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Substantive Due Process in Nebraska: *Gillette Dairy, Inc. v. Nebraska Dairy Products Board*, 192 Neb. 89, 219 N.W.2d 214 (1974)

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Note

Substantive Due Process in Nebraska

Gillette Dairy, Inc. v. Nebraska Dairy Products Board, 192 Neb. 89, 219 N.W.2d 214 (1974).

In *Gillette Dairy, Inc. v. Nebraska Dairy Products Board*[1] the constitutionality of setting minimum prices for dairy products in Nebraska was challenged. The plaintiff, a dairy located in northeastern Nebraska, contended the Dairy Industry Trade Products Act[2] violated the Nebraska Constitution because (1) it deprived the dairy of liberty and property without due process of law; and (2) it was an illegal delegation of legislative powers.[3]

The purpose of the act was to prevent unfair trade practices which were believed to be forcing dairies out of business. If left

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1. 192 Neb. 89, 219 N.W.2d 214 (1974).
2. NEB. REV. STAT. §§ 81-263.37-.38, .41-.49 (Reissue 1971); NEB. REV. STAT. §§ 81-263.39-.40 (Supp. 1974), while the statutes creating the Nebraska Dairy Products Board are found in NEB. REV. STAT. §§ 81-263.81-.83, .85-.86 (Reissue 1971); NEB. REV. STAT. § 81-263.84 (Supp. 1974).
3. The plaintiff urged that the Act violated article I, §§ 1, 3, 21 and 25, article II, and article III, § 1 of the Constitution of the State of Nebraska. Brief of appellant at 4. The text of the pertinent sections is:

   > All persons are by nature free and independent, and have certain inherent and inalienable rights; among these are life, liberty and the pursuit of happiness. . . . NEB. CONST. art. I, § 1.
   >
   > No persons shall be deprived of life, liberty, or property, without due process of law. *Id.* § 3.
   >
   > The property of no person shall be taken or damaged for public use without just compensation therefor. *Id.* § 21.
   >
   > This enumeration of rights shall not be construed to impair or deny others, retained by the people, and all powers not herein delegated, remain with the people. *Id.* § 26.

   The court capsulized the plaintiff's contentions in six areas:

   1. The act grants the defendants authority which exceeds the constitutional police power provided for the state by the Constitution.
   2. The public interest is not so affected that the use of police power by the state is warranted.
   3. The act fosters monopolistic milk practices.
   4. The act is arbitrary, capricious, and discriminatory in regulating the price of dairy products.
   5. The act illegally delegates legislative powers to the Nebraska Dairy Products Board and to the Department of Agriculture of the State of Nebraska.
   6. The act illegally deprives the plaintiff of certain constitutionally guaranteed property rights.

uncontrolled it was thought that price cutting would jeopardize the public interest of obtaining a sufficient supply of milk at a reasonable price.[4] "Price wars" were to be prevented by making it unlawful "[t]o sell or offer to sell within the state any dairy product for less than the minimum basic cost . . . ."[5] The Nebraska Supreme Court concluded that the statutes violated the due process clause and were therefore unconstitutional,[6] but declined to extend the holding to include an illegal delegation of powers.[7]

I.

A proper analysis of *Gillette* depends upon understanding the place this decision occupies in the context of reviewing economic regulation. For that reason a short history of federal decisions precedes the discussion of Nebraska cases.

In the context of economic regulations, judicial interpretation of "without due process of law" is extremely broad. In *Lochner v. New York*[8] the United States Supreme Court held a state labor law limiting bakery employees to a sixty hour work week unconstitutional. An argument based on safeguarding the health of the employees was dismissed as unreasonable.[9] The Court continued to

4. NEB. REV. STAT. § 81-263.38 (Reissue 1971), reads:

> It is hereby declared that the sale of dairy products is a business affecting the public health and welfare and affected with a public interest. Certain trade practices are now being carried on in the sale of dairy products which are unfair and unjust, which have already driven numerous firms out of business, and which if continued will jeopardize the public interest in securing a sufficient supply of properly prepared dairy products and in preserving the dairy industry of this state free from monopolistic and anticompetitive influences. It is the purpose of sections 81-263.37 to 81-263.49 and 81-263.81 to 81-263.86 to use the police power of the state in order to promote the public interest so declared by outlawing the continuance of such trade practices.

