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The Railroad Retirement Acts

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NOTES AND COMMENT

THE RAILROAD RETIREMENT ACTS.

When the issue is raised that Congress has violated the Due Process clause of the Fifth Amendment of the Constitution, or that a state legislature has violated the Due Process clause of the Fourteenth Amendment, the Court must examine the *reasonableness* of the statute in question.[1] If the statute is arbitrary, capricious, unreasonable or oppressive, or if the purpose of the statute is not reasonably related to the means adopted by Congress to accomplish that purpose, it is unconstitutional.[2] The Court is not concerned with the wisdom of the statute.[3] That is a function of the legislature.[4] The fact that the Court be in sympathy or in disagreement with the aims of the statute is not relevant.[5] Even if the means adopted to accomplish the purpose is unwise, the Court is not concerned, if the purpose is within the constitutional powers of Congress and the means adopted are reasonable.[6]

Railroad Retirement Board et al. v. *The Alton Railroad Co. et al.*[7]

The Railroad Retirement Act in question[8] passed by Congress

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[1] Nebbia v. New York, 292 U. S. 502, 54 Sup. Ct. 505 (1934); Chicago, B. & Q. R. R. Co. v. McGuire, 219 U. S. 549, 569, 31 Sup. Ct. 259 (1911); Adair v. United States, 208 U. S. 161, 28 Sup. Ct. 277 (1908); see 3 WILLOUGHBY, THE CONSTITUTION OF THE UNITED STATES (2d ed. 1929) 1700 *et seq.*

[2] *Ibid.*

[3] Laurel Hill Cemetery v. San Francisco, 216 U. S. 358, 30 Sup. Ct. 301 (1910); Jacobson v. Massachusetts (vaccination case), 197 U. S. 11, 25 Sup. Ct. 358 (1905); German Alliance Insurance Co. v. Kansas, 233 U. S. 389, 34 Sup. Ct. 612 (1914); Chicago, B. & Q. R. R. Co. v. McGuire, *supra* note 1.

[4] Munn v. Illinois, 94 U. S. 113 (1876); Radice v. New York, 264 U. S. 292, 44 Sup. Ct. 325 (1924); Berkson, *Revitalizing Rate Regulation* (1935) 9 ST. JOHN'S L. REV. 332 at 350.

[5] *Supra* note 3; *dissent,* Lochner v. New York, 198 U. S. 45, 25 Sup. Ct. 539 (1905).

[6] *Ibid.;* the foregoing general principles are recognized by both the prevailing and dissenting opinions in Railroad Retirement Board *et al* v. Alton R. R. Co. *et al.,* 295 U. S. 330, 55 Sup. Ct. 758 (1935).

[7] 295 U. S. 330, 55 Sup. Ct. 758 (1935), cited note 6, *supra;* the respondents consist of 134 Class I railroads.

[8] 48 STAT. 1283, 45 U. S. C. A. §§201-214. Its broad provisions are as follows:

The act established a compulsory railroad retirement and pension system for railroads subject to the Interstate Commerce Act. It provided for the creation of a fund from which, under supervision of the Railroad Retirement

was held to be unconstitutional [9] in that: (1) it violated the Due Process clause, and (2) it was an unreasonable exercise of the power of Congress to regulate interstate commerce.

Specific Provisions Held to Be Arbitrary.

1. The Act provided that the carriers were to be treated as a single employer in that all the assessments were pooled in a single fund. For various reasons [10] this would place unequal burdens on

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Board, designated as an independent agency in the executive branch of the Government, pensions would be paid to railroad employees. One-third of the fund was to be furnished by the then present and future employees of the carriers in the form of payroll deductions and the remaining two-thirds by the carriers, each carrier being required to contribute twice the aggregate sum contributed by its employees (Sec. 5). The Government was to contribute nothing to the fund. From this fund payments, called annuities, were to be made to beneficiaries throughout the remainder of their lives. The classes of beneficiaries eligible to annuities were: (1) all persons in the employ of any carrier on the date of enactment of the statute; (2) all persons who had been in the service of a carrier at any time within one year prior to the enactment; and (3) all persons who subsequent to enactment would have entered service of any carrier, with preferential treatment for such as shall ever in the past have been in service of any carrier (Sec. 1b). The annuities were payable to any person in any of the foregoing classes in either of two contingencies: First, when he attained the age of 65, regardless of whether or not then in carrier service (Sec. 3). If he were still in carrier service at that age, he and his employer could agree upon his continuance in service from year to year after that age, but at all events he was required to retire at 70 (Sec. 4); second, at the option of the beneficiary, at any time between the ages of 51 and 65, if he shall have previously served 30 years in carrier employ (Sec. 3).

