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CONSTITUTIONAL LAW — OLD AGE PENSIONS — TITLES II AND VIII OF SOCIAL SECURITY ACT — POWER TO SPEND FOR THE GENERAL WELFARE — In a case decided May 24, 1937, Titles II and VIII of the Social Security Act[1] were challenged. Title VIII lays a tax on employers, which reaches a maximum in 1949 of 3 per cent of the wages paid by the employer, and also a tax on employees measured by a similar percentage of the wages they earn, and which is withheld and paid by the employer. Neither tax applies to certain

[1] 49 Stat. L. 620 (1935), 42 U. S. C. (Supp. II, 1936), § 301 et seq.

kinds of occupations: agricultural labor, domestic service, governmental service, nor to wages earned by persons over sixty-five years of age. Title II provides for payment to persons over sixty-five who have worked the requisite time, a monthly pension, paid from an "Old-Age Reserve Account" created in the Treasury by appropriations by Congress. A stockholder of an employer-corporation sought to enjoin the corporation from paying either of the levies under Title VIII, on the basis that the levies were not a proper exercise of the tax power, and that Title VIII was inseparably tied up with the old age pensions of Title II, which was alleged to be beyond the powers of the Federal Government and an encroachment on state matters. *Held,* that the tax on employers is an excise or duty upon the relation of employment, that it is not arbitrary because of the exceptions, and that Title II in providing for old age pensions is a valid exercise of the power to spend for the general welfare. *Helvering v. Davis,* (U. S. 1937) 81 L. Ed. 804.

That the tax on employers was properly an excise or duty and that the exemptions were justifiable was decided by reference to the opinion in *Steward Machine Co. v. Davis,* decided the same day, which sustained a similar levy.[2] A more significant aspect of the decision is the recognition of the Federal Government's power to deal with social problems through the general welfare clause.[3] This clause is recognized not to give a general power to legislate for the general welfare.[4] But *United States v. Butler* [5] in 1936 for the first time committed the Supreme Court to the view that it was a separate enumerated power of taxation for the general welfare, and was not limited to taxation for the enumerated or implied powers found elsewhere in the Constitution. The power to tax for the general welfare carries with it a correlative power to spend for a like purpose.[6] There has been but little to indicate what the scope of this newly recognized power would be. The majority opinion in the *Butler* case expressly refused to decide whether expenditure for the aid of agriculture would be within the limits of general welfare or not.[7] The Court concluded in the *Butler* case that regulation of agriculture was not a national power, but regulation should be distinguished from spending for agriculture, for there is no power to regulate for the general welfare as there is to spend for the general welfare.[8] The instant case definitely establishes that the distress of individuals situated within the several states can create a national problem, subject to relief

[2] Steward Machine Co. v. Davis, (U. S. 1937) 81 L. Ed. 779, commented upon in this issue at page 1306, supra. The Court asserted that historically excises were not limited to commodities, as alleged, and held that it made no difference that the right taxed was a natural right, rather than a privilege.

[3] U. S. Const., Art. 1, § 8, clause 1.

[4] United States v. Butler, 297 U. S. 1 at 64, 56 S. Ct. 312 (1936); 1 STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES, 5th ed., § 907 ff. (1891).

[5] United States v. Butler, 297 U. S. 1 at 66, 56 S. Ct. 312 (1936).

[6] United States v. Butler, 297 U. S. 1 at 65, 56 S. Ct. 312 (1936); Steward Machine Co. v. Davis, (U. S. 1937) 81 L. Ed. 779.

[7] United States v. Butler, 297 U. S. 1 at 68, 56 S. Ct. 312 (1936).