5. NEB. REV. STAT. § 81-263.41 (Reissue 1971). Minimum basic cost is a weighted average to be determined by the Dairy Products Board from standards set forth in the act. *Id.* at § 81-263.84 (Cum. Supp. 1974).
6. 192 Neb. at 99, 219 N.W.2d at 221. Two bills were introduced in the first session of the eighty-fourth legislature to deal with the unconstitutionality of the present statutes. L.B. 324 proposed a repeal of the entire act while L.B. 406 proposed amendments which closely followed the court's suggested method of achieving a constitutional solution. L.B. 324 was passed and signed by the governor. *See* note 37 *infra* and accompanying text.
7. *Id.* at 102, 219 N.W.2d at 222. A discussion of the delegation of powers issue is beyond the scope of this Note.
8. 198 U.S. 45 (1905).
9. *Id.* at 58. Justice Holmes, in a dissenting opinion, emphasized the irrationality of basing a decision upon an economic theory not supported by the Constitution. *Id.* at 74-76. His dissent foreshadowed the view the Court would adopt in later years when he wrote:

> I think that the word "liberty" in the fourteenth amendment

guard individual property rights from state encroachment by requiring states to justify the relationship of the regulation to the public welfare.[10]

This attitude began to change in *Nebbia v. New York*[11] where a closely divided Court upheld the right of the state to impose price fixing on the retail sale of milk as a regulation reasonably designed to assure the community a supply of milk. Three years later in *West Coast Hotel Co. v. Parrish*[12] the Court upheld a state minimum wage law covering women and minors. The presumption of constitutionality of legislative declarations was thus established in economic due process cases. Since that time the Court has not overturned any economic legislation on due process grounds.

Subsequent opinions of the Court have strengthened the presumption of constitutionality[13] so that presently the standard is whether the legislature could rationally believe that the regulation is a means to a legitimate end.[14]

The judicial review of economic regulation has taken a separate course in the state courts. Many state courts have refused to uphold the validity of economic regulations based upon the construction of their own state constitutions. This ends the matter in most cases since no federal question is raised for review.

> is perverted when it is held to prevent the natural outcome of a dominant opinion, unless it can be said that a rational and fair man necessarily would admit that the statute would infringe fundamental principles as they have been understood by the traditions of our people and our law. It does not need research to show that no such sweeping condemnation can be passed upon the statute before us. A reasonable man might think it a proper measure on the score of health.

Id. at 76. *See* note 45 and accompanying text *infra.*

10. *See* Hetherington, *State Economic Regulation and Substantive Due Process of Law*, 53 NW. U.L. REV. 13, 22 (1958).
11. 291 U.S. 502 (1934). For a comprehensive discussion of milk control regulations, see Mangum, *Milk Control Laws in the United States*, 38 N.C.L. REV. 419 (1960). For a general economic analysis of their effect, see A. PHILLIPS, MARKET STRUCTURE, ORGANIZATION AND PERFORMANCE 80-90 (1962).
12. 300 U.S. 379 (1937).
13. *See, e.g.*, Ferguson v. Skrupa, 372 U.S. 726 (1963); Williamson v. Lee Optical Co., 348 U.S. 483 (1955); Day-Brite Lighting, Inc. v. Missouri, 342 U.S. 421 (1952).
14. "We cannot say that the regulation has no rational relation to that objective and therefore beyond constitutional bounds." 348 U.S. at 491. *See also* D. ENGDAHL, CONSTITUTIONAL POWER: FEDERAL AND STATE IN A NUTSHELL 254 (1974), where one reason for the standard is discussed:

> The reason that the criterion has been made no more stringent than this is not merely that state *legislatures* are more compe-

This was exemplified in 1941 when the United States Supreme Court overruled the Nebraska Supreme Court in *Olsen v. Nebraska*.[15] The court held that a state statute fixing the maximum compensation a private employment agency might charge was not unconstitutional under the fourteenth amendment due process clause. A second suit was brought in *Boomer v. Olsen*[16] to enjoin prosecution under the same law, this time asking for a determination of unconstitutionality based upon the Nebraska Constitution. The trial court held the statute unconstitutional. The Nebraska Supreme Court affirmed based upon evidence which tended to show that the plaintiff's business could not be maintained on the maximum fixed fee allowed.[17] This, together with a finding that there was lack of public interest in employment agencies, persuaded the court that the statute was unreasonable.