[9] The prevailing opinion was written by Justice Roberts; Justices Van Devanter, McReynolds, Sutherland and Butler concurred. Justices Brandeis, Stone and Cardoza joined in the dissenting opinion written by Chief Justice Hughes.

[10] The reasons were: (a) The probable age of entry into service of typical carriers had been proved to differ materially, but the Act made no allowance for this in allotting the amount of contribution to be paid by each carrier. The Court said, "Naturally the age of a pensioner at the date of employment will affect the resultant burden upon the contributors to the fund."

(b) The Act required all employees of the age of 70 to retire immediately. It was found that 56 of the respondents had no employees in that class, but their contributions would not be diminished.

(c) The evidence showed that some respondents are solvent and others are not. "* * * with the result that solvent railroads must furnish the money necessary to meet the demands of the system upon insolvent carriers."

(d) There are many persons who at some time previously had been employed in now defunct railroads. Since they become eligible for pensions on the basis of past years of railroad service upon being re-hired by any railroad, the carriers now functioning will bear the whole burden of the annuities awarded to these individuals.

(e) Upon death of any employee, his estate is entitled to the amount contributed by him to the fund with 3 per cent interest compounded annually. "The railroads are not only liable for their own contributions, but are in a measure, made insurers of those of the employees."

the individual carriers. The legality of pooling systems analogous to the one held unconstitutional in the instant case in spite of inequitable burdens placed upon individual contributors, has been repeatedly upheld by the Supreme Court.[11] These cases are distinguished by the majority opinion, but the dissenting opinion declares that the provision is valid, citing the same cases as supporting the principle.

2. The Act made eligible for pensions all those who were in carrier service one year prior to its passage, irrespective of any future re-employment. The Court said in reference to this provision:

> "It is arbitrary in the last degree to place upon the carriers the burden of gratuities to thousands who have been unfaithful and for that cause have been separated from the service, or who have elected to pursue some other calling, or who have retired from the business, or have been for other reasons dismissed."

3. The Act made eligible for pensions any employee who had been previously employed by a carrier and who at some future date would be taken into the service. In reference to this, the Court said:

> "The provision is not only retroactive in that it resurrects for new burdens transactions long since past and closed; but as to some of the railroad companies it constitutes a naked appropriation of private property upon the basis of transactions with which the owners of the property were never connected. Thus the Act denies due process of law by taking the property of one and bestowing it upon another."

4. The Act required the payment of a pension for thirty years of service regardless of the age of the employee. The Court stated that this provision was arbitrary because it would enable many who were experienced and reliable to deprive carriers of their services before reaching the age of sixty-five.

5. The Act provided for payment computed on the basis of past years of service. The Court stated that this was an appropria-

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[11] Dayton-Goose Creek Railway Co. v. United States, 263 U. S. 456, 44 Sup. Ct. 169 (1924) (Transportation Act required carriers to contribute one-half of their "excess earnings" to a revolving fund to be used by the Interstate Commerce Commission, "in furtherance of the public interest in railway transportation," for loans to carriers to meet capital expenditures and to refund mature securities, or for purchasing equipment and facilities and leasing them to carriers. *Held,* Constitutional); the New England Divisions Case, 261 U. S. 184, 43 Sup. Ct. 270 (1923); Thornton v. Duffy, 254 U. S. 361, 41 Sup. Ct. 137 (1917); Mountain Timber Co. v. State of Washington, 243 U. S. 219, 37 Sup. Ct. 260 (1920); Atlantic Coast Line R. R. Co., 219 U. S. 186, 31 Sup. Ct. 164 (1911); Noble State Bank v. Haskell, 219 U. S. 104, 31 Sup. Ct. 186 (1911).

tion of property without a benefit being rendered in return, and therefore was an unconstitutional provision.

6. The Act was held to be arbitrary because of its unconscionable cost.

The Act Was Held to Be an Unreasonable Exercise of Power.

Congress may in the exercise of its power to regulate interstate commerce [12] pass appropriate legislation to insure the safety of railroad operation.[13] The Safety Appliance Acts,[14] the Employers' Liability Act,[15] hours of service laws [16] which were cited in support of this Act were distinguished as being directly and intimately connected with the actual operation of the railroads. The doctrine laid down in the *Second Employers' Liability Cases* [17] was that the statute must have a real and substantial relation to some part of such commerce.

