10-1975

City of New Orleans v. Dukes

Lewis F. Powell Jr.

Preliminary Memo

Conf. of Feb. 14, 1975
List 3, Sheet 1

No. 74-775

CITY OF NEW ORLEANS

V.

DUKES

Appeal from CA 5 (Goldberg, ?, ?)[1]

Federal/Civil

Summary: The City of New Orleans attacks the holding of the Fifth Circuit that a New Orleans ordinance which restricted vendor permits for the sale of hot dogs in the French Quarter to those who had lawfully been in the business more than eight years is

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1/The names of the other members of the Fifth Circuit panel aren't specified.

unconstitutional under the Fourteenth Amendment as creating a statutory classification without rational relationship to a legitimate state purpose. Morey v. Doud, 354 U.S. 457, 463-64. Appellant City argues the statutory classification is rationally related to various legitimate objectives.

Facts: Appellee Dukes maintained a pushcart business in the Vieux Carre (French Quarter) in New Orleans for about a year prior to January 1, 1972. On that date the New Orleans City Council revised its ordinances, removing hot dog vendors from the list of permitted pushcart enterprises in the Vieux Carre but simultaneously allowing all licensed vendors who had continuously operated there for over eight years prior to January 1, 1972 to continue selling.[2/] The only peddler to actually qualify for a Vieux Carre permit was a firm called Lucky Dogs, Inc. When other hot dog vendors who were friends of Dukes were arrested for operating in the Vieux Carre and when she was unable to obtain a permit for the area, she filed suit in USDC (E.D. La.) (Gordon) under 28 U.S.C. §§ 2201, 2202 arguing that the municipal ordinances were unconstitutional

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2/828 MCS 46-1 does not include the sale of hot dogs in the Vieux Carre as an approved activity although the sale of hot dogs is allowed in other places. However, 828 MCS 46-1.1 added on the same day that the Vieux Carre was removed from the approved list provides that "vendors who have continuously operated within that area...[with a permit] for eight years prior to January 1, 1972 may obtain a... permit to operate" the business within the area of the Vieux Carre.

and seeking declaratory and injunctive relief. On stipulated facts the USDC, finding no issues of fact, granted judgment for the City. The CA reversed, holding the statutory "grandfather clause" irrational under the test of Morey, supra, and hence unconstitutional.

Jurisdiction: Appellant City seeks to appeal under 28 U.S.C. § 1254(2) which provides for review by this Court of cases in the courts of appeal:

> "By appeal by a party relying on a State statute held by a court of appeals to be invalid as repugnant to the Constitution ... but such appeal shall preclude review by writ of certiorari at the instance of such appellant."

The enactment in question is a city ordinance -- not an enactment of statewide application. In contrast to appeals from three-judge federal courts where "state statute" requires a state enactment of statewide application [Cases collected in Stern & Gressman, Supreme Court Practice § 2.14, p. 49-51], a line of cases have held that "state statute" for the purpose of § 1254(2) jurisdiction includes municipal ordinances. See Id. at § 2.6, p. 32; United Gas Co. v. Ideal Cement Co., 369 U.S. 134, 135; Chicago v. Atchison, T. & S.F. R. Co., 357 U.S. 77, 82. These cases appear controlling unless the logic of cases such as Gonzalez v. Automatic Employees Credit Union, ____ U.S. ____ (1974) indicate that this anomalous interpretation ought to yield to the policy factors expressed in

Gonzalez. If the case is not a proper appeal, it may be treated as a petition for cert even though it was brought under § 1254(2). Bradfort Electric Light Co. v. Clapper, 284 U.S. 221, 224; El Paso v. Simmons, 379 U.S. 497, 501-503. The preclusion clause in § 1254(2) applies only if the case is actually considered by this Court as an appeal.

Contentions: The Fourteenth Amendment doesn't outlaw classification -- only irrational discrimination. "A statutory discrimination will not be set aside if any set of facts reasonably may be conceived to justify it." McGowan v. Maryland, 366 U.S. 420 (1961). New Orleans and the nation have a vital interest in preserving the Vieux Carre as a place of beauty and as a historical landmark. The New Orleans City Council observed the Quarter was being overrun by hawkers and peddlers in substantial numbers whose rude assaults on sightseers and tourists alike were destroying the nature of the Quarter and its economic contribution in attracting tourists. The traditional hot dog peddler of the Quarter, Lucky Dogs, for many years has used decorative carts which have become a part of the beauty of New Orleans. This statutory classification suitably furthered an appropriate governmental interest. Further any burden imposed on appellee Dukes is de minimis: the entire city except for the Vieux Carre is available for her business. Although Lucky Dogs is the only peddler who actually qualified to use the Quarter under the grandfather clause, not all legislative

This is absurd. That area is the only place such venders can make a living

monopolies fall. Under Nebbia v. New York, 291 U.S. 502, 529-530, 538 (1934) such monopolies will be upheld where because of scarcity of space or other legitimate reasons the grant of such monopoly is a rational choice. Here large numbers of peddlers are incompatible with the historic nature of the Vieux Carre. In such circumstances the grandfather clause even if construed as the grant of a legislative monopoly is a rational choice and hence satisfies the Fourteenth Amendment.

The CA found the "traditional" equal protection test of Morey v. Doud, supra, applicable. However on the authority of that case this ordinance falls. Like American Express in Morey, there is no showing here that Lucky Dogs or other traditional peddlers will operate in a manner more consistent with the traditions of the Quarter than any other peddler. In the same way that the exemption of American Express from future regulation was irrational because there were no guarantees of its future performance, the grant of an effective legislative monopoly to Lucky Dogs falls here. Stanley v. Public Utilities Comm'n, 295 U.S. 76 which upheld the grant of a legislative monopoly is of no aid to appellant since there the legislative scheme was directed towards permitting only qualified applicants to do business and held open the possibility of licences for future qualified applicants unlike this scheme which totally eliminates the possibility of future entry. There are many other valid legislative means to the accomplishment of

the ends sought by New Orleans but the instant "grandfather clause" falls as irrational.

Discussion: On the merits there are good arguments either way. See e.g., Kotch v. Pilot Commissioners, 330 U.S. 552 (1947). The analogy by the CA to Morey v. Doud, supra, is not a complete one and Morey does not necessarily control the instant case.

The case offers an opportunity to limit the appellate jurisdiction of the Court by interpreting "state statute" as used in 28 U.S.C. § 1254(2) in the same way as it is interpreted under 28 U.S.C. § 1253 -- an enactment of statewide application.

The case probably warrants calling for a Motion to Affirm/Dismiss from appellees.

There is no Motion to Affirm/Dismiss.

1/27/75 O'Neill Op in Jur. Stat.

(appeal)

Jurt Q is whether a city ordinance (regulating hot dog sales in N/Orleans) is a "state statute" for 3 judge ct purposes. Jurisdiction under 1254(2)?

DISCUSS

Dun Ct. has so held — but then wrote little sense & I'd be willing to reconsider.

On merits, case is possibly wrongly decided (City Council merely enacted a grandfather clause protecting vendors already in business) but case is of no importance.

No. 74-775

CITY OF NEW ORLEANS
v.
DUKE

I am inclined to agree with the notewriter's suggestion that [redacted] "state statute" under 1254(2) should be restricted to enactments of statewide application. It seems absurd to hold that consideration of city ordinances of this type fall within the Court's mandatory jurisdiction.

On the merits, I think the CA was wrong. Grandfather clauses are by nature somewhat irrational; the only real issue is how far back the clause should reach. That's generally an issue that reveolves around politics rather than the merits of the various competitors. If this case were arising on cert, however, I'd deny cert. It's not a very important case. In any event, the Vieux Carre is a zoo and the addition of a few more hotdog venders will only make life for fat people like me easier.

David

Court ..... *Voted on* ....., 19...

Argued ....., 19... *Assigned* ....., 19... No. 74-775

Submitted ....., 19... *Announced* ....., 19...

CITY OF NEW ORLEANS, ET AL., Appellants

vs.

NANCY DUKES, d/b/a LOUISIANA CONCESSIONS

12/21/74 Appeal filed.

Rehnquist, Marshall ord. cert for 1254 but not for 1253

Noted

Juris Postponed

	HOLD FOR	CERT. G	CERT. D	JURISDICTIONAL STATEMENT N	JURISDICTIONAL STATEMENT POST	JURISDICTIONAL STATEMENT DIS	JURISDICTIONAL STATEMENT AFF	MERITS REV	MERITS AFF	MOTION G	MOTION D	ABSENT	NOT VOTING	
Rehnquist, J.						Postpone				Juris				
Powell, J.						Postpone				Juris				
Blackmun, J.						Postpone				Juris				
Marshall, J.							✓							
White, J.				✓										
Stewart, J.							✓							
Douglas, J.							✓							
Burger, Ch. J.								Postpone						

Bay cork

This is New Orleans case we have noted. (Hot Dog case)

CA 5 appointment

We have granted appellee's motion to proceed IFP. We should reconsider this, as no facts - merely conclusions or indigency - were shown. Not a Criminal justice Act case. Controlled by 28 USC 1915 & Rule 53(7)

In addition to the questionable nature of this motion, counsel has not distinguished himself in the motions dealing with the Clerk's office, or in the 100 page motion to affirm that he filed.

