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MONTANA GREEN RIVER ORDINANCES

Dennis Paxinos

I. INTRODUCTION

Equal protection is the constitutional guarantee that similar people will be dealt with in a similar manner.¹ In *Tipco Corp., Inc. v. City of Billings*,² the Montana Supreme Court ruled Billings' "Green River" ordinance³ unconstitutional under the equal protection clauses of the United States and Montana Constitutions. This note focuses on the Montana court's standard of review for testing equal protection violations and the validity of "Green River" laws.

II. TIPCO CORP., INC. V. CITY OF BILLINGS

A. Facts

Tipco Corporation, a foreign corporation that maintained no business office in Montana, licensed and bonded twelve independent sales agents to solicit magazine subscription orders. The agents canvassed Billings door-to-door. The agents were arrested and incarcerated under Billings' "Green River" ordinance.⁴ This ordinance prohibited solicitors and peddlers from selling goods door-to-door unless invited by the occupant of the business or residence. The Billings ordinance exempted regularly established businesses, bona fide merchants, or any person selling goods produced

1. Tussman & tenBroek, *The Equal Protection of the Laws*, 37 CALIF. L. REV. 341 (1949).

2. ____ Mont. ____, 642 P.2d 1074 (1982).

3. In 1931, Green River, Wyoming, enacted an ordinance which provided:

The practice of going in and upon private residences in the Town of Green River, Wyoming, by solicitors, peddlers, hawkers, itinerant merchants and transient vendors of merchandise, not having been requested or invited to do so by the owner or owners, occupant or occupants of said private residences, for the purpose of soliciting orders for the sale of goods, wares and merchandise, and/or peddling or hawking the same is hereby declared to be a nuisance and punishable as such nuisance or misdemeanor.

Since this ordinance was the first of its kind raised for United States Supreme Court review, such an ordinance has become known in the legal jargon as a "Green River" ordinance. It will be denominated as such throughout this case note.

4. Billings Municipal Code § 4.20.050 provides:

The practice of going into private residences, business establishments, or offices in the City by solicitors, peddlers, hawkers, itinerant merchants and transient vendors of merchandise not having been requested or invited to do so by the owner or owners, occupant or occupants of private residences, business establishments or offices for the purpose of soliciting orders for the sale of goods, wares, and merchandise and/or for the purpose of disposing of and/or peddling or hawking same is hereby declared to be a nuisance and punishable as a misdemeanor.

on premises located within one hundred and fifty miles of the city.⁵ Tipco sought to enjoin the city from enforcing its ordinance and to have the law declared unconstitutional. The district court treated the case as if motions for summary judgment had been filed and granted the City summary judgment. Tipco appealed on a number of issues. The Montana Supreme Court dismissed all save the equal protection issue and ruled the ordinance unconstitutional.⁶

B. *The Court's Reasoning*

Upon review of Billings' "Green River" ordinance, the court found no conflict between state statutes licensing itinerant vendors⁷ and the city ordinance prohibiting certain types of solicitation activities.⁸ It noted that "powers of local government shall be liberally construed" and "every reasonable doubt as to the extent of that power shall be resolved in favor of local government."⁹ The court stated cities may control "uninvited solicitors," declare them a nuisance, and prohibit their activity under the 1972 Montana Constitution and statutes enacted since adoption.¹⁰ The court followed *Breard v. City of Alexandria*¹¹ and held Billings' "Green River" ordinance did not violate Montana's freedom of speech¹² or due process¹³ guarantees,¹⁴ and it did not impact the federal Constitution's commerce clause.¹⁵

The Montana Supreme Court addressed the equal protection attack raised by Tipco and followed the now classic equal protection analysis of the United States Supreme Court—the "two tier approach."¹⁶ Under this analysis, statutory classifications based on race or national origin,¹⁷ or those inhibiting the exercise of a "fun-

5. Billings Municipal Code § 5.20.060 provides:

The provisions of this chapter shall not apply to regularly established places of business or to bonafide merchants having regularly established places of business within said city, or to any person distributing by sale, or otherwise, produced by him on owned or leased premises; provided such premises are located within 150 miles of the City.

6. *Tipco*, ___ Mont. ___, 642 P.2d at 1079.

7. MONT. CODE ANN. § 7-21-2301(2) (1981).

8. *Tipco*, ___ Mont. ___, 642 P.2d at 1077.

9. *Id.* (citing MONT. CODE ANN. § 7-1-101 (1981)).

10. *Id.* at ___, 642 P.2d at 1077-78.

11. *Breard v. Alexandria*, 341 U.S. 622 (1951).

12. MONT. CONST. art. II, § 7.

13. MONT. CONST. art. II, § 17.

14. *Tipco*, ___ Mont. ___, 642 P.2d at 1078.

