

Constitutional Law—Physicians and Surgeons—Constitutionality of Statute Forbidding Advertising by Dentists (Harry Semler v. Oregon State Board of Dental Examiners, et al., 55 S. Ct. 570 (1935))

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Finally, the State Recovery Act incorporates by reference, as the law of New York State, rules and regulations to be made in the future by an administrative agency of the federal government.¹⁵ This is contrary to the state constitution¹⁶ and to all judicial reasoning.¹⁷ This is a two-fold fault because, in New York State, at least, it would be unconstitutional to adopt another law in such fashion even though that law were in existence and well defined.¹⁸ On two major counts, therefore, Chapter 781, Laws of 1933, is unconstitutional and an extremely liberal viewpoint would be required to rule otherwise.

J. C. O'C.

CONSTITUTIONAL LAW—PHYSICIANS AND SURGEONS—CONSTITUTIONALITY OF STATUTE FORBIDDING ADVERTISING BY DENTISTS.—Plaintiff, alleging unconstitutionality, seeks to enjoin the defendant from enforcing a statute of the state of Oregon¹ which gives the

¹⁵ *Darweger v. Staats*, 153 Misc. 522, 275 N. Y. Supp. 394 (Sup. Ct. Broome Co., 1934), at 528:

"The Schackno Act does more than merely declare a policy and provide means to carry it into effect. The National Industrial Recovery Act * * * is declared to be the policy of the State of New York * * *. Codes adopted under the National Industrial Recovery Act are made, though not in existence, by reference those of the State of New York."

¹⁶ N. Y. CONST. art. III, §17.

¹⁷ *People ex rel. Comm. v. Banks*, 67 N. Y. 568, 575 (1876); *People v. Squire*, 107 N. Y. 593, 602, 14 N. E. 820 (1888); *Atkinson v. Hotel Pennsylvania*, 195 App. Div. 624, 187 N. Y. Supp. 278 (3d Dept. 1921), *aff'd*, 231 N. Y. 562, 132 N. E. 889; *State v. Intoxicating Liquors*, 121 Me. 438, 117 Atl. 588 (1922), and *State v. Gauthier*, 121 Me. 522, 118 Atl. 380 (1922). In *People v. Squire*, *supra*, the court said:

"The object and intent of the constitutional provision was to prevent statute laws relating to one subject from being made applicable to laws passed upon another subject, through ignorance and misapprehension on the part of the legislature, and to require that all acts should contain within themselves such information as should be necessary to enable it to act upon them intelligently and discreetly."

And in the *De Agostina* case, 155 Misc. 518, 278 N. Y. Supp. 622, cited *supra* note 14, the court, in referring to the Schackno Act, said:

"It (the legislature—author) has thus accomplished the very evil sought to be avoided by the constitutional prohibition."

It is true that in *Spielmann Motor Sales Co. v. Dodge*, 8 F. Supp. 437 (S. D. N. Y. 1934), the court held that the Schackno Act did not violate the N. Y. STATE CONST. art. III, §17. This case, however, is not controlling on the state courts even though it does control later federal cases. *Price v. Illinois*, 238 U. S. 446, 451, 35 Sup. Ct. 892 (1914); *Des Moines Nat. Bank v. Fairweather*, 263 U. S. 103, 105, 44 Sup. Ct. 23 (1923); *Michigan v. Michigan Trust Co.*, 286 U. S. 334, 52 Sup. Ct. 512 (1931).

¹⁸ *People ex rel. Comm. v. Banks*, *People v. Squire*, *Atkinson v. Hotel Pennsylvania*, *State v. Intoxicating Liquors*, and *State v. Gauthier*, all *supra* note 17.

¹ Oregon Laws 1933, c. 166.