Hint

May 9, 1975 Conference
List 5, Sheet 5

(2). d/t/a Louisiana Concessions

No. 74-775

Motion of Appellee for Appointment of Counsel

CITY OF NEW ORLEANS

v.

(3) what about this lawyer

DUKES

You might want to talk to Jim about this, or get me to do something DB

The Court postponed jurisdiction over this appeal from CA 5. The substantive issue raised involves the constitutionality of a New Orleans ordinance restricting vendor permits for the sale of hotdogs in the French Quarter to those who had lawfully been in the business more than eight years. The Court granted appellee's motion to proceed IFP. - when?

Appellee's counsel, Joseph Neves Marcal, III, Esquire of Louisiana, now moves that he be appointed to represent appellee before this Court. Mr. Marcal, first as General Counsel for the La. ACLU and now as a "referral attorney," has represented appellee without compensation since the case was appealed to CA 5.

He is intimately familiar with the scheme of legislation represented by the "permit law" in issue here and is "also very familiar with so-called 'civil rights litigation', of the type represented by the controversy before the Court herein, all of which involves 'invidious discrimination' practice by State authorities." Counsel is a member of the bar of this Court. He submits that he is more than ably qualified to brief and orally argue this matter before the Court.

DISCUSSION: This is not a Criminal Justice Act case. The motion is controlled by 28 U.S.C. 1915 and Rule 53(7). The standard appears to be indigency not inability to pay, and the only compensation involved is transportation and per diem expenses.

One obvious problem with the instant motion is that it is filed by counsel, and there is not even an averment that appellee consents to being represented by counsel. It would seem that appellee should be heard from on the matter. Although it is somewhat after the fact, there is also the question of whether appellee qualifies for IFP treatment. Appellee is styled both here and below as "Nancy Dukes, d/b/a Louisiana Concessions" and the Court has traditionally denied IFP status to artificial persons. One final problem is that although appellee submitted an affidavit in support of her (it's) motion to proceed IFP, the affidavit simply states her (it's) inability to pay "any costs. . . in regards to her response to Appellant's appeal." The affidavit does not provide financial information or state appellee's inability to obtain counsel, although the latter might be inferred. Appellee does not appear to have been granted IFP status below. The affidavit notes, however, that CA 5 (Goldberg) permitted appellee to proceed on typewritten transcripts and typewritten briefs.

The Court may wish to reconsider the motion to proceed IFP or, at least with respect to the pending motion to appoint counsel, request concurrence in the

motion by appellee and seek further financial information of the type required by Form 4, Fed. R. App. P.

There is no response.

5/2/75 Ginty No ops.

PJN

Court ..... *Voted on* ....., 19...

Argued ....., 19... *Assigned* ....., 19... No. 74-775

Submitted ....., 19... *Announced* ....., 19...

CITY OF NEW ORLEANS

vs.

DUKES MOTION

I do not have to appoint counsel at this time

Motion Denied

	HOLD FOR	CERT.		JURISDICTIONAL STATEMENT				MERITS		MOTION		ABSENT	NOT VOTING	
		G	D	N	POST	DIS	AFF	REV	AFF	G	D			
.....	.....													.....
Rehnquist, J.	.....													.....
Powell, J.	.....													.....
Blackmun, J.	.....													.....
Marshall, J.	.....													.....
White, J.	.....													.....
Stewart, J.	.....													.....
Brennan, J.	.....													.....
Douglas, J.	.....													.....
Burger, Ch. J.	.....													.....

LFP/vsl
August 26, 1975

No. 74-775, City of New Orleans v. Dukes.

The purpose of this memo, dictated during the summer, is to aid my memory as to the issues presented, and to record my quite tentative reaction after a preliminary reading of the opinions and briefs.

* * * * * * *

This is the New Orleans "hot dog" vending case. A 1972 ordinance restricted vendor permits for the sale of hot dogs by pushcart in the Vieux Carre (Latin Quarter) to vendors who had lawfully been in this business more then eight years.

At the time of this enactment, there were only two licensed hot dog vendors operating in the Latin Quarter: Nancy Dukes, who had operated there in a small way for less than two years; and Lucky Dogs, Inc., that had conducted this business in the Latin Quarter for about twenty years. The effect of this provision of the ordinance was to preclude Dukes from the push-cart selling of hot dogs in the Latin Quarter, leaving Lucky Dogs with a monopoly.

A Dukes salesman was arrested for violating the ordinance, but the charge was dismissed. Thereafter*, Dukes instituted a

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* The appendix (2 volumes) in this case is so fouled up, and the briefs are so poor, that I find it difficult to be sure of the facts. I believe that the arrest warrant against Dukes' employee was dismissed prior to the institution of this suit.

§ 1983 suit in the district court seeking a declaratory judgment and an injunction, alleging denial of equal protection and of due process under the federal constitution.

The DC decided the case on cross summary judgment motions, sustaining the validity of the ordinance. I do not think the DC filed a written opinion, and there are no stipulated facts.

CA5 (Goldberg) reversed, holding that there was no rational basis for the "grandfather clause" which allowed Lucky Dogs to remain in business while precluding Dukes. CA5 rejected Dukes' argument that the "compelling state interest" test applied. It found that there was no rational basis for the discrimination against Dukes, relying primarily on Morey v. Doud, 354 U.S. 457, 463-64 (1957). CA5 noted, after recognizing the authority of New Orleans to make some economic discriminations, that the grandfather clause in this ordinance was "facially unusual in that its establishment of a closed class of favored enterprises" is supported "solely by the length of their tenure as established operations." The city argued, as it still does, that Lucky Dogs' long continued operation was a part of the tradition of the Latin Quarter. In rejecting this argument, CA5 said:

> the hypothesis that a present eight year veteran of the pushcart hot dog market . . . will continue to operate in a manner more consistent with the traditions of the Quarter than any other operator is without foundation.

Appealability

The first issue presented is whether this is a proper appeal under 28 U.S.C. § 1254(2), providing for review by this Court:

> by appeal by a party relying on a state statute held by a Court of Appeals to be invalid as repugnant to the Constitution . . . .

The question is whether a city ordinance is, for purposes of § 1254(2), a "state statute." As a matter of semantics, the answer would appear to be plainly negative. This view is supported, also, by the fact that appeals from three-judge federal courts from the invalidating of a "state statute" require a state enactment of state-wide application. Nevertheless, there appear to be decisions of this Court which hold that "state statutes" include municipal ordinances for the purpose of jurisdiction under § 1254(2). See United Gas Co. v. Ideal Cement Co., 369 U.S. 134, 135.

In view, however, of our decision in Gonzales v. Automatic Employees Credit Union (1975), in which we limited the scope of three-judge court appeals in light of the basic purpose of this jurisdiction, I think I would join four other justices in applying the "plain language" test to § 1254(2). That is, I would construe "state statutes" to mean precisely that.

Merits

Even if we conclude that an appeal does not confer jurisdiction, I believe we have the option to treat the appeal as a petition for certiorari.

Finality?

A further question raised by appellee is whether the judgment of CA5 is final. Although the ordinance was held to be unconstitutional, the case was remanded to the district court to determine whether the entire pushcart vending ordinance is invalid, or whether merely the grandfather clause portion thereof is invalid. If the district court invalidates the grandfather clause, all hot dog vendors would be denied permits to operate.

Subject to further consideration, and despite my general reluctance to liberalize the finality requirement, it does seem to me that the critical constitutional question has been resolved finally against the city.

Merits

If we reach the merits, I view the question as quite close. Judge Goldberg's opinion is persuasive. It is "unusual," I believe, for a "grandfather clause" not to include all persons already within what fairly may be characterized as "the class." Here, the basic class included pushcart vendors of hot dogs in the

Latin Quarter. There were only two of these, one who had been there nearly twenty years and one less than two years. Both were duly qualified to sell hot dogs prior to enactment of this ordinance. As Judge Goldberg noted, on its face the ordinance is discriminatory without a self-evident legitimate purpose.

For the most part, the city's brief reads like it was written by the chamber of commerce. But putting this type of rhetoric aside, a substantial argument is made for the view that Lucky Dogs had in fact become a part of the "atmosphere" for which the Latin Quarter is famous. It is argued that this vendor has been selling hot dogs "from distinctive little carts, which are actually enlarged model versions of the product itself;" that these carts are attractive and appealing to tourists; are frequently photographed and described in literature about the French Quarter:

> Postcards showing sight in the Vieux Carre invariably will contain the carts and their costumed attendants. (Appellant's brief p. 21.)

On the "monopoly" issue, the city argues:

> The alleged monopoly in the case at bar was incidentally created by the city in its effort to maintain, as is, its main tourist attraction. The questioned grandfather clause is illustrative of the desire, not to favor particular businesses, but to maintain only those features which over the years, over a score of years in this case, have become landmarks in this area of the city of New Orleans. (City's brief p. 31.)

