CONSTITUTIONAL LAW

EQUAL PROTECTION CLAUSE AND NEPOTISM

A 1942 Louisiana statute limited navigation of "seagoing vessels" in the port of New Orleans to state licensed pilots.[1] Plaintiffs, federally licensed pilots with at least fifteen years experience in the port and elsewhere, thus could navigate only coastwise vessels.[2] They applied to the State Board of River Port Commissioners for appointment as state licensed pilots.[3] The Board refused to examine plaintiffs, since they had not completed a six-months apprenticeship required by statute.[4] The practice persists of permitting state licensed pilots to select apprentices, and with few exceptions only friends and relatives are given the opportunity for training.[5] Effectually barred from obtaining a license, plaintiffs sought relief in the state court, contending they had been denied equal protection of the laws. The Louisiana Supreme Court affirmed the trial court's dismissal of the complaint.[6] On appeal, the Supreme Court affirmed, holding the statutes to be related to the objective of the entire pilotage law—to secure for the state "the safest and most efficiently operated pilotage system practicable." *Kotch v. Board of River Port Pilot Comm'rs*, 330 U.S. 552 (1947) (Rutledge, Reed, Douglas, and Murphy, JJ. dissenting.)

This decision sanctions a state regulated system of pi-

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1. La. Gen. Stat. (Supp., 1946) §§9155, 9156.
2. Regulation of "seagoing shipping" is within the control of the state governments. Congress under the commerce clause (U.S. Const. Art. I, §8) has supreme power to regulate pilotage, but by adoption of Rev. Stat. §4235 (1878), 46 U.S.C. §211 (1940), expressed an intention not to deprive the states of power to regulate pilots. Anderson v. Pacific Coast S.S. Co., 225 U.S. 187 (1912). Regulation of coastwise shipping, however, is now exclusively under federal control. Rev. Stat. §§4401, 4444 (1875), 46 U.S.C. §§ 215, 364 (1940).
3. La. Gen. Stat. (Dart, 1939) §9154.
4. La. Gen. Stat. (Dart, 1939) §9157.
5. Kotch v. Board of River Port Pilot Comm'rs, 330 U.S. 552, 555 (1947). Selection of apprentices is accomplished by electing prospective apprentices into a pilot's association formed under authority of State law. La. Gen. Stat. (Dart, 1939) §9159. The state supreme court in its decision in the instant case construed the Act to require apprenticeship under present state pilot officers. Kotch v. Board of River Port Pilot Comm'rs, 209 La. 737, 25 So.2d 527 (1946).
6. 209 La. 737, 25 So.2d 527 (1946).

lotage which limits selection of pilots on the basis of nepotism. To establish their charge of an unconstitutional discrimination, plaintiffs relied heavily on the case of *Yick Wo v. Hopkins*.[7] In that case a San Francisco ordinance made it unlawful to conduct a laundry business in other than brick buildings without having first obtained the permission of a board of supervisors. All Chinese laundries were conducted in wooden buildings. The supervisors permitted the operation of all laundries in wooden buildings except those owned by Chinese. Thus, Yick Wo and other Chinese were systematically denied permission to engage in their calling. The Supreme Court held that equal protection of the laws had been denied.[8] In the principal case the majority astutely distinguished the *Yick Wo* decision by observing that the discrimination forbidden was purely racial in character and thus did not govern the case under consideration.[9] Justice Rutledge, in his dissent,[10] admits the discrimination shown was not consciously racial in character, but contends that the *Kotch* case falls squarely within the ruling of the *Yick Wo* decision because racial discrimination cannot be distinguished from nepotism.

The issue presented by the two opinions is whether a regulation based on nepotism is to be tested by the strict rule forbidding racial discrimination[11] or is to be evaluated by the more elastic rule of reasonableness applied to economic regulation.[12] The majority in choosing the latter was influenced by two important considerations.