State Board of Dental Examiners power to revoke his license to practice dentistry. The grounds for revocation under the statute, which defines professional misconduct, include: Advertising prices or free dental work or guaranteeing painless dentistry; advertising by means of large display or glaring light signs. On appeal by the plaintiff, *held*, affirmed, that the statute is a valid exercise of the police power of the state in an endeavor to guard against fraudulent advertising and is neither discriminatory, arbitrary nor repugnant to the requirements of due process, and, so being, all private contracts become subservient to its valid exercise. *Harry Semler v. Oregon State Board of Dental Examiners, et al.*, — U. S. —, 55 Sup. Ct. 570 (1935).

The professions of dentistry and medicine are cloaked with a public interest and are therefore subject to state regulation and control.² The state may, without being subject to the attack of discrimination, demand a diploma from a registered school as a condition preceding the grant of a license,³ or may, without being arbitrary, require the applicant to subject himself to an examination by an administrative board.⁴ In such a profession, as in any business closely allied to society, the property right to practice is secondary to the general welfare of the populace,⁵ and the legislature may lawfully protect against the consequences of ignorance and deception.⁶

The constitutional provision safeguarding contractual obligation⁷ does not extend to contracts made with respect to a public business, but they in turn become subordinate to the general welfare, and legislation affecting such contracts is violative neither of due process,⁸ nor of the aforementioned provision.⁹ In the exercise of its police

² *Dent v. West Virginia*, 129 U. S. 114, 9 Sup. Ct. 231 (1889); *Douglas v. Noble*, 261 U. S. 165, 43 Sup. Ct. 303 (1923); *Graves v. Minnesota*, 272 U. S. 425, 428, 47 Sup. Ct. 122 (1926). "A state may, consistently with the 14th Amendment, prescribe that only persons possessing the reasonably necessary qualifications of learning and skill shall practice medicine or dentistry."

³ *Graves v. Minnesota*, 272 U. S. 425, 47 Sup. Ct. 122 (1926); *Watson v. Maryland*, 218 U. S. 173, 179, 30 Sup. Ct. 644 (1910). "A law will not be declared discriminatory unless there is no fair reason for the law that would not require with equal force its extension to others whom it leaves untouched."

⁴ *Douglas v. Noble*, 261 U. S. 165, 43 Sup. Ct. 303 (1923).

⁵ *German Alliance Insurance Co. v. Kansas*, 233 U. S. 389, 34 Sup. Ct. 612 (1914); *Munn v. Illinois*, 94 U. S. 113 (1876); *Block v. Hirsch*, 256 U. S. 135, 41 Sup. Ct. 458 (1921); *Tagg Bros. v. Moorehead*, 280 U. S. 420, 50 Sup. Ct. 220 (1930); *Nebbia v. New York*, 291 U. S. 502, 54 Sup. Ct. 505 (1934).

⁶ *Dent v. West Virginia*, 129 U. S. 114, 9 Sup. Ct. 231 (1889).

⁷ U. S. CONST., Art. I, §10.

⁸ U. S. CONST., AMEND. Arts. V and XIV.

⁹ *Atlantic Coast Line R. R. Co. v. Goldsboro*, 232 U. S. 548, 34 Sup. Ct. 364 (1914); *Rast v. VanDeman and Lewis*, 240 U. S. 342, 363, 36 Sup. Ct. 370 (1916). "If the business is subject to regulation, the contracts made in its conduct are subject to such regulation."

Union Dry Goods v. Georgia Public Service Comm's'n, 248 U. S. 372, 375, 39 Sup. Ct. 117 (1919). "It is the settled law of this court that the interdiction of statutes impairing the obligation of contracts does not prevent the state from properly exercising such powers as are vested in it for the promotion of

power, the state is unhampered, save by the judicial test that the statute must be reasonable.¹⁰

As in the instant case, it has been held repeatedly that it is not unreasonable for the legislature to anticipate means, not harmful or immoral in themselves, as leading to an unwelcome or dangerous end and to avoid its advent by prohibitory legislation.¹¹ It is immaterial that such legislation might affect the innocent as well as the guilty, if it has for its end the object of safeguarding the health, safety, good order and the morals of the community.¹²