The foregoing type of argument, if in fact supported by the record, is not necessarily irrational. If indeed Lucky Dogs' vending of hot dogs over a twenty-year period has resulted in the creation of something akin to a "secondary meaning" for its particular type of operation, perhaps the city does have a legitimate interest in preserving it. Putting it differently, the city legitimately could limit the number of vending operations on these streets, and it may rationally have concluded -- if the facts justified it -- that only Lucky Dogs was truly compatible with the atmosphere for which the French Quarter is famous.

My difficulty with the city's argument is that, the case having been decided on summary judgment and with inadequate affidavits, I am by no means sure as to its factual accuracy.

This is certainly not a "great case," and I may conclude that it can be decided either way without doing violence to principled equal protection analysis.

BOBTAIL MEMORANDUM

TO: Mr. Justice Powell

FROM: Carl Schenker DATE: October 21, 1975

No. 74-775 New Orleans v. Dukes

This case presents two questions: (1) Is a municipal ordinance a "state statute" for purposes of the § 1254(b) appellate jurisdiction? (2) Did New Orleans' grandfather clause violate equal protection by excluding some preexisting operators from the closed class?

1. Jurisdiction

To clear the underbrush, we can ignore appellee's claim that the judgment below is insufficiently "final" for purposes of review under § 1254(b). I agree with you that it's final enough. Besides, it may be doubted that finality is really required. It is true that finality has been held to be required by § 1254(b). (Slaker v. O'Connor, 278 U.S. 188, 189.) But the statutory language does not compel this result, and the requirement is probably erroneous. In Chicago v. Atchison, T. & S. F.R. Co., 357 U.S. 77, the Court asked for briefing about whether the finality requirement should be retained but failed to reach the issue. Even if the judgment is not final, the finality requirement could be jettisoned in this case (if an appeal otherwise lies). (The appellant did brief this point.)

The real jurisdictional issue is whether "state statute" in § 1254(b) should be given the narrow "statewide statute" reading that prevails in § 1253 (three-judge court) cases. My sympathies lie with yours on the desirability of doing a "Gonzalez" on § 1254(b), but I think it would be a much tougher row to hoe than was Gonzalez. Apparently there is only one precedent squarely in point. In Chicago v. Atchison, supra, the Court took § 1254(b) jurisdiction in a case involving a municipal ordinance. (It should be noted, however, that this was done without discussion.) But there are other cases in which § 1254(b) jurisdiction has been taken that did not involve statutes of statewide application. More importantly, the case law under § 1257(2) is replete with precedent for the proposition that a municipal ordinance is a "state statute" for appellate purposes. And the Court once so held after giving plenary consideration to that specific issue (over a vigorous dissent from Holmes and Brandeis). There's the rub.

Section 1257(2) is a rough converse of § 1254(b). It provides for appeals when a state court upholds a "state statute" against a claim of infirmity. Section 1257(2) is of considerably longer lineage than § 1254(b) because the federal circuit courts of appeal are a rather recent creation. From 1789 until 1925 an appeal lay from state courts under predecessors of § 1257(2)

> where is drawn in question the validity of a statute of, or of an authority exercised under, any State . . . . and the decision is in favor of its validity.

Under this statute it was frequently held that appeals lay from state decisions sustaining the validity of municipal ordinances, but those decisions could be rested on the "authority exercised under" clause. Then in 1925, the statute was amended. (The date is important because the amending statute also introduced § 1254(b).) As amended, the predecessor read essentially as it does today, allowing appeal

> where is drawn in question the validity of a statute of any State . . . and the decision is in favor of its validity.

In King Manufacturing Co. v. City Council of Augusta, 277 U.S. 100 (1928), the Court considered whether deletion of the "authority exercised under" clause meant that appeals no longer lay in municipal ordinance cases. The conceded purpose of the 1925 legislation was to cut down the obligatory jurisdiction of the court. Nonetheless, the majority concluded that municipal ordinances were "statutes of any state." (The theory is that it is up to the state to determine how its law making authority will be exercised: a lot of state statutes or a lot of delegated authority.) Justices Holmes and Brandeis howled in dissent, complaining about how burdensome such trivial municipal ordinance cases were. But their complaints were to no avail.

The same statute amending the predecessor of § 1257(2) enacted the predecessor of § 1254(b). The predecessor read:

> Any case in a circuit court of appeals where is drawn in question the validity of a statute of any state . . . and the decision is against its validity, may . . . be taken to the Supreme Court for review on . . . appeal.

Today the statute reads:

> Cases in the court of appeals may be reviewed by the Supreme Court . . . (b) By appeal by a party relying on a state statute held by a court of appeals to be repugnant to the Constitution . . . .

The change in structure and the substitution of "state statute" for "statute of any state" came with the 1948 codification. But the reviser's note attributes no significance to these formal changes, and I'll eat this memorandum if there is any.

Thus: Section 1257(2) governs one head of appellate jurisdiction and was amended the same year § 1254(b) was introduced with the same "statute of any state" language. There is a precedent (King) on the books that holds a municipal ordinance to be a "statute of any state" for purposes of § 1257(2). Ergo the Court must either (1) hold a municipal ordinance to be a state statute for purposes of § 1254(b) or (2) overrule King (or distinguish King disingenuously).

Overruling King wouldn't come as easily as the change of direction in Gonzalez. Obviously the incentive for reading "state statute" not to include municipal ordinances is to get these trivial cases off the Court's obligatory docket. Similar thoughts led to the "statewide statute" reading of the three-judge court statute. But in the case of the three-judge court statutory scheme, legislative history and other provisions supported the exclusion of municipal-ordinance cases. (See Ex parte Collins, 277 U.S. 551 (decided in the same volume as King). Not so here (especially while King stands). Secondly, if "state

statute" (§ 1254(b)) or "statute of any state" (§ 1257(2)) doesn't include municipal ordinances for appellate purposes, the concept will have to be given another meaning for certiorari purposes. This would be required because § 1257(3) provides for review by cert "where the validity of a State statute is drawn in question" and the decision is against its validity.

I think any argument that § 1254(b) can be construed differently than § 1257(2) would be rather weak. I suppose one could say that the purpose of § 1257(2) is to assure that state courts are not niggardly in their interpretation of federal law, while that problem is not presented by § 1254(b) cases. Therefore the substantive policies served by the two jurisdictional statutes would support a distinction by which more cases were let in by appeal under § 1257(2) than under § 1254(b). But one purpose of the 1925 Act in general was to cut down on the workload of the Court. And if municipal ordinances are included in "statute of any state," there obviously are going to be more § 1257(2) appeals than § 1254(b) appeals. In light of <u>that</u> purpose, it could be argued that § 1257(2) should be construed more narrowly rather than more broadly than § 1254(b). Further, invalidations of state or municipal legislation by courts of appeals pose federalism problems that argue in favor of a broad interpretation of § 1254(b).

In sum, I think it's possible but extremely tough to exclude municipal ordinances from the operation of § 1254(b).

2. The Merits.

If a better man or woman than I can find a rationale supporting a "Gonzalez" approach to § 1254(b), there would be no appellate jurisdiction here. If the case ends up in that posture I think the Court should promptly deny cert. (As David Boyd noted on the pool memo, this case is not certworthy.)

As to the merits of the merits, I agree with you that the case as presented to CA 5 is more or less a toss up. I think the CA 5 opinion is persuasive, however. It is a careful and narrow holding, simply asking the City to do something to show that the statutory scheme relates rationally to the alleged purpose of conserving the atmosphere of the Vieux Carre. I thus think the case is "affirmable" and probably should be affirmed if the merits must be reached.

I am not sure that the case is properly "reversible." As you note in your aid-to-memory, the City relies heavily on its "preserve the Vieux Carre" rationale. But appellees brief states that the statutory scheme has been expanded to cover an area twice as large as the Vieux Carre. (See Brief at 15-16.) If the area covered is twice as large as the Vieux Carre, the City would not seem to have articulated reasons in support of its statute. As I read your equal protection opinions, you are the leading exponent of "articulated reasons" on the Court. Thus I don't think you would want to reverse this statute on the "Vieux Carre" rationale if much more than the Vieux Carre is covered.

CA 5 did not address this problem. It cites the 1972 "Vieux Carre" ordinance when describing the grandfather clause. (See footnote 1). The text of this ordinance is found at Appellee's Brief at Appendix M. The ordinance now on the books, however, was passed in 1973. It is reproduced at Appellant's Brief at 3 and Appellee's Brief at Appendix Q. The CA 5 opinion was dated September 24, 1974. It's a mystery to me why CA 5 did't consider the amendment. In any event, the broader coverage makes reversal seem inappropriate. If the Court were not inclined to affirm, it should at most remand for consideration of the statute's constitutionality in light of the present scope of the statute. (I think affirmance would be appropriate despite the change of the area covered because the geography is far less crucial to affirmance than to reversal.) You might want to pursue this whole matter at oral argument.

SUMMARY

(1) There is appellate jurisdiction.

(2) Affirm or remand for consideration in light of the present statutory framework.

Carl

October 25, 1975

No. 74-775 New Orleans v. Dukes

I dictate this memorandum after having reviewed the file, and again taken at look at the briefs (among the worst I have seen!), to record the following:

1. Finality. The constitutionality of the ordinance was decided below. The case is certainly sufficiently final for review under § 1254(2).

