,* the court did not ask why juke box licenses were limited on the basis of one for every 10,000 residents, instead of one for every 9,000. Assuming that the question had been raised, the answer lies in the recognition that

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[32] *Id.* at 274.
[33] Ragan v. City of Seattle, 158 Wash. Dec. 777, 785, 364 P.2d 916, 920 (1961).
[34] Continental Baking Co. v. Mount Vernon, 182 Wash. 68, 73, 44 P.2d 821, 823 (1935).
[35] Ford Hopkins Co. v. Iowa City, 216 Iowa 1286, 248 N.W. 668, 672 (1933).
[36] *Ibid.*

once the court has sanctioned the limitation itself, the particular number established is a matter of legislative discretion. Further, outside of the reasonableness argument, it is difficult to be more specific in terms of equal protection.

In *Ragan,* there was no denial of equal protection. Though the court couched its analysis solely in terms of reasonableness, its findings resolved any equal protection argument which was raised. As the cited decisions indicate, the equal protection standard is primarily a value judgment. Thus, the court exonerated the legislative motive—finding such a limitation to be within the power of the municipality—and concluded that the legislation was neither unreasonable nor oppressive. This determination sustained the statutory discrimination against the argument that it amounted to a denial of equal protection of the laws.[37]

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[37] Should the appellant wish to present his case to the United States Supreme Court, he may do so, by appeal, under 28 U.S.C.A. § 1257, which provides that "final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court as follows:... (2) By appeal, where is drawn in question the validity of a statute of any state on the ground of its being repugnant to the Constitution, treaties or laws of the United States, and the decision is in favor of its validity...." This does not mean that the Court will consider the case, for under The Rules of the Supreme Court of the United States, Rule 16 (b), such an appeal is subject to a motion to dismiss on the ground that it does not present a substantial federal question. In light of the findings of the Washington court, it seems apparent that the Supreme Court's equal protection cases sustain the conclusion in *Ragan.* This renders it highly doubtful that a substantial federal question could be shown to exist, such as to overcome a motion to dismiss under Rule 16 (b).