Supplementary Material

Chapter 8: The New Deal/Great Society Era—Equality/Equality Under Law

Railway Express Agency v. People of State of New York, 336 U.S. 106 (1949)

The Railway Express Agency sold space for advertising on the sides of their trucks to such companies as Camel Cigarettes and the Ringling Brothers Circus. That practice violated a New York City ordinance that forbade any person from operating an advertising vehicle" unless the vehicle was "engaged in the usual business or regular work of the owner." Under this law, Railway Express could advertise their business on their trucks, but not cigarettes, circuses, and the like. When company trucks continued to advertise other businesses, the Railway Express Agency was fined by a magistrate's court. After that ruling was sustained by the New York Court of Appeals, Railway Express appealed to the Supreme Court of the United States.

The Supreme Court unanimously sustained the New York City law. Justice Jackson's concurring opinion insisted on the traditional rule that legislative distinctions reflect real differences between the class of persons subject to the regulation and the class that remained unregulated. Given the extent to which an advertisement distracts does not depend on who owns the truck, what "real difference" did Jackson find between advertisers for hire and those who advertised their business? Was this a constitutionally sufficient distinction? Justice Douglas simply noted that this is not "the kind of discrimination" sanctioned by the equal protection clause? Does his opinion provide any clue as to "the kind of discrimination that is forbidden? Suppose in an effort to reduce, but not eliminate clutter, New York City banned advertising vehicles owned by persons whose last names began with the letters from M to Z. Would that be constitutional after Railway Express*?*

JUSTICE DOUGLAS delivered the opinion of the Court.

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The question of equal protection of the laws is pressed . . . strenuously on us. It is pointed out that the regulation draws the line between advertisements of products sold by the owner of the truck and general advertisements. It is argued that unequal treatment on the basis of such a distinction is not justified by the aim and purpose of the regulation. It is said, for example, that one of appellant's trucks carrying the advertisement of a commercial house would not cause any greater distraction of pedestrians and vehicle drivers than if the commercial house carried the same advertisement on its own truck. . . .

That, however, is a superficial way of analyzing the problem, even if we assume that it is premised on the correct construction of the regulation. The local authorities may well have concluded that those who advertised their own wares on their trucks do not present the same traffic problem in view of the nature or extent of the advertising which they use. It would take a degree of omniscience which we lack to say that such is not the case. If that judgment is correct, the advertising displays that are exempt have less incidence on traffic than those of appellants.

We cannot say that that judgment is not an allowable one. Yet if it is, the classification has relation to the purpose for which it is made and does not contain the kind of discrimination against which the Equal Protection Clause affords protection. It is by such practical considerations based on experience rather than by theoretical inconsistencies that the question of equal protection is to be answered. . . . And the fact that New York City sees fit to eliminate from traffic this kind of distraction but does not touch what may be even greater ones in a different category, such as the vivid displays on Times Square, is immaterial. It is no requirement of equal protection that all evils of the same genus be eradicated or none at all. . . .

JUSTICE RUTLEDGE acquiesces in the Court's opinion and judgment. . . .

JUSTICE JACKSON, concurring.

There are two clauses of the Fourteenth Amendment which this Court may invoke to invalidate ordinances by which municipal governments seek to solve their local problems. One says that no state shall 'deprive any person of life, liberty, or property, without due process of law'. The other declares that no state shall 'deny to any person within its jurisdiction the equal protection of the laws.'

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The burden should rest heavily upon one who would persuade us to use the due process clause to strike down a substantive law or ordinance. . . . Invalidation of a statute or an ordinance on due process grounds leaves ungoverned and ungovernable conduct which many people find objectionable.

Invocation of the equal protection clause, on the other hand, does not disable any governmental body from dealing with the subject at hand. It merely means that the prohibition or regulation must have a broader impact. I regard it as a salutary doctrine that cities, states and the Federal Government must exercise their powers so as not to discriminate between their inhabitants except upon some reasonable differentiation fairly related to the object of regulation. This equality is not merely abstract justice. The framers of the Constitution knew, and we should not forget today, that there is no more effective practical guaranty against arbitrary and unreasonable government than to require that the principles of law which officials would impose upon a minority must be imposed generally. Conversely, nothing opens the door to arbitrary action so effectively as to allow those officials to pick and choose only a few to whom they will apply legislation and thus to escape the political retribution that might be visited upon them if larger numbers were affected. Courts can take no better measure to assure that laws will be just than to require that laws be equal in operation.

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In this case, if the City of New York should assume that display of any advertising on vehicles tends and intends to distract the attention of persons using the highways and to increase the dangers of its traffic, I should think it fully within its constitutional powers to forbid it all. The same would be true if the City should undertake to eliminate or minimize the hazard by any generally applicable restraint, such as limiting the size, color, shape or perhaps to some extent the contents of vehicular advertising. Instead of such general regulation of advertising, however, the City seeks to reduce the hazard only by saying that while some may, others may not exhibit such appeals. . . .

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That the difference between carrying on any business for hire and engaging in the same activity on one's own is a sufficient one to sustain some types of regulations of the one that is not applied to the other, is almost elementary. But it is usual to find such regulations applied to the very incidents wherein the two classes present different problems, such as in charges, liability and quality of service.

The difference, however, is invoked here to sustain a discrimination in a problem in which the two classes present identical dangers. The courts of New York have declared that the sole nature and purpose of the regulation before us is to reduce traffic hazards. There is not even a pretense here that the traffic hazard created by the advertising which is forbidden is in any manner or degree more hazardous than that which is permitted. It is urged with considerable force that this local regulation does not comply with the equal protection clause because it applies unequally upon classes whose differentiation is in no way relevant to the objects of the regulation.

As a matter of principle and in view of my attitude toward the equal protection clause, I do not think differences of treatment under law should be approved on classification because of differences unrelated to the legislative purpose. The equal protection clause ceases to assure either equality or protection if it is avoided by any conceivable difference that can be pointed out between those bound and those left free. This Court has often announced the principle that the differentiation must have an appropriate relation to the object of the legislation or ordinance. . . .

The question in my mind comes to this. Where individuals contribute to an evil or danger in the same way and to the same degree, may those who do so for hire be prohibited, while those who do so for

their own commercial ends but not for hire be allowed to continue? I think the answer has to be that the hireling may be put in a class by himself and may be dealt with differently than those who act on their own. But this is not merely because such a discrimination will enable the lawmaker to diminish the evil. That might be done by many classifications, which I should think wholly unsustainable. It is rather because there is a real difference between doing in self-interest and doing for hire, so that it is one thing to tolerate action from those who act on their own and it is another thing to permit the same action to be promoted for a price.