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D.J. Farage

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THE RAILROAD PENSION ACT AND PROMOTION OF INTERSTATE COMMERCE

D. J. FARAGE*

The unusual interest evoked by the now famous *Schechter* case¹ has served to relegate to a less conspicuous position other recent constitutional decisions of our Supreme Court holding invalid social legislation of the New Deal era. Among these less thought about cases, that of *Railroad Retirement Board v. Alton Ry. Co.*,² hereinafter called the *Railroad Pension Case*, offers special interest to students of constitutional law. Certainly, its implications insofar as they limit the scope of the commerce power of Congress are highly important.

Briefly, the *Railroad Pension Case* concerned itself with the constitutional validity of a federal statute which required railroads to provide pensions for such employees, upon retirement, as had been engaged in interstate commerce. The Supreme Court, by a 5-4 vote, held that the act was invalid.³

The first ground relied upon by Justice Roberts, speaking for the majority, against the validity of the Act, was that a number of particular features of the act were arbitrary and unreasonable and therefore in contravention of the "due process" clause of the Fifth Amendment. It is not within the purview of this paper to consider the propriety of thus invoking the Fifth Amendment, apart from observing that in the light of four dissents, the question was perhaps an open one.⁴

The second ground stressed against the Act was that Congress had absolutely no power under the commerce clause⁵ to pass *any* pension act, even though the statute were admittedly free of arbitrary features. This argument of course, far transcends that of "due process" in importance.⁶ As Chief Justice Hughes remarked in his dissenting opinion,⁷

*A. B., 1930; LL. B., 1933, University of Pennsylvania; admitted to practice in Pennsylvania, 1933; Assistant to Francis H. Bohlen, Reporter on Torts, Restatement, for American Law Institute, 1933—; Professor, Dickinson School of Law, 1934—.

¹55 S. Ct. 837 (1935).

²55 S. Ct. 758 (1935).

³The dissenting Justices were Hughes, Brandeis, Stone and Cardozo.

⁴The minority disputed some, though not all, charges of unreasonable features in the act.

⁵Art. I, Section 8, Subsec. 3.

⁶As this paper goes to press, it appears that a recent article has ably demonstrated that the court *unnecessarily* relied on the "lack of commerce power" argument. Powell, "Commerce, Pensions, and Codes," 49 H. L. R. 1 (Nov. 1935).

⁷55 S. Ct. 758, at page 773.

"The gravest aspect of the decision is that it does not rest simply upon a condemnation of particular features of the Railroad Retirement Act—but denies to Congress the power to pass any compulsory pension act for railroad employees. If the opinion were limited to the particular provisions of the act which the majority find to be objectionable and not severable, the Congress would be free to overcome the objections by a new statute."

The statute of course, by its terms, was applicable only in favor of employees in interstate commerce. There was no claim that the statute attempted to regulate intrastate activity. The basis for Justice Roberts' view that the commerce power did not support the Act was merely that, in his opinion, the Act fails to "promote" interstate commerce. The proponents of the statute argued that it would promote safety and efficiency in the railway industry. But the majority of the Court was adamant in its view, in spite of an expression in the Act itself that one of its purposes was the "promotion of efficiency and safety in interstate transportation", that there could, in fact, be no promotion of the industry through the operation of the statute.

The minority bitterly assailed the majority's position. After pointing out that "where the constitutional validity of a statute depends upon the existence of facts, courts must be cautious about reaching a conclusion respecting them contrary to that reached by the Legislature",⁸ Chief Justice Hughes argued that interstate commerce would be promoted by the statute because,

"it is clear that the morale of railroad employees has an important bearing upon the efficiency of the transportation service, and that a reasonable pension plan by its assurance of security is an appropriate means to that end."⁹

Very similar, of course, to the problem presented in the *Railroad Pension Case*, was that involved in the *Second Employers' Liability Act Cases*.¹⁰ There the Supreme Court held valid a federal statute which provided for workmen's compensation for railroad employees engaged in interstate commerce. It seems difficult on principle to argue that a federal workmen's compensation act does promote interstate commerce but that a federal pension act for the same employees does not. After all, in both cases, payments may be made to individuals who because of serious illness or old age, may never again actually engage in railroad work.