This analysis was continued in *Lincoln Dairy Co. v. Finnegan*[18] where the plaintiff asked for a declaratory judgment on the constitutionality of an act prohibiting the sale of milk not labeled and produced as Grade A. The act was found to be unreasonable based upon strong evidence[19] that the plaintiff's milk was wholesome, nutritious, healthful and fit for human consumption.[20] In both of these cases substantial evidence was presented by the plaintiff tending to show the law was unreasonable in fact.

An analysis of these decisions discloses at least three standards which a state court might apply in reviewing economic regulations: (1) placing the burden of justification upon the state; (2) following the federal decisions which uphold the regulation if a rational basis could have been assumed, a nearly conclusive presumption of constitutionality; or (3) a middle ground that includes a presumption of constitutionality which may be refuted upon inquiry into the reasonableness in fact of the regulations.[21]

II.

Gillette presented the Nebraska Supreme Court with an opportunity to clarify the basis and limits of judicial review of economic

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tent than federal *courts* to make the sort of factual determination of telic relation that is called for; rather, the primary reason is the Court's discountenance of any greater *federal* interference in matters of *state* concern than is clearly necessary to protect federal or individual interests which the Constitution secures.

15. 313 U.S. 236 (1941).
16. 143 Neb. 579, 10 N.W.2d 507 (1943).
17. *Id.* at 584-85, 10 N.W.2d at 510-11.
18. 170 Neb. 777, 104 N.W.2d 227 (1960).
19. *Id.* at 785, 104 N.W.2d at 233.
20. *Id.* at 788, 104 N.W.2d at 234.
21. *See* 15 STAN. L. REV. 309, 316 (1963).

regulations. The majority opinion sets out the standard for review as adopted in previous Nebraska cases. It acknowledges legislative discretion in determining the means of economic regulation,[22] thus establishing the presumption of constitutionality. The standard of review to be applied was enunciated in *Lincoln Dairy*: "Measures adopted by the legislature to protect the public health and secure the public welfare must have some reasonable relation to those proposed ends."[23]

In analyzing *Gillette* one must ask how well the court followed its own standards. The answer is to be found initially by looking at the purpose of the act as declared by the legislature:

> Certain trade practices are now being carried on . . . which have already driven numerous firms out of business, and which if continued will jeopardize the public interest in securing a sufficient supply of properly prepared dairy products and in preserving the dairy industry of this state free from monopolistic and anticompetitive influences.[24]

There is some evidence in the record supporting the existence of a monopoly. "The record establishes that in 1950 Nebraska had 151 milk processors and ice cream manufacturers, in 1963 that number had dropped to 55, in 1972 the number was 17."[25] The state presented additional factual support indicating the need for such regulation,[26] including the dangers inherent in allowing unrestricted price cutting.[27] In spite of this evidence the court held: "We conclude the act is unreasonable, arbitrary, and capricious in that it purports to fix a minimum basic cost that bears *no relation* to, and