2. Jurisdiction. The case comes to us as an appeal from CA5 under § 1254(2). That section provides for appeal from a decision of courts of appeal where a "state statute" has been held unconstitutional. The question is whether a city ordinance is a state statute for purposes of 1254(2). There is substantial authority for the view that an ordinance may be deemed a state statute for this purpose. King Mfg. Co. v. Augusta, 277 U.S. 100; and Chicago v. Atchison, Topeka and Santa Fe, 357 U.S. 77 (where the Court assumed 1254(2) jurisdiction without discussion).

Unless four other Justices wish to reexamine these authorities, I suppose I should accept them. My preference, if writing on a clean slate, would be to construe 1254(2) in the same manner as § 1253 (three judge court) jurisdiction is construed, that is narrowly to require a statute of state-wide application. But, for reasons indicated in Carl's memo of October 21, this is not a promising prospect.

3. Merits. As indicated in my summer memo of August 26, this case is a real "sport" and if it were a cert it should never have been taken. I am basically indifferent as to how the merits are decided, as I think a feeble argument - and not much more - can be made on either side of the equal protection issue.

On balance, I will vote to affirm on the merits. The city's "chamber of commerce" argument with respect to preservation of the atmosphere of Vieux Carre is not impressive.

L.F.P., Jr.

ss

74-775 CITY OF NEW ORLEANS v. DUKES Argued 11/11/75

See my file memo. of 10/25.

Loeffelholz (Ant + Caly Atty)

Juris. issue under 1254(2)

~~Jurisdictional Q~~

~~Subsidiary Q~~

Initial Q is whether this is an appeal or pet. for cert. CA5 did decide const. issue; & an ordinance is a state statute.

On merits

Money v. Doud (not cited in Caly's Br) state gen. principles but ~~not~~ doesn't support CA5's decision.

Run in economic reg. — rationality test applies (altho. Loeffelholz seemed confused about this until Rehnquist led him by Qs).

Appellee is not a competitor of Lucky Dog. See p 80 of Vol I of Appendix — sale of hot dogs not mentioned. Run is only ev.

Marcal (for Duke)

Concedes that affidavit (R 80) doesn't mention hot-dogs. (Marcal didn't prepare affidavit)

Stewart asked how appellee can contend she was discriminated vs & how can she complain since she was not selling hot dogs

Rehnquist indicated that City could have granted permit or concession to only one vendor & selected whomever it wanted. Marcal replied that City can't select one of several competitors w/out apply objective standards.

Relies on leg. history to show that City deliberately discriminated vs Duke & that City's interest was not to promote charm & beauty of Latin Quarter. No reasonable relation: fact that a vendor had been there 8 yrs is not a relevant standard.

The Chief Justice Reverse
Willing to hold no
juries. Ordinance not
state statute. Agree with
Holmes + Brandeis.
Grant cert + Reverse

Douglas, J.

Brennan, J. Reverse
Would overrule
Mooney v Dowd. It is
a bad precedent.

Stewart, J. Affirmed
On Juris. issue - we
are bound by prior
case.
On merits, will affirm
unless 4 other
Justices are willing
to overrule Mooney v
Dowd. In that event,
Potter will join them.
Mooney controls
unless we overrule

Reverse

Don't need to overrule Morey. Can be distinguished.

Doesn't agree with reasoning of Morey but result was right.

Affirm

No ~~not~~ material basis. Money controls.

Blackmun, J. Reverse??

On justic., we are locked in my ~~prior~~ prior cases. But there is an issue of finality - e.g. Cox.

On merits, Morey is hard to distinguish. Could go either way & will not dissent either way

Powell, J. Affirm (?)

I view this as a toss-up & agree with Harry ~~in~~ in Hunberg I'll probably not dissent.

On justic., I disagree with prior cases - but they are binding precedents.

Rehnquist, J. Reverse

Would overrule Morey & reverse. For guidance of lower courts, we should work out Morey & make clear that there is no exception to general principles of E/P.

Overrules Morey v Doud — 11,12
Says that Morey is only case in last 50 years to invalidate an economic regulation on E/P grounds. — 11
If our opinion in Lisenba gets a court, it would be the second.

To: The Chief Justice
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Blackmun
— Mr. Justice Powell
Mr. Justice Rehnquist
Mr. Justice Stevens

From: Mr. Justice Brennan

Circulated: 1/27/76

Recirculated: _____

Received
1/29

2nd DRAFT

SUPREME COURT OF THE UNITED STATES

No. 74-775

City of New Orleans et al., Appellants, v. Nancy Dukes, dba Louisiana Concessions. | On Appeal from the United States Court of Appeals for the Fifth Circuit.

[January —, 1976]

MR. JUSTICE BRENNAN delivered the opinion of the Court.

The question presented by this case is whether the provision of a New Orleans ordinance, as amended in 1972, that excepts from the ordinance's prohibition against vendors' selling of foodstuffs from pushcarts in the Vieux Carre, or French Quarter, "vendors who have continually operated the same business within the Vieux Carre . . . for eight years prior to January 1, 1972 . . ." denied appellee vendor equal protection of the laws in violation of the Fourteenth Amendment.[1]

Appellee operates a vending business from pushcarts throughout New Orleans but had carried on that business in the Vieux Carre for only two years when the ordinance was amended in 1972 and barred her from

[1] The pertinent provision of the New Orleans ordinance, c. 46, §§ 1 and 1.1 of the Code of the City of New Orleans, as amended August 31, 1972, provides:

"Vendors who have continuously operated the same business within the Vieux Carre under the authority of this Chapter for eight or more years prior to January 1, 1972 may obtain a valid permit to operate such business within the Vieux Carre."

continuing operations there.[3] She had previously filed an action in the District Court for the Eastern District of Louisiana attacking the validity of the former version of the ordinance,[3] and amended her complaint to challenge the application of the ordinance's "grandfather clause"—the eight years or more provision—as a denial of equal protection. She prayed for an injunction and declaratory judgment. On cross-motions for summary judgment, the District Court, without opinion, granted appellant city's motion. The Court of Appeals for the Fifth Circuit reversed. 501 F. 2d 706 (1974). We postponed the question of this Court's jurisdiction to a hearing on the merits, 421 U. S. 908 (1975). We hold that we have jurisdiction of appellant's appeal, and on the merits reverse the judgment of the Court of Appeals.

The Vieux Carre—the "French Quarter"—of the city of New Orleans is the heart of that city's considerable tourist industry and an integral component of the city's economy.[4] The sector plays a special role in the city's life, and pursuant to the Louisiana State Constitution, c. 8 of Art. V of the City's Home Rule Charter grants the New Orleans City Council power to enact ordinances designed to preserve its distinctive charm, character, and economic viability.

Chapter 46 of the Code of the City of New Orleans sets up a comprehensive scheme of permits for the conduct of various businesses in the city. In 1972, the Code was amended to restrict the validity of many of these per-

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[3] Most of appellee's sales, particularly during the summer months, were made in the Vieux Carre.

[2] Jurisdiction was invoked pursuant to 28 U. S. C. §§ 1331, 1343 (3)(4), and 2201–2202. The Equal Protection violation was alleged to constitute a violation of 42 U. S. C. §§ 1983, 1985.

[4] See generally App. Vol. II, at 31–63 (Excerpts from Comprehensive Study Plan for the Vieux Carre Under a Demonstration Grant from Department of Housing and Urban Development).

mits to points outside the Vieux Carre. However, even as to those occupations—including all pushcart food vendors—which were to be banned from the Vieux Carre during seasons other than Mardi Gras, the city council made the "grandfather provision" exception. Two pushcart food vendors—one engaged in the sale of hot dogs and the other an ice cream vendor—had operated in the Vieux Carre for 20 or more years and therefore qualified under the "grandfather clause" and continued to operate there. The Court of Appeals recognized the "City Council's legitimate authority generally to regulate business conducted on the public streets and sidewalks of the Vieux Carre in order to preserve the appearance and custom valued by the Quarter's residents and attractive to tourists," 501 F. 2d, at 709, but nevertheless found that the Council's justification for the "grandfather" exception was "insufficient to support the discrimination imposed" and thus deprived appellee of equal protection. *Id.*, at 711. Stating expressly that this Court's decision in *Morey* v. *Doud*, 354 U. S. 457 (1957), was "our chief guide in resolving this case," 501 F. 2d, at 710, the Court of Appeals focused on the "exclusionary character" of the ordinance and its concomitant "creation of a protected monopoly for the favored class member." *Id.*, at 712–713. The "pivotal defect" in the statutory scheme was perceived to be the fact that the favored class members need not "continue to operate in a manner more consistent with the traditions of the Quarter than would any other operator," *id.*, at 711, and the fact that there was no reason to believe that length of operation "instills in the [favored] licensed vendors (or their likely transient operators) the kind of appreciation for the conservation of the Quarter's tradition" that would cause their operations to become or remain consistent with that tradition. *Id.*, at 712. Because these factors demonstrated the "insubstantiality of the relation between the

nature of the discrimination and the legitimate governmental interest in conserving the traditional assets of the Vieux Carre," *id.*, at 713, the ordinance was declared violative of Equal Protection as applied and the case was remanded for a determination of the severability of the "grandfather clause" from the remainder of the ordinance. The court also expressed the view that alternative measures such as regulation of the location or appearance of pushcarts would be rational, given the city's purported objectives in enacting the ordinance. *Ibid.*

I

The question of this Court's jurisdiction to hear the appeal need detain us only briefly. 28 U. S. C. § 1254 (2) grants jurisdiction to review decisions of the courts of appeals

> "By appeal by a party relying on a State Statute held by a court of appeals to be invalid as repugnant to the Constitution, treaties or laws of the United States . . . ."