⁸Id., at page 775.

⁹Id., at page 775.

¹⁰223 U. S. 1 (1912).

Justice Robert spins a very fine theory to distinguish the two cases. He said:¹¹

"Workmen's Compensation laws deal with existing rights and liabilities by readjusting old benefits and burdens incident to the relation of employer and employee. Before their adoption, the employer was bound to provide a fund to answer the lawful claims of his employees; * * * * The act with which we are concerned seeks to attach to the relation of employer and employee a new incident, without reference to any existing obligation or legal liability, solely in the interest of the employee, with no regard to the conduct of the business, or its safety or efficiency, but purely for social ends."

In other words, the distinction drawn by Justice Robert seems to be that the effect of Compensation Acts is, to borrow another of his phrases, merely "to substitute a new remedy for the common-law right of action",¹² whereas the Pension Act gives the employees a gratuity.

That such a distinction in fact exists between Workmen's Compensation Acts and the Pension Act is highly doubtful. The majority overlooks, that to the extent that Compensation Acts now allow recovery to employees in spite of the defenses of "contributory negligence" or "voluntary assumption of risk" or in spite of the "fellow-servant" rule, to that extent the employee is being given something for nothing by the Workmen's Compensation Acts since at common law these defenses would have been an absolute bar to recovery.

Moreover, assuming that the distinction which the majority draws does in fact exist, why should that fact necessarily be legally operative to produce a different result. Rare indeed are enactments which merely substitute one remedy for another, leaving a status quo in the substantive relations of the parties involved. Most statutes take something substantial from those amenable thereto, or they give something to beneficiaries without necessarily extracting a quid pro quo.

It is to be noted that the distinction made by Justice Roberts in effect causes him to abandon the alleged requirement that regulation under the commerce power to be valid must "promote" interstate commerce, in favor of another and different requirement that the legislation shall not operate to take something from one person without compensation, nor to give something to another as a gratuity. In effect, Justice Robert says, "I admit that the Pension Act promotes interstate commerce to the same extent as Workmen's Compensation Acts, but what I object to is that the railroads here are being made to give up something for nothing."

This requirement of quid pro quo obviously would tend to "sand-bag" effective exercise of the commerce power. No other case appears to have suggested

¹¹55 S. Ct. 758 at page 772.

¹²*Id.*, at page 772.

that such a condition precedent is necessary to the exercise of the commerce power. Moreover, it is doubtful whether Justice Roberts meant to set a precedent in this particular. What probably happened was that in his astuteness to distinguish Workmen's Compensation Acts from the Pension Act, he lost sight of the fundamental test by which he had undertaken to determine the validity of statutes under the commerce power. So far as the similarity of the Pension Act to Workmen's Compensation Acts is concerned, as Chief Justice Hughes remarked in his dissent, "The effort to dispose of the analogy serves only to make it the more impressive."¹³

The most highly significant feature about the *Railroad Pension Case* remains to be pointed out. It will be noted that while the Court definitely split on the question as to whether the statute in question "promoted" interstate commerce, on the other hand, the entire court seemed to concur in treating that question as being the crux of the case. The fact is that the entire court really *assumed* without questioning or investigation that the promotion of interstate commerce has to be a necessary consequence of regulation of interstate commerce in order that the power be validly exercised. In other words, the whole court seems to accept the theory that "regulation" means "promotion".

This theory has given rise to two corollaries, (1) that power to regulate does not constitute power to prohibit; (2) that power to regulate cannot be used to accomplish an objective outside of benefitting commerce itself; that is, that for example, the power to regulate commerce cannot be used as police power.¹⁴ The soundness of these corollaries especially in the light of past decisions of the Court is dubious.