22. "Whether a business is charged with such a public interest as to warrant its regulation is a legislative question in which the courts ordinarily will not interfere." 192 Neb. at 96, 219 N.W.2d at 219 (quoting Boomer v. Olsen, 143 Neb. 579, 10 N.W.2d 507 (1943).
23. 192 Neb. at 97, 219 N.W.2d at 219.
24. NEB. REV. STAT. § 81-263.38 (Reissue 1971).
25. 192 Neb. at 104-05, 219 N.W.2d at 223 (Clinton, J., dissenting).
26. Brief for Appellee at 8-9.
27. The Legislature concluded and the evidence supports the proposition that this situation [the decrease in the number of processors] resulted from "milk wars" particularly in populous eastern Nebraska. Expert witnesses through affidavit testified that if "milk wars" are allowed to continue they "could destroy many full service dairies with the result that the consumers and dairy farmers would be hurt as well as full service processors in the price war markets."
192 Neb. at 105, 219 N.W.2d at 223-24 (Clinton, J., dissenting).
It is ironic that the small, local processor which the court claims to be protecting is the most susceptible to price wars. It is the nationally based processor that is able to cut prices in a small area while sales from other outlets are used to offset the temporary loss of revenue. *See generally* 19 S.C.L. REV. 389, 397 (1967) discussing the effect of a milk price war in South Carolina.

is not justified by any requirements of the public interest."[28] The holding is best explained by noting the lack of a presumption of constitutionality.[29] The court dismissed the declared purpose without mentioning the supporting evidence submitted by the state, inferring that the act's real effect would be to foster monopoly.[30] The majority preferred to approach the problem from the perspective of the danger of price regulation and the resulting need for justification.[31]

This failure to come to grips with the issues is further emphasized by the conclusionary nature of the language used throughout the opinion.[32] That which appeared "obvious" to the court is often unsupported by the record[33] leading one to believe that much of what was said was based on economic beliefs not shared with the legislature.

The court reasoned that an individual prohibition against each processor selling below his cost of production would provide the same benefits without the present objections.[34] Whether prohibitions of the sort described would prevent monopoly remains unclear. It is clear however that a decision upon the most appropriate means to accomplish a particular result is a legislative function. The legislature may have been concerned with the administrative cost of determining and enforcing individual standards, or

28. 192 Neb. at 99, 219 N.W.2d at 221 (emphasis added).
29. The presumption of constitutionality, although not explicitly acknowledged in *Gillette*, note 22 *supra*, is widely expressed in Nebraska decisions. Annot. 3A NEB. DIG. 470 (1959).
30. 192 Neb.at 96, 219 N.W.2d at 219.
31. The test in this state for price fixing is at least two-fold: First, devotion to a public use; and, second, circumstances where the public interest requires a monopoly to exist in order to prevent costly duplication of facilities at the expense of the ultimate consumer.
192 Neb. at 99, 219 N.W.2d at 220.
32. I submit . . . that the recital in the opinion six separate times that certain key conclusions are either "obvious" or "apparent" are neither obvious nor apparent, have no evidentiary support, and depend on the a priori acceptance of certain economic views as to what type of competition is desirable in the milk processing and distributing industry and what the effects of the act will be.
192 Neb. at 103-04, 219 N.W.2d at 223 (Clinton, J., dissenting).
33. The only evidence introduced by the plaintiff is that shown in affidavits which are exhibits 13, 14 and 15. The essence of exhibit 13 is expressed in the following conclusion: Therefore plaintiff and his competitors can only compete on the following items: Types of produce packaging, advertising, quality of service, and the shelf price of the finished product. Exhibits 14 and 15 seem to support the conclusion that the 1962 to 1972 gasoline price stayed the same where dairy products went up.
192 Neb. at 103, 219 N.W.2d at 223 (Clinton, J., dissenting).
34. *Id.* at 96, 219 N.W.2d at 218.

it may have found such a system to be unworkable. But it is the legislature that is equipped to determine the appropriate solution. The court only has evidence available concerning one possible means and should restrict itself to reviewing the reasonableness of that particular remedy.

The plaintiff emphasized that a prohibition against selling below an average cost was discriminatory because it deprived him of the ability to increase sales by selling at a lower price than his less efficient competitors.[35] Consequently, the majority opinion divided processors into two groups, "efficient" and "inefficient."[36]

While the use of a weighted average to determine cost does break the class of processors into two groups, it is more accurate to refer to them as those with greater than average costs and those with less than average costs. Efficiency is only one of the factors which decides into which group a processor will fall. Another element is volume purchasing. The important consideration in the eyes of the legislature is that the impairment of some processors' rights to set prices is outweighed by the public benefit of having a secure milk supply at a reasonable price.[37] It is the reasonableness of this belief, taking into account any impairment of individual rights, which the court must determine.