A municipal ordinance is a "State Statute" for purposes of this provision. See *Doran* v. *Salem Inn, Inc.*, 422 U. S. 922, 927 n. 2 (1975); *United Gas Pipe Line Co.* v. *Ideal Cement Co.*, 369 U. S. 134 (1962). See also, *e. g.*, *Dusch* v. *Davis*, 387 U. S. 112 (1967); *Chicago* v. *Atchison, Topeka & Santa Fe R. Co.*, 357 U. S. 77 (1958); *City of Detroit* v. *Murray Corp.*, 355 U. S. 489 (1958).

However, it is argued that the Court of Appeals' decision is not "final" under the doctrine enunciated in *Slaker* v. *O'Connor*, 278 U. S. 188 (1929) (predecessor statute to § 1254 (2)), and *South Carolina Electric & Gas Co.* v. *Flemming*, 351 U. S. 901 (1956) (*per curiam*), since the Court of Appeals, although finding the statute unconstitutional as applied, remanded the case to the

District Court for a determination as to the severability of the "grandfather provision." There may be some question as to the continuing vitality of the "finality" requirement in the context of § 1254 (2), which unlike such jurisdictional statutes as 28 U. S. C. § 1257 and 28 U. S. C. § 1291 has no "finality" provision in the statute itself. See, *e. g., Doran* v. *Salem Inn, Inc., supra,* 422 U. S., at 927; *Chicago* v. *Atchison, Topeka & Santa Fe R. Co., supra,* 357 U. S., at 82–83. But without resolving that question, we believe that any "finality" test is met under the facts of this case.

The unconstitutionality of the ordinance, in its application to appellee, has been definitely and finally adjudicated by the Court of Appeals, and only a state law question remains to be decided on remand—whether the statute will be totally invalidated or whether only its "grandfather provision" will be struck down. There is no federal, much less constitutional, question which is yet to be resolved below, and the policy underlying § 1254 (2)—ensuring that state laws are not erroneously invalidated—will in no way be served by further delay in adjudicating the constitutional issue presented. Moreover, since the outcome of the severability question will not moot a difficult constitutional issue in this case, the policy of avoiding needless constitutional decisions would not be furthered by staying our hand. Furthermore, to the extent any "finality" requirement in the context of § 1254 (2) might be premised on the policies of avoiding piecemeal appeals or the rendering of advisory opinions, neither difficulty is likely to eventuate in this case; even if we were to uphold the Court of Appeals' remand for a determination of the severability of the "grandfather provision" under state law, the ruling on remand is not one which would be subject to further review in this Court. On the other hand, a decision by this Court

rejecting the constitutional challenge to the statute will obviate the need for further proceedings and bring to a halt the continued disruption of the city's internal economic affairs. Cf. generally, *e. g., Cox Broadcasting Corp.* v. *Cohn*, 420 U. S. 469, 476–478, 480, 485–486 (1975). We accordingly hold that this appeal is properly before us under 28 U. S. C. § 1254 (2). We therefore turn to the merits.

II

The record makes abundantly clear that the amended ordinance, including the "grandfather provision," is solely an economic regulation aimed at enhancing the vital role of the French Quarter's tourist-oriented charm in the economy of New Orleans.

When local economic regulation is challenged solely as violating the Equal Protection Clause, this Court consistently defers to legislative determinations as to the desirability of particular statutory discriminations. See, *e. g., Lehnhausen* v. *Lake Shore Auto Parts Co.*, 410 U. S. 356 (1973). Unless the regulation trammels fundamental personal rights or is drawn upon inherently suspect distinctions such as race, religion, or alienage, our decisions presume the constitutionality of the statutory discriminations and require only that they be "reasonable, not arbitrary, and . . . rest upon some ground of difference having a fair and substantial relation to the object of the legislation." *Johnson* v. *Robison*, 415 U. S. 361, 374 (1974). States are accorded wide latitude in the regulation of their local economies under their police powers, and rational distinctions may be made with substantially less than mathematical exactitude. Legislatures may implement their program step-by-step, *Katzenbach* v. *Morgan*, 384 U. S. 641 (1966), in such economic areas, adopting regulations that only partially ameliorate a perceived evil and deferring complete elimination

of the evil to future regulations. See, *e. g.*, *Williamson* v. *Lee Optical Co.*, 348 U. S. 483, 488–489 (1955). In short, the judiciary may not sit as a superlegislature to judge the wisdom or desirability of legislative policy determinations made in areas that neither affect fundamental rights nor proceed along suspect lines, see, *e. g.*, *Day-Brite Lighting, Inc.* v. *Missouri*, 342 U. S. 421, 423 (1952), *Massachusetts Board of Retirement* v. *Murgia*, — U. S. — (1976); in the local economic sphere, it is only the invidious discrimination, the wholly arbitrary act, which cannot stand consistently with the Fourteenth Amendment. See, *e. g.*, *Ferguson* v. *Skrupa*, 372 U. S. 726, 732 (1963).[5]

The Court of Appeals held in this case, however, that the "grandfather provision" failed even the test of minimal scrutiny. We disagree. The Court of Appeals recognized that the city had identified its objective in enacting the provision as a means "to preserve the appearance and custom valued by the Quarter's residents

[5] *Ferguson* presented an analogous situation. There is a Kansas statute excepted lawyers from the prohibition of a statute making it a misdemeanor for any person to engage in the business of debt adjusting. We held that the exception of lawyers was not a denial of equal protection, stating, 372 U. S., at 532:

"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 of the laws; it is only 'invidious discrimination' which offends the Constitution. . . . If the State of Kansas wants to limit debt adjusting to lawyers, the Equal Protection Clause does not forbid it."

We emphasize again that these principles, of course, govern only when no constitutional provision other than the Equal Protection Clause itself is apposite. Very different principles govern even economic regulation when constitutional provisions such as the Commerce Clause are implicated, or when local regulation is challenged under the Supremacy Clause as inconsistent with relevant federal laws or treaties.

and attractive to tourists." 501 F. 2d, at 709. The legitimacy of that objective is obvious. The city council plainly could further that objective by making the reasoned judgment that street peddlers and hawkers tend to interfere with the charm and beauty of an historic area and disturb tourists and disrupt their enjoyment of that charm and beauty, and that such vendors in the Vieux Carre, the heart of the city's tourist industry, might thus have a deleterious effect on the economy of the city. They therefore determined that to ensure the economic vitality of that area, such businesses should be substantially curtailed in the Vieux Carre, if not totally banned.

It is suggested that the "grandfather provision," allowing the continued operation of some vendors without limiting the number of permits they could obtain, was a totally arbitrary and irrational method of achieving the city's purpose. But rather than proceeding by the immediate and absolute abolition of all pushcart food vendors, the city could rationally choose initially to eliminate vendors of more recent vintage. It was suggested on oral argument that the city will probably ultimately eliminate even the two vendors that qualified under the "grandfather provision." This gradual approach to the problem is not constitutionally impermissible. The governing constitutional principle was stated in *Katzenbach* v. *Morgan, supra,* at 657:

> ". . . we are guided by the familiar principles that a 'statute is not invalid under the Constitution because it might have gone farther than it did,' *Roschen* v. *Ward*, 279 U. S. 337, 339, that a legislature need not 'strike at all evils at the same time,' *Semler* v. *Dental Examiners*, 294 U. S. 608, 610, and that 'reform may take one step at a time, addressing itself to the phrase of the problem which seems

The question should be: what is the purpose of the classification made in the grandfather clause — NOT what is the purpose of the overall statute. Is there any indication that there is an articulated or clearly implicit purpose for the classification? (Carl says even the purpose of the whole ordinance may be a façade since it has since been extended beyond the Vieux Carré.)

most acute to the legislative mind,' *Williamson* v. *Lee Optical Co.*, 348 U. S. 483, 489."

This is a purpose hypothesized by the court !!

The city could reasonably decide that newer businesses were less likely to have built up substantial reliance interests in continued operation in the Vieux Carre and that the two vendors which qualified under the "grandfather clause"—both of which had operated in the area for over 20 years rather than only eight—had themselves become part of the distinctive character and charm that distinguishes the Vieux Carre. We cannot say that these judgments so lack rationality that they constitute a constitutionally impermissible denial of equal protection.