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7. 118 U.S. 356 (1886).
8. "The fact of this discrimination is admitted. No reason for it is shown, and the conclusion cannot be resisted, that no reason for it exists except hostility to the race and nationality to which the petitioners belong, and which in the eye of the law is not justified. The discrimination is, therefore, illegal, and the public administration which enforces it is a denial of the equal protection of the laws and a violation of the Fourteenth Amendment of the Constitution." 118 U.S. 356, 374 (1886).
9. "Yick Wo was denied the right to engage in an occupation . . . solely because he was Chinese." 330 U.S. 552, 557 (1947).
10. 330 U.S. 552, 564 (1947).
11. See n.16, 17 infra.
12. "There is therefore no precise application of the rule of reasonableness of classification, and the rule of equality permits many practical irregularities." Magoun v. Illinois Trust & Sav. Bank, 170 U.S. 283, 296 (1898). The equal protection clause of the Fourteenth Amendment does not take from the State the power to classify in the adoption of police laws but admits of a wide scope of discretion in that regard, and avoids what is done only

First, there was no racial discrimination shown. Although nepotism and racial discrimination are similar, it is submitted that they are distinguishable for the purpose of the Fourteenth Amendment. The Amendment became a part of the Constitution to guarantee the rights of the emancipated race for which the Civil War had been fought. The Court early gave judicial recognition to that fact and speaking of the equal protection clause stated: "We doubt very much whether any action of a state not directed by way of discrimination against the negroes as a class, or on account of their race, will ever be held to come within the purview of this provision."[13] Later cases recognized that the protection must necessarily be extended to all races.[14] Similarly discriminations against persons for reasons other than race were held to be within the Constitutional prohibitions of the Fourteenth Amendment.[15] But when a racial discrimination is presented, the Court feels mandated by the people to strike down all barriers erected by a state because of color.[16] The attitude with which race legislation is viewed has amounted in effect to a presumption of the legislation's unconstitutionality.[17]

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if it is without any reasonable basis and is therefore purely arbitrary, Chicago R.R. v. McGuire, 219 U.S. 549 (1911); Louisville R.R. v. Melton, 218 U.S. 36 (1910).

13. Slaughter-House Cases, 16 Wall. 36 (U.S. 1873).

14. Buchanan v. Warley, 245 U.S. 60 (1917); Maxwell v. Dow, 176 U.S. 581 (1900); Yick Wo v. Hopkins, 118 U.S. 356 (1886).

15. In Santa Clara Co. v. Southern Pac. R.R., 118 U.S. 394 (1886); Waite, C.J., said: "The court does not wish to hear argument on the question whether the provision in the fourteenth amendment to the Constitution which forbids a state to deny to any person within its jurisdiction the equal protection of the laws, applies to these corporations. We are all of opinion that it does."

16. "The 14th Amendment, adopted as it was with special solicitude for the equal protection of members of the Negro race lays a duty upon the court to level by its judgment these barriers of color." Nixon v. Condon, 286 U.S. 81, 89 (1932): "States may do a good deal of classifying that it is difficult to believe rational, but there are limits, and it is too clear for extended argument that color cannot be made the basis of statutory classification affecting the right set up in this case." Nixon v. Herndon, 273 U.S. 540, 541 (1927).

17. See n.16, supra. In Truax v. Raich, 239 U.S. 32, 41 (1915), Mr. Justice Hughes said: "It is sought to justify this act as an exercise of the power of the state to make reasonable classifications in legislating to promote the health, safety, morals, and welfare of those within its jurisdiction. But this admitted authority, with the broad range of legislative discretion that it implies, does not go so far as to make it possible for the state to deny to lawful inhabitants, because of their race or nationality, the ordinary means of earning a livelihood." See Korematsu v.