In the field of law, advertising has been curtailed to some extent by statutes defining unprofessional conduct and providing disbarment as a penalty.¹³ On the whole, however, statutory regulation of the topical subject does not aim at any particular profession, and, if it does,¹⁴ it does not prohibit the means chosen but rather the manner of use.¹⁵ This we find exemplified in the so-called Printers' Ink Acts¹⁶ which do not restrict the type of medium utilized, but seek to safeguard the public from untrue, deceptive or misleading statements in advertisements.

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the commonweal, or are necessary for the general good of the public, though contracts previously entered into between individuals may thereby be affected."

Sproles v. Binford, 286 U. S. 374, 52 Sup. Ct. 581 (1932). In holding that the state has a right to limit the loads on trucks using the public highway, the court at 391 states, "Contracts which relate to the use of the highways must be deemed to have been made in contemplation of the regulatory authority of the state." *Stephenson v. Binford*, 287 U. S. 251, 53 Sup. Ct. 181 (1932).

¹⁰ *Nebbia v. New York*, 291 U. S. 502, 537, 54 Sup. Ct. 505 (1934). "If the laws passed are seen to have a reasonable relation to a proper legislative purpose and are neither arbitrary nor discriminatory the requirements of due process are satisfied."

¹¹ *Booth v. Illinois*, 184 U. S. 425, 22 Sup. Ct. 425 (1902); *Otis v. Parker*, 187 U. S. 606, 23 Sup. Ct. 168 (1903); *Fisher v. St. Louis*, 194 U. S. 361, 24 Sup. Ct. 673 (1904); *Muller v. Oregon*, 208 U. S. 412, 28 Sup. Ct. 324 (1908); *Bunting v. Oregon*, 243 U. S. 426, 37 Sup. Ct. 435 (1917); *Purity Extract Co. v. Lynch*, 226 U. S. 192, 33 Sup. Ct. 44 (1912); *Hebe Co. v. Shaw*, 248 U. S. 297, 39 Sup. Ct. 125 (1919); *Pierce Oil Co. v. Hope*, 248 U. S. 498, 39 Sup. Ct. 172 (1919); *Village of Euclid v. Amber Realty Co.*, 248 U. S. 365, 47 Sup. Ct. 114 (1926); *Bloom v. Cruise*, 288 U. S. 588, 53 Sup. Ct. 318 (1933).

¹² *Ibid.*

¹³ *In re Neuman*, 169 App. Div. 638, 155 N. Y. Supp. 428 (1st Dept. 1915), holding that advertising "Matrimonial actions a specialty" is advertising to procure a divorce within N. Y. PENAL LAW, §120; *In re Schnitzer*, 33 Nev. 581, 112 Pac. 848 (1911), allowing suspension for violation of statute defining professional misconduct; *State v. Giantvalley*, 123 Minn. 227, 143 N. W. 780 (1913).

¹⁴ Auctioneers must give an accurate description of the quality of jewels put up for sale. Ala. Acts 1923, No. 522.

¹⁵ *Infra* note 16; also Wyo. Laws 1929, c. 103 (cold storage eggs not to be sold as fresh); Mich. Acts 1927, No. 112 (meat must not be falsely advertised as kosher); Wis. Laws 1927, c. 230 (forbidding misrepresentation of the nutritive qualities of bread).

¹⁶ ALA. CODE (1928) §4133; Conn. Acts (1923) c. 265; KAN. REV. STAT. ANN. (1923) c. 21, §1112; Mich. Acts (1925) No. 319; W. VA. CODE ANN. (Barnes, 1923) c. 145, §36; WYO. COMP. STAT. ANN. (1920) §7302; WIS. STAT. (1927) §§343, 413; see Note (1930) 43 HARV. L. REV. 945, 946.