The professed purpose of the Railroad Retirement Act,[18] that it was passed to promote efficiency and safety in interstate transportation, was held to be not reasonably related to the means adopted and therefore unconstitutional as being an arbitrary exercise of the power of Congress to control interstate commerce. In the words of the prevailing opinion, this objection "goes to the heart of the law." [19] The minority finds that this conclusion "is a departure from sound principles and places an unwarranted limitation upon the commerce clause of the Constitution." [20]

No conclusive evidence could be produced to indicate whether or not the provisions for the elimination of excessive superannuation and for old age security of employees would aid in making railroads

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[12] U. S. CONST. Art. I, §8; Gibbons v. Ogden, 6 U. S. 1, 9 (1824) (the Commerce power is the "power to regulate; that is, to prescribe the rule by which commerce is to be governed"); The Daniell Ball, 77 U. S. 557, 564 (1870) (the power to enact "all appropriate legislation" for its "protection and advancement").

[13] Texas & New Orleans R. R. Co. v. Brotherhood of Railway & Steamship Clerks, 281 U. S. 548, 50 Sup. Ct. 427 (1930); Southern Ry. Co. v. United States, 222 U. S. 20, 32 Sup. Ct. 2 (1911).

[14] ASH PAN ACT, 35 STAT. 476, 45 U. S. C. A. §18 (1908); 27 STAT. 531, 45 U. S. C. A. §1 (1893); Southern Ry. Co. v. United States, *supra* note 13; Texas & Pacific Railway Co. v. Rigsby, 241 U. S. 33, 36 Sup. Ct. 482 (1916).

[15] EMPLOYERS' LIABILITY ACT, 36 STAT. 291, 28 U. S. C. A. §71 (1910); Second Employers' Liability Cases, 223 U. S. 1, 32 Sup. Ct. 169 (1912).

[16] Act of March 4, 1907, 34 STAT. 1415, 45 U. S. C. A. §61 (1907); Baltimore & Ohio R. R. Co. v. Interstate Commerce Commission, 221 U. S. 612, 31 Sup. Ct. 621 (1911).

[17] Second Employers' Liability Cases, *supra* note 15.

[18] *Supra* note 8.

[19] 295 U. S. 330, 55 Sup. Ct. 758, 768 (1935).

[20] 295 U. S. 330, 55 Sup. Ct. 758, 774 (1935).

safer or more efficient. The Court failed to find evidence to prove that old employees were unsafe employees. Statistics were presented to show a progressive decrease in the number of railroad casualties over a long period of years, the decrease occurring in a period of alleged increasing superannuation. The dissent points out that the increase in safety may be due largely to the refinement of technical efficiency and that the high degree of railroad safety now shown is no indication that it could not be further improved. The removal of the fear of being without the means of livelihood in old age as bearing on safety was rejected as being an unproved theory.

The dissenting Justices question the right of the Court to make such a holding, relying on the seemingly well-settled ruling in *Radice* v. *People of the State of New York:* [21]

> "Where the constitutional validity of the statute depends upon the existence of facts, courts must be cautious about reaching a conclusion respecting them contrary to that reached by the legislature; and if the question of what the facts represent be a fairly debatable one, it is not permissible for the judge to set up his opinion in respect of it against the opinion of the law-maker."

Where there is a significant body of well-informed opinion which believes that the statute will reasonably accomplish its professed purpose, the Court is not justified in overruling the legislature.[22] The Court is not concerned with the wisdom but only with the reasonableness of a statute,[23] and where bodies of opinion differ as to the effect of a statute, that is merely a matter relating to its wisdom.[24]

There is a representative body of expert opinion which believes that fear on the part of superannuated employees about being without adequate means of support when they are discharged often results in such an emotional condition as may be provocative of accidents.[25]

Since the question as to whether the professed purpose of the Act (the promotion of safety in interstate transportation) is a matter relating to the wisdom of the Statute and not to its reasonableness, the Court is not properly concerned.[26] All that is required on the score of wisdom is that there be an authoritative body of opinion which believes it to be true.[27]

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[21] 264 U. S. 292, 44 Sup. Ct. 325 (1924).

[22] Laurel Hill Cemetery v. San Francisco, Jacobson v. Massachusetts, both *supra* note 3.

[23] *Supra* notes 1 to 6.

[24] *Supra* note 22.

[25] NATIONAL INDUSTRIAL CONFERENCE BOARD, ELEMENTS OF INDUSTRIAL PENSION PLANS (1931) 9; State *ex rel.* Dudgeon v. Levitau, 181 Wis. 326, 330, 193 N. W. 499, 501 (1933).

[26] *Supra* notes 1 to 6.

[27] *Supra* note 22.