15. *Id.*

16. Gunther, *The Supreme Court, 1971 Term—Foreward: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 HARV. L. REV. 1 (1972).

17. See, e.g., *Loving v. Virginia*, 388 U.S. 1 (1967).

damental right"¹⁸ are constitutionally permissible only if necessary to achieve a compelling state interest. Classification of this type will be subject to "strict scrutiny."¹⁹ This test means that a court will not defer to the decision of the governing body but instead will independently determine the relationships between the legislation's means and its ends.²⁰ In *Tipco*, the court determined the Billings ordinance was not subject to a "strict scrutiny" test of equal protection "because it does not burden a fundamental right nor constitute invidious discrimination against a suspect class."²¹ The court then applied the "rational relationship" test—the second tier. Classifications which fall under this analysis are upheld so long as they arguably relate to a legitimate function of government.²² In *Tipco*, the Montana Supreme Court held the Billings ordinance failed the rational relationship test and was unconstitutional. The court reasoned that "the only rational relationship that has been suggested is that the city can exercise control over local merchants."²³ The court found the city's argument difficult to follow and not rationally related to the achievement of a legitimate governmental objective.²⁴

The United States Supreme Court has used a far less critical approach in evaluating legislative classifications under the "rational relationship" test. The Court has taken two approaches to such classifications. First, legislation that resulted in the unequal treatment of individuals but did not create a classification simply has not been perceived as falling within the scope of the equal protection clause.²⁵ Second, any non-suspect classification has passed constitutional muster so long as it rested "on grounds [not] wholly irrelevant to the achievement of the State's objective."²⁶ The rational relationship test demands that the Justices recite some plausible set of facts that would allow the Court to justify the statute in question.²⁷

The rational relationship or "minimal scrutiny" standard re-

18. See, e.g., *Shapiro v. Thompson*, 394 U.S. 618 (1969).

19. *Id.*

20. L. TRIBE, *AMERICAN CONSTITUTIONAL LAW* § 16-10 (1978).

21. *Tipco*, ___ Mont. ___, 642 at 1078.

22. Gunther, *supra* note 16.

23. *Tipco*, ___ Mont. ___, 642 P.2d at 1078 (emphasis added).

24. *Id.*

25. See *San Antonio Indep. School Dist. v. Rodriguez*, 411 U.S. 1 (1973). "The function of the Equal Protection Clause . . . is simply to measure the validity of *classifications* created by state laws." *Id.* at 59 (Stewart, J., concurring) (emphasis in original).

26. *McGowan v. Maryland*, 366 U.S. 420, 425 (1961).

27. See *Forum: Equal Protection and the Burger Court*, 2 HASTINGS CONST. L.Q. 645, 647 (1975).

flects the Supreme Court's reluctance to interfere with legislative decisions. The Supreme Court has even conjured factual bases to render legislative classifications "rational" in deference to the legislature.²⁸ The Court has demonstrated avowed hesitation to substitute judicial value judgment for those elected to legislate.²⁹

The Montana Supreme Court chose not to "conjure" or "re-cite" some plausible reasoning to justify Billings' "Green River" ordinance. Instead, the court rejected the City's "rational reasons" and found the classification patently arbitrary. The court grounded its analysis on the fact that the Billings ordinance exempted "locals" from the solicitation prohibitions while in *Breard* there was no exemption for local merchants.³⁰ The Montana court then struck down both the exemption and the ordinance "since we have no way of knowing whether the City of Billings would enact the ordinance without the unconstitutional exemption."³¹

III. ANALYSIS

The *Tipco* decision is troubling for three reasons. First, the Montana Supreme court misread the *Breard* decision. Second, the Montana court appears to have adopted a new and questionable standard of review for equal protection attacks. Third, because of this decision, Montana's municipalities must review and revise their respective "Green River" ordinances to comply with the court's interpretation of Montana's equal protection clause.

The Montana court cited *Breard* as the determinative case for "Green River" ordinances such as Billings'. The court parenthetically noted that the ordinance in *Breard* did not exempt local merchants.³² This reading by the court is fundamentally wrong. The ordinance in *Breard* exempted "local purveyors of farm products" from the ordinance.³³ The Billings ordinance exempts "any person distributing by sale or otherwise goods produced by him on owned or leased premises . . . located within 150 miles of the city."³⁴ The Montana Supreme Court found such an exemption patently arbitrary under the rational relationship test. The Montana court did not defer to the city's legislation and rejected the city's argument for the exemption. This is a misapplication of the ra-

28. See, e.g., *McGowan*, 366 U.S. at 425-26.

29. See, e.g., *West Coast Hotel Co. v. Parrish*, 300 U.S. 379, 399 (1937).

30. *Tipco*, ___ Mont. ___, 642 P.2d at 1078.

31. *Id.* at ___, 642 P.2d at 1079.