Appellee contends that the ordinance "eliminates" rather than "regulates" business, and that the city's arguments concerning economic vitality and the charm and beauty of the Vieux Carre are simply feigned; the "real" intent of the city council is said to be the creation of a legislative monopoly in favor of a particular concern. But we decline to assess statutory distinctions by determining whether the law "eliminates" or "regulates," cf. *Ferguson* v. *Skrupa, supra,* at 732, or to invalidate rational economic legislation on the basis of presumed improper motivation. There is no reason to presume that the monopoly effectively created by the ordinance was not merely the temporary and incidental effect of a partial ban on street vendors which was designed to serve other purposes and which will eventually become a total ban. But even if the city created a permanent monopoly, that would not alter the applicable equal protection standard, or subject the discrimination to more careful scrutiny. *Ferguson* v. *Skrupa, supra.* There is nothing in the Equal Protection Clause which denies a city the option of establishing a monopoly if the city rationally believes that reduced competition will benefit it economically by preventing an unsightly and bothersome prolifer-

ation of street vendors, thereby fostering increased tourism. Cf. *Nebbia* v. *New York*, 291 U. S. 502, 527–530 (1934). Contrary to the Court of Appeals' view, the fact that other regulation—such as limits on the number of permits—could accomplish the same legitimate objective does not mean that the Constitution requires New Orleans to adopt one rational alternative rather than another merely because judges regard one to be the wiser or otherwise preferable choice; such policy decisions in the purely economic realm are properly committed to more representative bodies of our Federal and State Governments. And to the extent due process procedural safeguards might attend the selection of the party that will be the beneficiary of any such state-authorized grant of monopoly that might rationally be established, appellee makes no argument that there was a denial of procedural due process during the creation or modification of the city's permit scheme.[a]

Nevertheless, relying on *Morey* v. *Doud*, *supra*, as its "chief guide," the Court of Appeals held that even though the exemption of the two vendors was rationally related to legitimate city interests on the basis of facts extant when the ordinance was amended, the "grandfather clause" still could not stand because "the hypothesis that a present eight-year veteran of the pushcart hot dog market in the Viex Carre will continue to operate in a manner more consistent with the traditions of the Quarter than would any other operator is without founda-

[a] Although appellee in her complaint asserted that the ordinance denied her due process, it appears from the record that this was a substantive due process claim concerning a nonfundamental right. *Ferguson* v. *Skrupa*, 372 U. S., at 729–732, finally interred such claims. The Court of Appeals did not address any due process issues, and appellee made no claim in her briefs or at oral argument of any infirmity in the procedures by which the permit scheme was promulgated or implemented.

tion." 501 F. 2d, at 711. Since the city has not imposed specific requirements that current operational methods or particular standards be maintained by the beneficiaries of the "grandfather clause," or that they not seek an increased number of permits, the Court of Appeals concluded that the classification was arbitrary and irrational and therefore unconstitutional. But there was no evidence in the record that elimination of more recent vendors has caused any such changes. In any event, we repeat, legislatures need not regulate currently to meet all future contingencies, and the constitutionality of such economic regulation cannot be impugned merely because some speculative future developments might cause the regulation to outlive its usefulness or render it irrational. The city can take account of such changed conditions if and when they occur. Actually, the reliance on the statute's potential irrationality in *Morey* v. *Doud*, as the dissenters in that case correctly pointed out, see 354 U. S., at 474–475 (Frankfurter, J., dissenting), was a needlessly intrusive judicial infringement on the State's legislative powers, and we have concluded that the equal protection analysis employed in that opinion should no longer be followed. *Morey* was the only case in the last half century to invalidate a wholly economic regulation solely on equal protection grounds, and we are now satisfied that the decision misapplied the rational relationship test. *Morey* is, as appellee and the Court of Appeals properly recognized, essentially indistinguishable from this case,[7]

[7] Since it was known that there were only two vendors eligible for the benefits of the "grandfather provision," and since the legislation as enacted would not permit alteration of the closed class without subsequent legislation, there is no analytical difference between this case and *Morey*, where the beneficiary of the legislative exception was specifically named. The Illinois statute invalidated in *Morey* excepted American Express Company from the Illinois statute that licensed and regulated currency exchanges engaged in the business of issuing or selling money orders.

but the decision so far departs from proper equal protection analysis in cases of exclusively economic regulation that it should be, and it is, overruled.

The judgment of the Court of Appeals is reversed and the case is remanded for further proceedings consistent with this opinion.

It is so ordered.

Overruled

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE BYRON R. WHITE

January 28, 1976

Re: No. 74-775 - City of New Orleans v. Dukes

Dear Bill:

Please join me.

Sincerely,

Mr. Justice Brennan

Copies to Conference

[c JAN. 29, 1976]

To: LFP

From: CRS

Re: New Orleans v. Dukes, No. 74-775

Your conference vote was to affirm CA5, but you indicated that you probably would not dissent from a reversal. On that basis I think you can join this opinion.

My principal reason for thinking this case could not be reversed was that the statute we are considering has been amended to make the grandfather clause exclusion applicable to an area wider than the Vieux Carre. It seemed to me that we could not uphold the validity of a statute that was no longer on the books In a sense the controversy as to that statute was moot; further, since the statute had changed and the parties had not addressed it, the only reasons articulated for the statute by the City dealt with the Vieux Carre only, not the wider area now covered.

My views on that matter stemmed from my understanding from the CA5 opinion that only declaratory and injunctive relief had been sought. But Dukes also sought damages against the individual defendant. Thus, the validity of the old statute must be decided in this case, withdrawing any "mootness" related problems and making relevant the articulated reasons advanced by the City.

The question therefore becomes the validity of those reasons. That is pretty much an arguable case, as we both have felt all along. Brennan's opinion manages to make the statute sound just about as rational as possible and does no damage to the developing "articulated reasons" jurisprudence of the Court.

On that score, I might note that the opinion does not do all that it might have to make clear what the City argued and what the Court is hypothesizing, which is really very little. But it doesn't do anything explicitly to suggest that the Court will create rationales and justifications for statutes. Thus, the opinion is consistent with your stand on articulated reasons.

The foregoing all leads me to conclude that you can join despite your conference vote. If you want to adhere to your conference vote we could attack the rationality of the statute with some force. (Basically, the complaint is that there are no limitations on how Lucky Dog comports its business in the Vieux Carre. But some of the force of these arguments was taken away at oral argument with the suggestion that all vendors might be eliminated eventually. If that is the City's plan, failing to restrict Lucky Dogs for the time being is not really so significant. Since Brennan makes the most of this, our counter rationality arguments would sound thinner than they otherwise would.)

On the big strategic picture, I must admit some surprise to Brennan's approach here, which is basically a real roll-over-and-play-dedd one in economic regulation cases. This might not be totally consistent with your view that equal protection analysis outside the "suspect classes"should be more than minimal. But there is nothing said that's inconsistent with your view--it's more a matter of tone.

My one carp is that at p. 6 he refers to "alienage" as a suspect classification. Who knows what alienage is? You might want him to strike "alienage" but I think there is enough support in the cases to sustain it--depending on the alienage cases now being written.

Carl

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
THE CHIEF JUSTICE

March 4, 1976

Re: 74-775 - City of New Orleans v. Dukes

Dear Bill:

I am generally with you, but I cannot join saying that alienage is a "suspect classification". I can no longer go along with these "litmus" words.

In short, I can easily be "had".

Regards,

WEB

Mr. Justice Brennan

Copies to the Conference

To: Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Blackmun
Mr. Justice Powell
Mr. Justice Rehnquist
Mr. Justice Stevens

From: The Chief Justice

Circulated: APR 14 1976

Recirculated: _____

Re: 74-775 - City of New Orleans v. Dukes

MR. CHIEF JUSTICE BURGER, concurring.

I join the (proposed) opinion of the Court overruling Morey v. Doud, supra, essentially because I believe that case was wrongly decided for the reasons expressed at the time by Justices Black, Frankfurter and Harlan. The political branches of government must have wide scope in regulating commercial activity, and whether the choices made by the city government here are wise and sound, or the contrary, it is not the function of judges to reassess them on the basis of the Equal Protection Clause.

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
THE CHIEF JUSTICE

April 15, 1976

Re: 74-775 - City of New Orleans v. Dukes

Dear Bill:

On further reflection I think I will withdraw my concurring opinion and concur in the judgment. I have other problems with the opinion itself but prefer not to add to the literature with more writing.

Regards,

WEB

Mr. Justice Brennan

Copies to the Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
THE CHIEF JUSTICE

June 16, 1976

Re: 74-775 - New Orleans v. Dukes

Dear Bill:

I join your opinion as modified. If you can "swallow" it, why not sign as originally?

Regards,

WEB

Mr. Justice Brennan

Copies to the Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE WILLIAM H. REHNQUIST

June 16, 1976

Re: No. 74-775 - New Orleans v. Dukes

Dear Bill:

Please join me in your revised circulation. I agree with Potter and the Chief that it should be a signed opinion unless you prefer otherwise.

Sincerely,

WHR

Mr. Justice Brennan

Copies to the Conference

6/17/76 { I've joined as modified — as one element of our agreement to "neutralize" both Marcia & Dukes to avoid carrying these cases over. See my Memo to Conference on bringing Marcia down as a P. C.

2nd DRAFT

SUPREME COURT OF THE UNITED STATES

No. 74-775

City of New Orleans et al., Appellants, v. Nancy Dukes, dba Louisiana Concessions.	On Appeal from the United States Court of Appeals for the Fifth Circuit.