The Court disagreed with the concept that voluntary adoption of pension plans by over eighty per cent of the railroads was evidentiary of the relationship of pension plans to safety, pointing out that the theory behind the plans was the instilling of gratitude and loyalty and hence of morale on the part of the employees and that an enforced pension plan would result in no such gratitude to the employer but only to the legislature. It is submitted that the common factor behind the voluntary and compulsory pension plans is the removal of the fear of old age poverty.

The Railroad Retirement Act of 1935.[28]

The provisions of the new Act are designed to overcome the objections of the United States Supreme Court in the first pension case [29] by utilizing the taxing power [30] of Congress. The new Act provides for an income tax on railroad employees [31] and for an excise tax to be levied on the carriers on the basis of its payroll expenditures.[32]

The new Act compromises on two provisions. Instead of the carriers bearing two-thirds [33] of the burden as they were required to do by the unconstitutional Act, they contribute equally with the employees, and in lieu of the one-year retroactive effect,[34] the new Act operates only as of the date of enactment. Congress evidently made these changes in the hope that they would influence the Court to say that the specific provisions of the Act were not arbitrary. However, the Court may again insist that the pooling provisions, the "unconscionable cost," and the thirty-year service retirement option are still repugnant to due process, may refuse again to perform judicial surgery even in the face of the provision for severability and may again declare the whole Act unconstitutional because of these provisions.

The major question which will be presented when this Act comes before the Court on the question of its Constitutional validity is whether Congress may by its taxing power accomplish that which it may not do by the exercise of its power to regulate interstate commerce. The Court will not find the cases [35] cited by the Attorney-

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[28] Act of Aug. 29, 1935, c. 812, 49 STAT. —, — U. S. C. A. —, H. R. 8651.
[29] *Supra* note 7.
[30] U. S. CONST. Art. I, §8.
[31] Act of Aug. 29, 1935, c. 813, 49 STAT. —, — U. S. C. A. —, H. R. 8652, §2.
[32] *Id.* §4.
[33] *Supra* note 8.
[34] *Ibid.*
[35] Vesey Bank v. Fenno, 75 U. S. 533 (1869); McCray v. United States, 195 U. S. 27, 24 Sup. Ct. 769 (1904); United States v. Doremus, 249 U. S. 86, 39 Sup. Ct. 214 (1919); Magnano Co. v. Hamilton, 292 U. S. 40, 54 Sup. Ct. 599 (1934).

General's department of the United States [36] in support of the Act difficult to distinguish. There are *dicta* in these very cases which the Court may rely upon to declare the Act unconstitutional. For example, in the case of *Magnano* v. *Hamilton* [37] the Court said:

> "That clause (the Fourteenth Amendment)[38] is applicable to a taxing statute such as the one assailed only if the act be so arbitrary as to compel the conclusion that it does not involve an exertion of the taxing power; but constitutes, in substance and effect, the direct exertion of a different and forbidden power, as, for example, the confiscation of property."

The carriers will undoubtedly cite the *Child Labor Tax Case* [39] as authority for the proposition that this Act exceeds the taxing power of Congress. Such application by the Court would be unfortunate, since the Child Labor Tax [40] was held to be unconstitutional on the express grounds that the tax sought to exercise a forbidden power through the use of a penalty, and has since been distinguished by *Magnano* v. *Hamilton*.[41] It is clear that the tax in Railroad Retirement Act [42] is not designed to act as a penalty. Whether or not the Supreme Court will declare the new Act unconstitutional depends, it would seem, on the willingness of the Court to employ the objectivity exemplified by the late Justice Oliver Wendell Holmes.

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THE COVENANT OF SEISIN.

I

Since no covenant is to be implied in a conveyance of real estate in New York,[1] a purchaser in the absence of fraud, accident or mutual mistake, must look to whatever covenants his deed actually contains for indemnity should the title prove defective or fail.[2] Consequently, among many things, the usual warranty deed embraces an undertaking on the part of the grantor that he is seised as owner, at

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[36] PRENTICE-HALL, LABOR AND UNEMPLOYMENT INSURANCE SERVICE, Fed. 26,125 (1935).
[37] 292 U. S. 40, 54 Sup. Ct. 599 (1934).
[38] The constitutionality of a state tax was in issue.
[39] (Bailey v. Drexel Furniture Co.) 259 U. S. 20, 42 Sup. Ct. 449 (1922).
[40] TAX ON EMPLOYMENT OF CHILD LABOR, c. 18, 40 STAT. 1138, 26 U. S. C. A. §702 (1919).
[41] *Supra* note 37; see Note (1934) 47 HARV. L. REV. 1229.
[42] *Supra* note 8.

[1] N. Y. REAL PROP. LAW §251.
[2] Whitbeck v. Waine, 16 N. Y. 532, 535 (1858).