32. *Id.* at ___, 642 P.2d at 1078.

33. *Breard*, 341 U.S. at 647.

34. *Tipco*, ___ Mont. ___, 642 P.2d at 1076.

tional basis test. Once a court determines that no fundamental right is burdened, it may speculate for rationale to justify the legislation.³⁵

In *People v. Bohnke*,³⁶ the town of Southampton, New York, had an ordinance similar to Billings', including an exemption for any person maintaining a business in Southampton for six months. The Court of Appeals of New York held that the exemption did not violate equal protection guarantees. The town's stated purpose for the ordinance was "to protect its citizens against crime."³⁷ The court considered that reason for the ordinance and held the exemption valid as well because "presumably the dangers and annoyances of . . . unsolicited visits are less when the . . . uninvited visitors are not strangers but known, or easily identifiable and traceable, residents of the community."³⁸ The *Bohnke* decision is an example of a court deferring to the legislative body and "con-juring" up plausible facts which allow the court to justify the ordinance.

In *Tipco*, the court could have deferred to the Billings city council and inferred its own set of plausible facts. Billings has a rational basis for the exemption. First, like all Montana municipalities, it is located near farms and ranches. The "local" producers who bring fresh food to the city may sometimes sell their goods going from one business to another, or even on a door-to-door basis. Food produced from these area markets benefits the city economically and "presumably" benefits the health of the city's citizens. Therefore, the exemption has a "plausible" rational basis for its existence and should be immune from an equal protection attack based on the rational relationship test. The *Tipco* court, however, seemed more concerned with the city's ability to control local merchants. The *Bohnke* court reasoned where local merchants are known or at least easily identifiable, the dangers of annoyance are less.³⁹ This was the same rationale offered by the city in *Tipco*.⁴⁰ Since all Montana communities are small enough to identify and trace their own residents, this rationale should have sufficed the "rational basis" test employed by the court.

In *Tipco*, the court implied "Green River" ordinances may be valid provided they do not exempt "locals."⁴¹ This decision im-

35. Gunther, *supra* note 16.

36. 287 N.Y. 154, 38 N.E.2d 478 (1941).

37. *Id.* at 158, 38 N.E.2d at 479.

38. *Id.*

39. *Id.*

40. *Tipco*, ___ Mont. ___, 642 P.2d at 1078.

41. *Id.* at ___, 642 P.2d at 1079.

pacts some local merchants as demonstrated by *Phillips v. City of Bend*,⁴² a case decided only weeks after *Breard*. In this case, a local citizen and businessman was arrested under that city's "Green River" ordinance for selling vacuum cleaners door-to-door. This ordinance did not expressly exempt local merchants. The local businessman vehemently argued that the ordinance discriminated against him since he was unable to demonstrate his product in a customer's home. He contended this ordinance violated his equal protection rights under both the United States and Oregon Constitutions.⁴³ The citizen argued the ordinance implied that local merchants were allowed to sell their wares in the prohibited manner since local businessmen were not itinerant merchants.⁴⁴

The Oregon Supreme Court chose not to construe the ordinance to imply such an exemption. Instead, the court held the ordinance merely condemned the method of the sale and did not rely on the merchant's location. It stated that "the municipal ordinance which places them in a single class for the purpose of regulation is not manifestly arbitrary or without reasonable basis and the legislative intent will therefore not be disturbed."⁴⁵ The court held that since no exemption for local merchants was expressed, none could be implied.⁴⁶ Now, under *Tipco*, Montana communities which have a "Green River" ordinance may not expressly exempt their local merchants or their local purveyors of farm products from soliciting in the community. Thus, communities wishing to permit their local producers to sell must permit all solicitors to sell within their city.

IV. CONCLUSION

The Montana court's *Tipco* decision signals a departure from the simple two-tier approach analysis of the constitutionality of a statute under the equal protection clause. Generally, when a court applies a "strict scrutiny" standard, it is fatal to the statute, and when a court applies "minimal scrutiny" a statute is upheld.⁴⁷ The Montana court has failed to articulate a meaningful rationale explaining why it chose a "heightened" judicial scrutiny standard while invoking the language of "rational basis."

The *Tipco* case may result in an accumulation of ad hoc decisions flexible enough to accommodate the court's preference for re-

42. 192 Or. 143, 234 P.2d 572 (1951).

43. *Id.* at 148, 234 P.2d at 576.

44. *Id.*

45. *Id.* at 160, 234 P.2d at 579.

46. *Id.*

47. Gunther, *supra* note 16, at 8.

sults in the realm of equal protection. *Tipco* may stand for a stricter basis test than has previously been applied. As for "Green River" laws in Montana, no exemptions may be granted unless all persons, including foreign corporations, are permitted the privilege of selling door-to-door.