[8] 297 U. S. 1 at 64.

by expenditure for the general welfare.[9] The possibilities of spending for the general welfare are large, and may offer an avenue to federal powers in new social fields. This is especially true when some conditions are imposed on the states to secure federal assistance, as was brought out more sharply in *Steward Machine Company v. Davis*.[10] The limitation laid down in the AAA case still exists, however, that if the so-called tax or expenditure is thought to be so hedged about with conditions or indirect control that it is thought to be a disguised attempt to control matters left within the field of state powers by the Constitution, it will be invalid.[11] Such an attack was refuted in the principal case, the opinion declaring that any policy of the state to have relief given to its citizens only on a basis of need would be overridden by the superior policy of a valid exercise of the federal power. The old-age pension provisions are peculiarly free from any attempt at regulation of conduct of or within the states. In the *Steward Machine Company* case the principal reasons of the four dissenting justices were the surrender of state powers alleged to be involved.[12] The decision in the instant case reiterates [13] the principle that Congress has a wide discretion as to what constitutes general welfare, and that the courts can override the opinion of Congress only in clear cases. Important also is the emphasis that the Government is not tied to concepts which were known and accepted in 1789, but that what is general welfare depends on present day conditions and needs.[14] Significant elements leading to the conclusion that Congress acted within its discretion in declaring that old age benefits would be for the general welfare were the increasing urban pupulation, the growing policy of many companies to refuse to hire persons beyond certain age limits,

[9] The agricultural problem as considered in the Butler case would seem to have many characteristics similar to those indicated below as found significant by the Court in the old-age dependency problem.

[10] (U. S. 1937) 81 L. Ed. 779. To abtain a reduction in the amount of federal tax levied on employers in a state, the state must have an unemployment benefit system with certain designated characteristics, and deposit state funds for the state system in a special fund in the United States Treasury, to be paid out on demand for the uses under the state plan.

[11] The usual statement of the rule in the tax cases is that if the legislation is not intended as a revenue measure, but for regulation not otherwise allowed to the government, it will be invalid, but if a bona fide tax measure, incidental regulatory effect will not defeat the measure. Bailey v. Drexel Furniture Co. (Child Labor Tax Case), 259 U. S. 20, 42 S. Ct. 499 (1922). The majority opinion in the AAA case held that the taxing and spending there amounted to a system of regulation of agriculture, a local matter. But the line between a valid exercise of the taxing or spending power as an enumerated power which subordinates asserted state rights, and the situation where the taxing or spending will be held merely an attempt at regulation is hard to draw. See dissenting opinions in the AAA case and in the Steward Machine Co. case.

[12] Steward Machine Co. v. Davis, (U. S. 1937) 779.

[13] United States v. Butler, 297 U. S. 1 at 67, 56 S. Ct. 312 (1936); United States v. Realty Co., 163 U. S. 427 at 440, 16 S. Ct. 1120 (1896).

[14] Helvering v. Davis, (U. S. 1937) 81 L. Ed. 804 at 808: "Nor is the concept of the general welfare static. Needs that were narrow or parochial a century ago may be interwoven in our day with the well-being of the nation. What is critical or urgent changes with the times."

the increasing ratio of old people to the total population, loss of savings caused by possible periodic depressions,—in general the facts found by a social survey showing that old age dependency is an increasingly serious social problem, which extends to all the states. The relief of unemployment, whether by old age pensions to persons incapable of work, or by benefits as were upheld in the *Steward Machine Company* case, was said to present not a particular but a general problem. The *Steward Machine Company* case gave the added reason for national interest in a permanent relief plan that it could no longer be doubted within the power of the Federal Government to give relief to the needy in times of depression, as has been done recently, and that some permanent plan might save the national government later necessity of emergency contributions.[15] "The problem is plainly national in area and dimensions." [16] It was also noted in the principal case that the states individually could not deal effectively with the problem,[17] because of difficulty of records of a shifting population, migration so as to overburden states which were lenient with old age relief, lack of financial resources, and hesitancy to handicap local business in competition with business from states without similar burdens. "Only a power that is national can serve the interests of all." [18]

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[15] Steward Machine Co. v. Davis, (U. S. 1937) 81 L. Ed. 779 at 788.

[16] Helvering v. Davis (U. S. 1937) 81 L. Ed. 804 at 809-810.

[17] Inability of the states, or lack of power in the states to deal with a problem, does not necessarily lead to the conclusion that the federal government has such power. United States v. Butler, 297 U. S. 1, 56 S. Ct. 312 (1936); Kansas v. Colorado, 206 U. S. 46, 27 S. Ct. 655 (1907). The contrary "James Wilson—Roosevelt" doctrine is not accepted.

[18] Helvering v. Davis, (U. S. 1937) 81 L. Ed. 804 at 810.