[January —, 1976]

Per Curiam.) ~~MR. JUSTICE BRENNAN delivered the opinion of the Court.~~

The question presented by this case is whether the provision of a New Orleans ordinance, as amended in 1972, that excepts from the ordinance's prohibition against vendors' selling of foodstuffs from pushcarts in the Vieux Carre, or French Quarter, "vendors who have continually operated the same business within the Vieux Carre . . . for eight years prior to January 1, 1972 . . ." denied appellee vendor equal protection of the laws in violation of the Fourteenth Amendment.[1]

Appellee operates a vending business from pushcarts throughout New Orleans but had carried on that business in the Vieux Carre for only two years when the ordinance was amended in 1972 and barred her from

[1] The pertinent provision of the New Orleans ordinance, c. 46, §§ 1 and 1.1 of the Code of the City of New Orleans, as amended August 31, 1972, provides:

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continuing operations there.[2] She had previously filed an action in the District Court for the Eastern District of Louisiana attacking the validity of the former version of the ordinance,[3] and amended her complaint to challenge the application of the ordinance's "grandfather clause"—the eight years or more provision—as a denial of equal protection. She prayed for an injunction and declaratory judgment. On cross-motions for summary judgment, the District Court, without opinion, granted appellant city's motion. The Court of Appeals for the Fifth Circuit reversed. 501 F. 2d 706 (1974). We postponed the question of this Court's jurisdiction to a hearing on the merits, 421 U. S. 908 (1975). We hold that we have jurisdiction of appellant's appeal, and on the merits reverse the judgment of the Court of Appeals.

The Vieux Carre—the "French Quarter"—of the city of New Orleans is the heart of that city's considerable tourist industry and an integral component of the city's economy.[4] The sector plays a special role in the city's life, and pursuant to the Louisiana State Constitution, c. 8 of Art. V of the City's Home Rule Charter grants the New Orleans City Council power to enact ordinances designed to preserve its distinctive charm, character, and economic viability.

Chapter 46 of the Code of the City of New Orleans sets up a comprehensive scheme of permits for the conduct of various businesses in the city. In 1972, the Code was amended to restrict the validity of many of these per-

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[3] Jurisdiction was invoked pursuant to 28 U. S. C. §§ 1331, 1343 (3)(4), and 2201-2202. The Equal Protection violation was alleged to constitute a violation of 42 U. S. C. §§ 1983, 1985.

[4] See generally App. Vol. II, at 31-63 (Excerpts from Comprehensive Study Plan for the Vieux Carre Under a Demonstration Grant from Department of Housing and Urban Development).

mits to points outside the Vieux Carre. However, even as to those occupations—including all pushcart food vendors—which were to be banned from the Vieux Carre during seasons other than Mardi Gras, the city council made the "grandfather provision" exception. Two pushcart food vendors—one engaged in the sale of hot dogs and the other an ice cream vendor—had operated in the Vieux Carre for 20 or more years and therefore qualified under the "grandfather clause" and continued to operate there. The Court of Appeals recognized the "City Council's legitimate authority generally to regulate business conducted on the public streets and sidewalks of the Vieux Carre in order to preserve the appearance and custom valued by the Quarter's residents and attractive to tourists," 501 F. 2d, at 709, but nevertheless found that the Council's justification for the "grandfather" exception was "insufficient to support the discrimination imposed" and thus deprived appellee of equal protection. *Id.*, at 711. Stating expressly that this Court's decision in *Morey* v. *Doud*, 354 U. S. 457 (1957), was "our chief guide in resolving this case," 501 F. 2d, at 710, the Court of Appeals focused on the "exclusionary character" of the ordinance and its concomitant "creation of a protected monopoly for the favored class member." *Id.*, at 712–713. The "pivotal defect" in the statutory scheme was perceived to be the fact that the favored class members need not "continue to operate in a manner more consistent with the traditions of the Quarter than would any other operator," *id.*, at 711, and the fact that there was no reason to believe that length of operation "instills in the [favored] licensed vendors (or their likely transient operators) the kind of appreciation for the conservation of the Quarter's tradition" that would cause their operations to become or remain consistent with that tradition. *Id.*, at 712. Because these factors demonstrated the "insubstantiality of the relation between the

nature of the discrimination and the legitimate governmental interest in conserving the traditional assets of the Vieux Carre," *id.*, at 713, the ordinance was declared violative of Equal Protection as applied and the case was remanded for a determination of the severability of the "grandfather clause" from the remainder of the ordinance. The court also expressed the view that alternative measures such as regulation of the location or appearance of pushcarts would be rational, given the city's purported objectives in enacting the ordinance. *Ibid.*

I

The question of this Court's jurisdiction to hear the appeal need detain us only briefly. 28 U. S. C. § 1254 (2) grants jurisdiction to review decisions of the courts of appeals

> "By appeal by a party relying on a State Statute held by a court of appeals to be invalid as repugnant to the Constitution, treaties or laws of the United States . . . ."

A municipal ordinance is a "State Statute" for purposes of this provision. See *Doran* v. *Salem Inn, Inc.*, 422 U. S. 922, 927 n. 2 (1975); *United Gas Pipe Line Co.* v. *Ideal Cement Co.*, 369 U. S. 134 (1962). See also, *e. g.*, *Dusch* v. *Davis*, 387 U. S. 112 (1967); *Chicago* v. *Atchison, Topeka & Santa Fe R. Co.*, 357 U. S. 77 (1958); *City of Detroit* v. *Murray Corp.*, 355 U. S. 489 (1958).

However, it is argued that the Court of Appeals' decision is not "final" under the doctrine enunciated in *Slaker* v. *O'Connor*, 278 U. S. 188 (1929) (predecessor statute to § 1254 (2)), and *South Carolina Electric & Gas Co.* v. *Flemming*, 351 U. S. 901 (1956) (*per curiam*), since the Court of Appeals, although finding the statute unconstitutional as applied, remanded the case to the

District Court for a determination as to the severability of the "grandfather provision." There may be some question as to the continuing vitality of the "finality" requirement in the context of § 1254 (2), which unlike such jurisdictional statutes as 28 U. S. C. § 1257 and 28 U. S. C. § 1291 has no "finality" provision in the statute itself. See, *e. g., Doran* v. *Salem Inn, Inc., supra,* 422 U. S., at 927; *Chicago* v. *Atchison, Topeka & Santa Fe R. Co., supra,* 357 U. S., at 82–83. But without resolving that question, we believe that any "finality" test is met under the facts of this case.

The unconstitutionality of the ordinance, in its application to appellee, has been definitely and finally adjudicated by the Court of Appeals, and only a state law question remains to be decided on remand—whether the statute will be totally invalidated or whether only its "grandfather provision" will be struck down. There is no federal, much less constitutional, question which is yet to be resolved below, and the policy underlying § 1254 (2)—ensuring that state laws are not erroneously invalidated—will in no way be served by further delay in adjudicating the constitutional issue presented. Moreover, since the outcome of the severability question will not moot a difficult constitutional issue in this case, the policy of avoiding needless constitutional decisions would not be furthered by staying our hand. Furthermore, to the extent any "finality" requirement in the context of § 1254 (2) might be premised on the policies of avoiding piecemeal appeals or the rendering of advisory opinions, neither difficulty is likely to eventuate in this case; even if we were to uphold the Court of Appeals' remand for a determination of the severability of the "grandfather provision" under state law, the ruling on remand is not one which would be subject to further review in this Court. On the other hand, a decision by this Court

rejecting the constitutional challenge to the statute will obviate the need for further proceedings and bring to a halt the continued disruption of the city's internal economic affairs. Cf. generally, *e. g., Cox Broadcasting Corp.* v. *Cohn*, 420 U. S. 469, 476–478, 480, 485–486 (1975). We accordingly hold that this appeal is properly before us under 28 U. S. C. § 1254 (2). We therefore turn to the merits.

II

The record makes abundantly clear that the amended ordinance, including the "grandfather provision," is solely an economic regulation aimed at enhancing the vital role of the French Quarter's tourist-oriented charm in the economy of New Orleans.

When local economic regulation is challenged solely as violating the Equal Protection Clause, this Court consistently defers to legislative determinations as to the desirability of particular statutory discriminations. See, *e. g., Lehnhausen* v. *Lake Shore Auto Parts Co.*, 410 U. S. 356 (1973). Unless the regulation trammels fundamental personal rights or is drawn upon inherently suspect distinctions such as race, religion, or alienage, our decisions presume the constitutionality of the statutory discriminations and require only that they be "reasonable, not arbitrary, and . . . rest upon some ground of difference having a fair and substantial relation to the object of the legislation." *Johnson* v. *Robison*, 415 U. S. 361, 374 (1974). States are accorded wide latitude in the regulation of their local economies under their police powers, and rational distinctions may be made with substantially less than mathematical exactitude. Legislatures may implement their program step-by-step, *Katzenbach* v. *Morgan*, 384 U. S. 641 (1966), in such economic areas, adopting regulations that only partially ameliorate a perceived evil and deferring complete elimination

of the evil to future regulations. See, *e. g., Williamson* v. *Lee Optical Co.*, 348 U. S. 483, 488–489 (1955). In short, the judiciary may not sit as a superlegislature to judge the wisdom or desirability of legislative policy determinations made in areas that neither affect fundamental rights nor proceed along suspect lines, see, *e. g., Day-Brite Lighting, Inc.* v. *Missouri*, 342 U. S. 421, 423 (1952); *Massachusetts Board of Retirement v. Murgia*, U. S. (1976); in the local economic sphere, it is only the invidious discrimination, the wholly arbitrary act, which cannot stand consistently with the Fourteenth Amendment. See, *e. g., Ferguson* v. *Skrupa*, 372 U. S. 726, 732 (1963).[*]

The Court of Appeals held in this case, however, that the "grandfather provision" failed even the test of minimal scrutiny. We disagree. The Court of Appeals recognized that the city had identified its objective in enacting the provision as a means "to preserve the appearance and custom valued by the Quarter's residents

[*] *Ferguson* presented an analogous situation. There is a Kansas statute excepted lawyers from the prohibition of a statute making it a misdemeanor for any person to engage in the business of debt adjusting. We held that the exception of lawyers was not a denial of equal protection, stating, 372 U. S., at 532:

"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 of the laws; it is only 'invidious discrimination' which offends the Constitution. . . . If the State of Kansas wants to limit debt adjusting to lawyers, the Equal Protection Clause does not forbid it."