Under the former, it would follow that Congress cannot order embargoes on foreign commerce because, rather than promoting it, the embargo operates to shut off entirely foreign commerce. Yet would anyone contend that Congress cannot call off trade because of any theory that the power to regulate does not include power to prohibit? Obviously, prohibition may, on occasion, be one of the best methods of regulating. Nor can it be soundly argued that a distinction should be drawn between regulation of foreign commerce and regulation of interstate commerce; for, power to regulate both is given in the same breath by the same clause of the Constitution.¹⁵ Similarly, the Constitution provides for the "regulation" by Congress of land and naval forces.¹⁶ Does that mean that Congress can only build up the forces but never diminish them?

The argument that power to regulate does not include power to prohibit was raised squarely in the *Lottery Case*,¹⁷ where the Supreme Court held that

¹³Id., at page 777.

¹⁴See supra, note 11, the quotation from the opinion of Justice Roberts in which he voices this second corollary.

¹⁵Art. I, Sec. 8, Subsec. 3.

¹⁶Art. I, Sec. 8, Subsec. 14.

¹⁷*Champion vs. Ames*, 188 U. S. 321 (1903).

Congress had power under the commerce clause to prohibit lotteries from passing in interstate commerce. The court vigorously denied that the power to regulate is not power to prohibit.

The second corollary of the theory that regulation means promotion, namely that the commerce power cannot be used to reach other objectives beyond the betterment of commerce itself, has enjoyed a livelier career. One of the earliest payments of lip-service to it occurred in connection with the *Second Employers' Liability Act Cases*,¹⁸ where the Court held that a statute providing for Workmen's Compensation for railroad employees engaged in interstate commerce was valid. The Court in answering the contention that the statute there involved did not promote commerce, worked out the argument that the statute did promote commerce by making the railway industry safer.

The course pursued by the Court was not at all necessary to reach the result the Court had in mind. Reliance could have been placed on prior analogous decisions. In the case of *In re Rapier*,¹⁹ Congress under the postal power, passed an act forbidding the sending of lotteries through the mail. It was argued that the statute there did not improve or deal with the mail service as such, but that it was in the nature of a police regulation. The Court rejected the argument saying in effect that power is power no matter for what purpose it might be used.

In *Veazie Bank vs. Fenno*,²⁰ a federal tax was imposed on state banks not for the purpose of bringing in revenue but to drive the state banks into becoming national banks and thereby invest in federal securities being floated to finance the Civil War. The tax was held valid. So too, in the *License Tax Cases*,²¹ a tax on lotteries was upheld though its purpose was not to get revenue but to curb lotteries. Again in *McCray vs. U. S.*,²² an oppressive tax on oleomargarine which operated to drive it out of the market in favor of butter, was held valid although its purpose was not to get revenue but to act like police power in hitting the sale of oleomargarine.

The Court in the *Second Employers' Liability Act Cases* could have followed these analogies and said that so long as Congress used the commerce power to affect interstate activities, it was immaterial for what purpose the power was used. Instead, the Court nourished along the theory that the commerce power can be used only to improve commerce, by attempting to show that the particular statute did benefit commerce.

Granting some remote benefit upon commerce through such a statute, it seems clear, however, that the statute when passed was intended purely and solely

¹⁸Supra note 10.

¹⁹143 U. S. 110 (1891).

²⁰8 Wall. 533 (1869).

²¹15 Wall. 462 (1867).

²²195 U. S. 27 (1914).

as social legislation.²³ If a benefit was thereby conferred upon interstate commerce as such, that fact was discovered and invoked by the Court after the event to justify the validity of the act; it was not a benefit upon commerce as such that was contemplated by the statute. The Court should have frankly accepted the statute for what it was meant to be,— as purely social legislation. And the answer of the Court to the contention that the commerce power was being used for purpose other than to benefit commerce, should have been a mere, "What of it?"

In *B. and O. Ry. vs. Int. Com. Comm.*,²⁴ the Supreme Court upheld a statute limiting the hours of labor of employees of interstate carriers. Again, some remote benefit to interstate commerce may be found as a result. But again, was not that Act essentially a piece of social legislation? So long as it affects only interstate activities, what matter that it is in the nature of a police regulation?

