"[I]n the local economic sphere, it is only the invidious discrimination, the wholly arbitrary act, which cannot stand consistently with the Fourteenth Amendment."

NEW ORLEANS v. DUKES

472 U.S. 297, 96 S.Ct. 2513, 49 L.Ed.2d 511 (1976).

In 1972 New Orleans amended its ordinances to forbid "pushcart vendors" within the old French Quarter of the city, the Vieux Carr. The amendment, however, contained a "grandfather clause": Any pushcart peddler who had been in business for eight or more years could continue to operate in the Vieux Carre. Nancy Dukes, who had operated a pushcart therefor only two years, sued in a federal district court, claiming the amendment denied her equal protection. She lost, but the Court of Appeals for the Fifth Circuit reversed. New Orleans then appealed to the U.S. Supreme Court.

PER CURIAM....

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. Unless a classification 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 the classification challenged be rationally related to a legitimate state interest. 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.... [I]n 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 (1963).

The Court of Appeals held in this case, however, that the "grandfather provision" failed even the rationality test. We disagree. The city's classification rationally furthers the purpose which the Court of Appeals recognized the city had identified as its objective in enacting the provision, that is, as a means "to preserve the appearance and custom valued by the Quarter's residents and attractive to tourists." 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 a 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 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. This gradual approach to the problem is not constitutionally impermissible. The governing constitutional principle was stated in Katzenbach v. Morgan [1966]:

> [W]e 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 [1929], that a legislature need not "strike at all evils at the same time," Semler v. Dental Examiners [1935], and that "reform may take one step at a time, addressing itself to the phase of the problem which seems most acute to the legislative mind," Williamson v. Lee Optical Co. [1955].

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 who qualified under the "grandfather clause"– both of whom 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.

Nevertheless, relying on Morey v. Doud (1957), as its "chief guide," the Court of Appeals held that ... the "grandfather clause" ... could not stand because "the hypothesis that a present eight year veteran of the pushcart hot dog market in the Vieux Carre will continue to operate in a manner more consistent with the traditions of the Quarter than would any other operator is without foundation." ... *Morey* was the only case in the last half century to invalidate a wholly economic regulation solely on equal protection grounds. *Morey* is, as appellee and the Court of Appeals properly recognized, essentially indistinguishable from this case, 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.

[*Reversed*.

Mr. Justice **MARSHALL** concurs in the judgment.

Mr. Justice **STEVENS** took no part in the consideration or decision of this case.

Editors' Notes

(1) Perhaps one of the problems with the Court's use of terms such as "rationality" or "rational basis test" is that the justices use "rational" in a loose, common-sensical way, not in the more technical sense that social scientists would employ that word. See, for example, Sidney Verba, "Assumptions of Rationality and Non-Rationality in Models of the International System,"

14 *World Pols.*93 (1961). For analyses of the Court's use of rationality, see: Scott Bice, "Rationality Analysis in Constitutional Law," 65 *Minn.L.Rev.* 1 (1980); Hans A. Linde, "Due Process of Lawmaking," 55 *Neb.L.Rev.* 197 (1976); and Frank I. Michelman, "Political Markets and Community Self-Determination," 53 *Ind.L.J.* 145 (1978).

(2) **Query:** Is there any way the state can lose if the Court applies the sort of deferential scrutiny it did in these cases? (See the discussion of Lindsley v. Natural Carbonic Gas Co. [1911] in the Introductory Essay to this Chapter.) What happens then to the promise of equal protection of the laws? Does it vanish or does deferential judicial scrutiny merely turn from the question of HOW to interpret to WHO interprets, with the Court's offering the answer that this aspect of constitutional interpretation falls almost completely under the jurisdiction of legislators and administrators?