On the other hand, in cases involving state regulation of economic affairs a greater latitude is accorded to legislative judgment—in fact, the policy pursued amounts to one of judicial self-restraint, resulting in a presumption of constitutionality.[18] The reason for the differentiation in the two classes of cases is that in the economic regulation field the Court does not feel it is under compulsion to narrowly limit the bounds of state action. That reason would appear to apply with equal vigor to any legislation not involving a racial discrimination. Therefore, the correct test to be applied in the principal case is that used when examining any other state regulatory legislation.

Secondly, the case tests the right and power of a state to select its own officers.[19] The relation of the means of regulation to the end sought by the statute—that of securing a safe and efficient pilotage system—is controversial. Questions of degree are inescapable,[20] and if reasonable men may

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U.S., 323 U.S. 214, 216 (1944) (dicta to the effect that race restrictions are subjected to rigid scrutiny).

18. U.S. v. Carolene Products Co., 304 U.S. 144 (1938).

19. The Court accepted the Louisiana court's construction that the pilots were state officers. The state decision is not binding upon the Supreme Court when a right guaranteed by the federal Constitution is concerned. Coombes v. Getz, 285 U.S. 434, 441 (1931). The Court speaking through Mr. Justice Stone said, "An office is a public station conferred by the appointment of government. The term embraces the idea of tenure, duration, emolument and duties fixed by law." There must be an office before there can be an officer. Metcalf v. Mitchell, 269 U.S. 514, 520 (1925). The Louisiana Statutes create the office of "River Port Pilots." La. Gen. Stat. (Dart, 1939) §9155. The number of pilots and their duties are specified. La. Gen. Stat. (Dart, 1939) §§9155, 9156, 9157. The pilots must take an oath of office and furnish bond. Id. at §9160. A procedure is set up to try incompetent pilots. Id. at §9161. Deference should be granted to state judicial construction of long standing. See Atlantic Coast Line R.R. v. Phillips, 67 Sup. Ct. 1584, 1585 (1947). Louisiana early decided that pilots were state officers. Levine v. Michel, 35 La. Ann. Rep. 1121, 1124 (1883); Louisiana v. Follett, 33 La. Ann. Rep. 228, 230 (1881); Williams v. Payson, 14 La. Ann. Rep. 7, 8 (1859). The Louisiana Pilots have many, if not all, of the characteristics of state officers. Therefore, it seems that the state's determination should be respected.

20. "Thus we come to the usual question of degree and of drawing a line where no important distiction can be seen between the nearest points on the two sides, but where the distinction between the extreme is plain." Klein v. Board of Supervisors, 282 U.S. 19, 23 (1930).

differ,[21] governmental regulation ought to be sustained.[22] Furthermore, the Court is reluctant to interfere with the standards or qualifications adopted by the state when selecting its officers.[23] This consideration becomes important in permitting wider discretion to legislative judgment when testing the rational basis of the legislation under attack. Absent the state officer element, it is possible the Court would have declared the discrimination unreasonable and arbitrary.[24]

It might be argued that the right to work, *i.e.*, equal opportunity for all to pursue his chosen profession, is a civil liberty. While one may have a constitutional right to pursue his chosen calling, he does not have a constitutional right to do so free from reasonable professional standards imposed by state regulation. For where there is a rational basis for legislative judgment[25] and the means of regulation is related to the end sought,[26] state legislation regulating professions and callings has been consistently upheld.[27]