A direct comparison with *Boomer* emphasizes that the *Gillette* decision should be viewed as a severe departure from previous cases. In *Boomer* the plaintiff was required to present strong evidence to overcome the presumption of constitutionality. In contrast the plaintiff in *Gillette* submitted very little in the way of substantive evidence, while the state presented considerable evidence to support the act.[38] The clear indication is that legislation invoking price regulation is not presumed constitutional but rather requires the state to overcome a burden of justification.

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35. Brief of Appellant at 5.
36. 192 Neb. at 94-95, 219 N.W.2d at 21.
37. If the purpose of the Act were merely to secure a sufficient supply of milk its reasonableness would seem uncertain because no showing was made that a very few processors could not satisfy the public demand. However, evidence was also presented of the likelihood of a dislocation of the milk supply at its source, a proposition which could lead to at least short-term deficiencies in supply. *See* note 22 *supra*. The more pervasive danger seems to be the possibility that in a monopoly situation milk prices need not remain competitive.
38. *See* notes 17, 27, and 33 *supra*. Plaintiff offered no direct proof that it would be injured by the Act. Unless actual data showing the effects of price regulation on the plaintiff were to be submitted, any statement made on the subject is purely speculative.

III.

The elaboration of well reasoned standards for judicial review is particularly important in an area where the federal Constitution is construed differently from the state constitution. The conflict which exists in reviewing statutes on due process grounds originates in the separation of the legislative and judicial branches of government. The state constitution charges elected legislators with determining appropriate means of regulation. The power of judicial review is limited to securing compliance with that constitution. The refusal of the United States Supreme Court to review state economic regulations on substantive grounds clearly illustrates the conflict,[39] which even advocates of closer review acknowledge.[40]

There are reasons, peculiar to the states, which favor closer review. State legislatures often have relatively short sessions where lawmakers may be subjected to intense lobbying by special interest groups.[41] This is particularly true in Nebraska, where the checks of a two-house legislature are not present. Advocates for closer review argue that the democratic process is not foreclosed because in most states, constitutional amendment is relatively easy.[42] Whatever the extent of the review, it is the courts' function clearly to elaborate the standards and apply them to the facts. Professor Paul Freund discussed the rationality of judicial decisions by stating: "[Rationality] is a warrant not so much of the soundness of a decision as of the course pursued—that the course of inquiry has been kept open and operating in appropriate ways and within appropriate termini."[43]

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39. We refuse to sit as a "superlegislature to weigh the wisdom of legislation," and we emphatically refuse to go back to the time when courts used the Due Process Clause "to strike down state laws, regulatory of business and industrial conditions, because they may be unwise, improvident or out of harmony with a particular school of thought." Nor are we willing to draw lines by calling a law "prohibitory" or "regulatory". Whether the legislature takes for its textbook Adam Smith, Herbert Spencer, Lord Keynes, or some other is no concern of ours.

Ferguson v. Skrupa, 372 U.S. 726, 731 (1963) (citations omitted).

40. *See* Hetherington, *supra* note 15, at 249.

41. *Id.* at 248-251.

42. *Supra* note 21, at 390. The Constitution of the State of Nebraska may be amended upon proposal by three-fifths of the legislature followed by a majority vote at the next election of legislators provided that it receives at least thirty-five per cent of the total votes cast. NEB. CONST. art. XVI, § 1.

43. P. FREUND, ON LAW AND JUSTICE 64 (1968).

IV. CONCLUSION

When viewed objectively it appears an inquiry into the reasonableness in fact of the act combined with a presumption of constitutionality might have produced a different decision in *Gillette*. It must be assumed therefore that at least in the area of price regulation, the state has a burden of justification which must be overcome before the constitutionality of an act is upheld. The failure of the court to follow its own standards for review results in needless uncertainty in an already difficult area.

Randall C. Hanson, '76