In *Champion vs. Ames*,²⁵ which was also decided before the *Second Employers' Liability Act Cases*, the Supreme Court held it constitutional to prohibit interstate traffic of lotteries, the statute there being based on the commerce power. The Court, paying lip-service to the theory that regulation means promotion, found as a convenient formula of words for avoiding the theory, that the lotteries "polluted the stream" of interstate commerce, and that the prohibition therefore promoted commerce by removing the pollution. This concept of commerce as a stream of water is obviously metaphysical. Viewed from a realistic standpoint, the Court really decided that the commerce power can be used to accomplish a social objective other than the improvement of commerce itself, for from a practical viewpoint, it is difficult to see how lotteries in interstate commerce would necessarily hurt other legitimate interstate business.

Again in *Hoke vs. U. S.*,²⁶ the Supreme Court held valid a federal statute which made it a crime to transport any girl across state lines for the purpose of prostitution. Does such a statute improve commerce as such? Could such a statute have been intended by Congress as other than social legislation, having the effect of police regulation? Yet since the statute dealt only with interstate transportation, it was held valid.

A similar decision was reached in *Brooks vs. U. S.*²⁷ There the Court upheld as valid a federal act which punished the taking of stolen automobiles across state lines. Again, apart from the metaphysical concept of "pollution of the stream"

²³Many writers deny that Workmen's Compensation Acts tend to promote safety on the theory that the employer becomes more careful of his employees' welfare. The fact is that employers generally provide for Workmen's Compensation by taking out insurance. Having paid the insurance premium, it is immaterial to the employer whether his employees suffer one or a thousand injuries. Professor Bohlen, an outstanding authority on Workmen's Compensation Law, rejects the notion that the Acts promote safety.

²⁴221 U. S. 612 (1911).

²⁵Supra note 17.

²⁶227 U. S. 308 (1913).

²⁷267 U. S. 432 (1925).

of commerce, the statute does not seem to promote commerce as such. This act too, was only social legislation.

The *Railroad Pension Case*, in the light of these cases, goes far in giving bone and substance to what was heretofore only an empty formula. Heretofore, social legislation has been upheld under the commerce power and the Courts have recognized the theory that regulation means promotion, only by resorting to ingenious explanations to show benefits conferred on commerce and by using metaphysical formulae (like "pollution of the stream of commerce") to explain away a theory which was almost as metaphysical as its explanations. Now, in the *Pension Case*, the Court definitely looks for a direct beneficial influence on commerce. It seems indeed strange that not even one dissenting member of the Court assailed the taking for granted of the premise that "regulation" necessitates "promotion".

This narrow view of the meaning of the term regulation definitely limits the sphere of beneficial governmental activity. It means that even though states are powerless to deal with social evils because they are attached to interstate business and therefore outside the powers reserved by the Constitution to the States, nevertheless Congress, too, is to lack power to deal with these social evils because to regulate them is not to improve commerce itself. Thus there arises a "vacuum of anarchy"²⁸ within which the unscrupulous may act with impunity.

It is improbable that the *Pension Case* will bring doubt upon the validity of statutes already adjudicated constitutional. However, it will encourage doubtful and debatable argument as to whether and how any future statute has a direct tendency to promote commerce. Must the promotion be substantial? If so, how substantial must it be? Are the views of Congress as to whether an act promotes commerce to be given any effect, or shall the Court constitute itself a super-legislature and determine for itself in each case whether Congress has conformed to the Court's standard of what is substantial? It is to be hoped that the Court will view its past decisions realistically so as to recognize that it has upheld purely social legislation as valid under the commerce power, and that it will in the future adopt the broader and saner view of the meaning of the term regulation.

Carlisle, Pa.

D. J. Farage

²⁸John Dickinson, *Defect of Power in Constitutional Law*, 9 *Temple Law Quarterly* 389 (1935).