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21. In fields other than those involving civil liberties, Justice Holmes refused to strike down legislation on the reasons or policy of which reasonable men differ. Adair v. U.S., 208 U.S. 161, 191 (1907) (dissenting opinion); Lochner v. New York, 198 U.S. 45, 76 (1905) (dissenting opinion). This view has been accepted by the Court, Nebbia v. New York, 291 U.S. 502, 537-39 (1933).
22. "The interpretation of constitutional principles must not be too literal. We must remember that the machinery of government would not work if it were not allowed a little play in its joints." Bain Peanut Co. v. Pinson, 282 U.S. 499, 501 (1931).
23. Snowden v. Hughes, 321 U.S. 1 (1943); Taylor v. Beckham, 178 U.S. 548 (1900).
24. It must be noted that the majority takes into account that the case is unique and carefully limits the decision to pilotage. 330 U.S. 552, 564 (1947).
25. Discrimination will be upheld if it "does not preclude the possibility of a rational basis for the legislative judgment." Clarke v. Deckebach, 274 U.S. 392, 397 (1927) (denial of pool hall licenses to aliens upheld).
26. Chicago R.R. v. McGuire, 219 U.S. 529 (1911); Louisville R.R. v. Melton, 218 U.S. 36 (1910). "A very wide discretion must be conceded to the legislative power of the State in the classification of trades, callings, businesses or occupations which may be subjected to special forms of regulation or taxation through an excise or license tax. If the selection or classification is neither capricious nor arbitrary, and rests upon some reasonable consideration of difference or policy, there is no denial of the equal protection of the law." Brown-Forman Co. v. Kentucky, 217 U.S. 563, 573 (1910).
27. State regulation of pilotage has consistently been upheld. See Anderson v. Pacific Coast S.S. Co., 225 U.S. 187 (1912); Olson v. Smith, 195 U.S. 344 (1904); Wilson v. McNamee, 102 U.S. 572

Furthermore, if the right to work were considered a civil liberty, it might be urged that the nepotic system employed by Louisiana in selecting officers was not an unconstitutional infringement of that liberty. In *United Public Workers of America v. Mitchel*,[28] the Hatch Act was sustained against a charge that it unconstitutionally violated the right to free speech and to engage in political activity.[29] The majority there indicated that the requisite protection of civil rights did not restrict the reasonable regulation permitted to Congress in legislation promulgated to regulate government employees. Indeed, it held that the "clear and present danger doctrine,"[30] applied to legislation restricting citizens' civil liberties, was not applicable to the regulation of government employees. Thus, it can be contended that the prohibition of discriminatory legislation in the field of private callings is not applicable when a state is selecting pilot officers in the reasonable regulation of commerce.

(1880). Cf. Semler v. Oregon, 294 U.S. 608 (1935) (dentists); Roschen v. Ward, 279 U.S. 337 (1929) (optometrists); Hayman v. Galveston, 273 U.S. 414 (1927) (osteopaths); Hurwitz v. North, 271 U.S. 40 (1926) (physicians); Lehman v. Board of Accountancy, 263 U.S. 394 (1923) (public accountants); Bratton v. Chandler, 260 U.S. 110 (1922) (real estate brokers); La Tourette v. McMasters, 248 U.S. 465 (1919) (insurance agents); Merchants Exchange v. Missouri, 248 U.S. 365 (1919) (public weighers of grain); Crane v. Johnson, 242 U.S. 339 (1917) (healers by mental suggestion); Lehan v. Atlanta, 242 U.S. 53 (1916) (private detectives); Brazee v. Michigan, 241 U.S. 340 (1916) (employment agencies); Gundling v. Chicago, 177 U.S. 183 (1900) (cigarette vendors).

28. 330 U.S. 75 (1947).

29. 53 Stat. 1147 (1939), as amended, 18 U.S.C.A. §611 (Supp. 1946). The Act restricts substantially all employees in the executive branch of the federal government making it unlawful "to take any active part in political management or in political campaigns."

30. In the case of state restrictions upon the basic guaranties of civil liberties in the First Amendment there is a presumption against the validity of the law, and the burden of proof rests upon those who defend it to show that the invasion of civil liberty is justified by some "clear and present danger" to the public security. West Virginia Bd. of Education v. Barnette, 319 U.S. 624 (1943); Cantwell v. Conn., 310 U.S. 296 (1940); Lovell v. Griffin, 303 U.S. 444 (1938) (restrictions on religion held unconstitutional); Thomas v. Collins, 323 U.S. 516 (1944); Thornhill v. Ala. 310 U.S. 88 (1940) (restrictions on freedom of speech prohibited).