We emphasize again that these principles, of course, govern only when no constitutional provision other than the Equal Protection Clause itself is apposite. Very different principles govern even economic regulation when constitutional provisions such as the Commerce Clause are implicated, or when local regulation is challenged under the Supremacy Clause as inconsistent with relevant federal laws or treaties.

and attractive to tourists." 501 F. 2d, at 709. The legitimacy of that objective is obvious. The city council plainly could further that objective by making the reasoned judgment that street peddlers and hawkers tend to interfere with the charm and beauty of an historic area and disturb tourists and disrupt their enjoyment of that charm and beauty, and that such vendors in the Vieux Carre, the heart of the city's tourist industry, might thus have a deleterious effect on the economy of the city. They therefore determined that to ensure the economic vitality of that area, such businesses should be substantially curtailed in the Vieux Carre, if not totally banned.

It is suggested that the "grandfather provision," allowing the continued operation of some vendors without limiting the number of permits they could obtain, was a totally arbitrary and irrational method of achieving the city's purpose. But rather than proceeding by the immediate and absolute abolition of all pushcart food vendors, the city could rationally choose initially to eliminate vendors of more recent vintage. It was suggested on oral argument that the city will probably ultimately eliminate even the two vendors that qualified under the "grandfather provision." This gradual approach to the problem is not constitutionally impermissible. The governing constitutional principle was stated in *Katzenbach* v. *Morgan*, *supra*, at 657:

> ". . . we are guided by the familiar principles that a 'statute is not invalid under the Constitution because it might have gone farther than it did,' *Roschen* v. *Ward*, 279 U. S. 337, 339, that a legislature need not 'strike at all evils at the same time,' *Semler* v. *Dental Examiners*, 294 U. S. 608, 610, and that 'reform may take one step at a time, addressing itself to the phrase of the problem which seems

most acute to the legislative mind,' *Williamson* v. *Lee Optical Co.*, 348 U. S. 483, 489."

The city could reasonably decide that newer businesses were less likely to have built up substantial reliance interests in continued operation in the Vieux Carre and that the two vendors which qualified under the "grandfather clause"—both of which had operated in the area for over 20 years rather than only eight—had themselves become part of the distinctive character and charm that distinguishes the Vieux Carre. We cannot say that these judgments so lack rationality that they constitute a constitutionally impermissible denial of equal protection.

Appellee contends that the ordinance "eliminates" rather than "regulates" business, and that the city's arguments concerning economic vitality and the charm and beauty of the Vieux Carre are simply feigned; the "real" intent of the city council is said to be the creation of a legislative monopoly in favor of a particular concern. But we decline to assess statutory distinctions by determining whether the law "eliminates" or "regulates," cf. *Ferguson* v. *Skrupa*, *supra*, at 732, or to invalidate rational economic legislation on the basis of presumed improper motivation. There is no reason to presume that the monopoly effectively created by the ordinance was not merely the temporary and incidental effect of a partial ban on street vendors which was designed to serve other purposes and which will eventually become a total ban. But even if the city created a permanent monopoly, that would not alter the applicable equal protection standard, or subject the discrimination to more careful scrutiny. *Ferguson* v. *Skrupa*, *supra*. There is nothing in the Equal Protection Clause which denies a city the option of establishing a monopoly if the city rationally believes that reduced competition will benefit it economically by preventing an unsightly and bothersome prolifer-

ation of street vendors, thereby fostering increased tourism. Cf. *Nebbia* v. *New York*, 291 U. S. 502, 527–530 (1934). Contrary to the Court of Appeals' view, the fact that other regulation—such as limits on the number of permits—could accomplish the same legitimate objective does not mean that the Constitution requires New Orleans to adopt one rational alternative rather than another merely because judges regard one to be the wiser or otherwise preferable choice; such policy decisions in the purely economic realm are properly committed to more representative bodies of our Federal and State Governments. And to the extent due process procedural safeguards might attend the selection of the party that will be the beneficiary of any such state-authorized grant of monopoly that might rationally be established, appellee makes no argument that there was a denial of procedural due process during the creation or modification of the city's permit scheme.[8]

Nevertheless, relying on *Morey* v. *Doud*, *supra*, as its "chief guide," the Court of Appeals held that even though the exemption of the two vendors was rationally related to legitimate city interests on the basis of facts extant when the ordinance was amended, the "grandfather clause" still could not stand because "the hypothesis that a present eight-year veteran of the pushcart hot dog market in the Viex Carre will continue to operate in a manner more consistent with the traditions of the Quarter than would any other operator is without founda-

[8] Although appellee in her complaint asserted that the ordinance denied her due process, it appears from the record that this was a substantive due process claim concerning a nonfundamental right. *Ferguson* v. *Skrupa*, 372 U. S., at 729–732, finally interred such claims. The Court of Appeals did not address any due process issues, and appellee made no claim in her briefs or at oral argument of any infirmity in the procedures by which the permit scheme was promulgated or implemented.

tion." 501 F. 2d, at 711. Since the city has not imposed specific requirements that current operational methods or particular standards be maintained by the beneficiaries of the "grandfather clause," or that they not seek an increased number of permits, the Court of Appeals concluded that the classification was arbitrary and irrational and therefore unconstitutional. But there was no evidence in the record that elimination of more recent vendors has caused any such changes. In any event, we repeat, legislatures need not regulate currently to meet all future contingencies, and the constitutionality of such economic regulation cannot be impugned merely because some speculative future developments might cause the regulation to outlive its usefulness or render it irrational. The city can take account of such changed conditions if and when they occur. Actually, the reliance on the statute's potential irrationality in *Morey* v. *Doud*, as the dissenters in that case correctly pointed out, see 354 U. S., at 474–475 (Frankfurter, J., dissenting), was a needlessly intrusive judicial infringement on the State's legislative powers, and we have concluded that the equal protection analysis employed in that opinion should no longer be followed. *Morey* was the only case in the last half century to invalidate a wholly economic regulation solely on equal protection grounds, and we are now satisfied that the decision misapplied the rational relationship test. *Morey* is, as appellee and the Court of Appeals properly recognized, essentially indistinguishable from this case,[7]

[7] Since it was known that there were only two vendors eligible for the benefits of the "grandfather provision," and since the legislation as enacted would not permit alteration of the closed class without subsequent legislation, there is no analytical difference between this case and *Morey*, where the beneficiary of the legislative exception was specifically named. The Illinois statute invalidated in *Morey* excepted American Express Company from the Illinois statute that licensed and regulated currency exchanges engaged in the business of issuing or selling money orders.

but the decision so far departs from proper equal protection analysis in cases of exclusively economic regulation that it should be, and it is, overruled.

The judgment of the Court of Appeals is reversed and the case is remanded for further proceedings consistent with this opinion.

It is so ordered.

June 17, 1976

No. 74-775 City of New Orleans v. Dukes

Dear Bill:

I'll join, unhappily, the "neutered" version of Murgia's twin.

Sincerely,

Mr. Justice Brennan

lfp/ss

cc: The Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE HARRY A. BLACKMUN

June 17, 1976

Re: No. 74-775 - City of New Orleans v. Dukes

Dear Bill:

This is to let you know that I shall join the anticipated truncated per curiam opinion.

Sincerely,

Harry

Mr. Justice Brennan

cc: The Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE THURGOOD MARSHALL

June 21, 1976

Re: No. 74-775 -- City of New Orleans v. Nancy Dukes

Dear Bill:

Please add to your Per Curiam, "Mr. Justice Marshall joins in the judgment."

Sincerely,

T.M.

Mr. Justice Brennan

cc: The Conference

THE C. J.	W. O. D.	W. J. B.	P. S.	B. R. W.	T. M.	H. A. B.	L. F. P.	W. H. R.
		11/18/75						
Join WJB 6/16/76		2nd draft 1/27/76 3rd draft 6/21/76		Join WJB 1/28/76	Joins in the judgment 6/21/76	Join WJB 6/17/76	Join WJB 6/17/76	Join WJB 6/16/76
					74-775 City of New Orleans v. Dukes			