Supplementary Material

Chapter 8: The New Deal/Great Society Era—Individual Rights/Property/Due Process

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

Frank Skrupa was a credit advisor who objected to a Kansas law forbidding persons from engaging in "debt adjustment" unless they were licensed attorneys. Skrupa filed a lawsuit against William Ferguson, the attorney general of Kansas, claiming that the law violated the right to operate a legitimate business protected by the due process clause of the Fourteenth Amendment. A lower federal court agreed with Skrupa's contention. Ferguson appealed to the Supreme Court of the United States.

The Supreme Court by a unanimous vote sustained the Kansas law. Justice Hugo Black's majority opinion asserted that such cases as Williamson v. Lee Optical *(1955) cast out* Lochner v. New York *(1905) style reasoning, root and branch. Drawing heavily on the pre-New Deal dissents of Justice Oliver Wendell Holmes and the decisions of the post-1937 decisions of the Court, Black instructed that business owners such as Frank Skrupa should turn to the legislature, not the courts, for relief, even from prohibitory legislation. Would Justice Black ever declare a business regulation violated the due process clause? Would Justice Harlan? How does the Harlan concurrence differ from the Black majority opinion?*

JUSTICE BLACK delivered the opinion of the Court.

The only case discussed by the court below as support for its invalidation of the statute was *Commonwealth* v. *Stone* (PA 1959), in which the Superior Court of Pennsylvania struck down a statute almost identical to the Kansas act involved here. In *Stone* the Pennsylvania court held that the State could regulate, but could not prohibit, a "legitimate" business. Finding debt adjusting, called "budget planning" in the Pennsylvania statute, not to be "against the public interest" and concluding that it could "see no justification for such interference" with this business, the Pennsylvania court ruled that State's statute to be unconstitutional. In doing so, the Pennsylvania court relied heavily on *Adams* v. *Tanner* (1917), which held that the Due Process Clause forbids a State to prohibit a business which is "useful" and not "inherently immoral or dangerous to public welfare."

Both the District Court in the present case and the Pennsylvania court in *Stone* adopted the philosophy of *Adams* v. *Tanner*, and cases like it, that it is the province of courts to draw on their own views as to the morality, legitimacy, and usefulness of a particular business in order to decide whether a statute bears too heavily upon that business and by so doing violates due process. Under the system of government created by our Constitution, it is up to legislatures, not courts, to decide on the wisdom and utility of legislation. There was a time when the Due Process Clause was used by this Court to strike down laws which were thought unreasonable, that is, unwise or incompatible with some particular economic or social philosophy. In this manner the Due Process Clause was used, for example, to nullify laws prescribing maximum hours for work in bakeries, *Lochner* v. *New York* (1905), outlawing "yellow dog" contracts, *Coppage* v. *Kansas* (1915), setting minimum wages for women, *Adkins* v. *Children's Hospital* (1923), and fixing the weight of loaves of bread, *Jay Burns Baking Co*. v. *Bryan* (1924). This intrusion by the judiciary into the realm of legislative value judgments was strongly objected to at the time, particularly by Justice Holmes and Justice Brandeis. Dissenting from the Court's invalidating a state statute which regulated the resale price of theatre and other tickets [*Tyson & Brother* v. *Banton* (1927)], Justice Holmes said,

> I think the proper course is to recognize that a state legislature can do whatever it sees fit to do unless it is restrained by some express prohibition in the Constitution of the United States or of the State, and that Courts should be careful not to extend such prohibitions beyond their obvious meaning by reading into them conceptions of public policy that the particular Court may happen to entertain.

And in an earlier case he had emphasized that, "The criterion of constitutionality is not whether we believe the law to be for the public good."

The doctrine that prevailed in *Lochner, Coppage, Adkins, Burns*, and like cases—that due process authorizes courts to hold laws unconstitutional when they believe the legislature has acted unwisely—has long since been discarded. We have returned to the original constitutional proposition that courts do not substitute their social and economic beliefs for the judgment of legislative bodies, who are elected to pass laws. As this Court stated in a unanimous opinion in 1941, "We are not concerned . . . with the wisdom, need, or appropriateness of the legislation." Legislative bodies have broad scope to experiment with economic problems, and this Court does not sit to "subject the State to an intolerable supervision hostile to the basic principles of our Government and wholly beyond the protection which the general clause of the Fourteenth Amendment was intended to secure." It is now settled that States "have power to legislate against what are found to be injurious practices in their internal commercial and business affairs, so long as their laws do not run afoul of some specific federal constitutional prohibition, or of some valid federal law."

In the face of our abandonment of the use of the "vague contours" of the Due Process Clause to nullify laws which a majority of the Court believed to be economically unwise, reliance on *Adams* v. *Tanner* is as mistaken as would be adherence to *Adkins* v. *Children's Hospital*, overruled by *West Coast Hotel Co*. v. *Parrish* (1937). . . . We conclude that the Kansas Legislature was free to decide for itself that legislation was needed to deal with the business of debt adjusting. Unquestionably, there are arguments showing that the business of debt adjusting has social utility, but such arguments are properly addressed to the legislature, not to us. 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." [*Williamson* v. *Lee Optical Co.* (1955)] Nor are we able or 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. ["The Fourteenth Amendment does not enact Mr. Herbert Spencer's Social Statics." *Lochner* v. *New York* (1905) (Holmes, J., dissenting)] The Kansas debt adjusting statute may be wise or unwise. But relief, if any be needed, lies not with us but with the body constituted to pass laws for the State of Kansas.

Nor is the statute's exception of lawyers a denial of equal protection of the laws to nonlawyers. Statutes create many classifications which do not deny equal protection; it is only "invidious discrimination" which offends the Constitution. *Lee Optical* . . . If the State of Kansas wants to limit debt adjusting to lawyers, the Equal Protection Clause does not forbid it. . . .

JUSTICE HARLAN concurs in the judgment on the ground that this state measure bears a rational relation to a constitutionally permissible objective. See *Williamson* v. *Lee Optical Co*. (1955).