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NOTES

THE GENERAL WELFARE CLAUSE OF THE CONSTITUTION AND THE VALIDITY OF PWA LOANS

One of the more abstruse phases of constitutional law is the meaning and extent of the so-called "general welfare" clause,¹ and the scope of Congress' spending power under it. The Supreme Court has never passed on the question,² and the few lower court decisions have adopted a conservative point of view³ which is directly in conflict with the view apparently taken by Congress.⁴ The Con-

¹ U.S. Const. Art. 1, § 8, cl. 1.

² See *Field v. Clark*, 143 U.S. 649 (1892); *United States v. Realty Co.*, 163 U.S. 427 (1896); *Allen v. Smith*, 173 U.S. 389 (1899). See also argument of counsel in *Massachusetts v. Mellon*, 262 U.S. 447 (1923) at page 456.

³ *U.S. v. Boyer*, 85 Fed. 425 (D.C. Mo. 1898); *Amazon Petroleum Corp. v. Railroad Comm.*, 5 F. Supp. 639 (D.C. Tex. 1934); *Hart Coal Corp. v. Sparks*, U.S. Attorney et al., 7 F. Supp. 16 (D.C. Ky. 1934).

⁴ Congress has adopted acts which could be justified only under a broad interpretation of the "general welfare" clause. Without this, there would be no justification for the Departments of Agriculture and Labor, the Bureaus of Mines and Fisheries, or any of the many relief measures carried on by the Federal government. All of the Federal aids to education would also be

gressional view follows closely that expressed by many of the country's early leaders, including Washington and Hamilton, while the more conservative view was taken by Madison, Monroe, Jackson and Buchanan.⁵

The technique of the Supreme Court in this type of case has been, first of all, to look to the property rights of the plaintiff who asserts the invalidity of the statute in question, to determine whether he has such a claim as will make a justiciable controversy, and then to use language indicating that the problem is a political question for the determination of Congress, and beyond the scope of the court's discretion.⁶ This latter means of evading the necessity of passing on the merits of the issue by calling it a political question, particularly in the Mellon case, has been adversely criticized by thoughtful writers.⁷ It has, however, long been used by the courts in avoiding the consequences of deciding particularly troublesome questions of peculiar public import.⁸ The policy of requiring an adversely affected property right in the plaintiff who, on economic grounds, challenges the constitutionality of an act has also been a useful means of escaping difficult decisions.⁹ The necessity for such a right to make the question a "case or controversy" within the scope of the court's jurisdiction¹⁰ is one of the oldest and best settled points of constitutional law, and is never seriously questioned.¹¹

These issues are among those which have faced the courts in their consideration of cases arising under the Public Works Administration.¹² In *Washington*

beyond Congress' spending power under the narrow construction, but in this latter instance the courts have evidently assumed the grants constitutional. See *Cornell University v. Fiske*, 136 U.S. 152 (1890); *Wyoming v. Irvine*, 206 U.S. 278 (1907).

⁵ See historical discussions in Corwin, *The Twilight of the Supreme Court* (1934), c. IV; Corwin, *The Spending Power of Congress—Apropos the Maternity Act*, 36 *Harv. L. Rev.* 548 (1923); Nicholson, *The Federal Spending Power*, 9 *Temple L.Q.* 3 (1934); Burdick, *Federal Aid Legislation*, 8 *Corn. L.Q.* 324 (1923). See also Tucker, *Judge Story's Position on the So-Called General Welfare Clause*, 13 *A.B.A.J.* 363, 465 (1927).

⁶ *Massachusetts v. Mellon*, 262 U.S. 447 (1923).

⁷ Finkelstein, *Judicial Self Limitation*, 37 *Harv. L. Rev.* 338 (1924); Finkelstein, *Further Notes on Judicial Self Limitation*, 39 *Harv. L. Rev.* 221 (1925); Weston, *Political Questions*, 38 *Harv. L. Rev.* 296 (1925). Finkelstein, although favoring an extremely broad view of the doctrine of political questions, feels that there was ample ground for upholding the Maternity Act statute involved in the Mellon case on the merits of the case.

⁸ *Supra* notes 2 and 7. *Luther v. Borden*, 7 *How. (U.S.)* 1 (1849); *Mississippi v. Johnson*, 4 *Wall. (U.S.)* 475 (1867); *Pacific Telephone and Telegraph Co. v. Oregon*, 223 U.S. 118 (1912).

⁹ *Massachusetts v. Mellon*, *supra*, note 2; see *Cherokee Nation v. Georgia*, 5 *Pet. (U.S.)* 1, 75 (1831).

¹⁰ U.S. Const. Art. 3, § 2.

¹¹ *Chisholm v. Georgia*, 2 *Dall. (U.S.)* 419, 431 (1793); *Muskrat v. U.S.*, 219 U.S. 346, 356 (1911).

¹² Title II of the National Industrial Recovery Act, P.L. No. 67, 73d Cong., 1st Sess., 40 USCA, c. 8 (1933).

Water Power Co. v. City of Coeur d'Alene,¹³ the plaintiff company sought to enjoin a loan made by the PWA to the defendant city for the purpose of erecting a municipal electric power plant which would operate in competition with the plaintiff. It was held that the loan was unconstitutional as a violation of the Tenth Amendment,¹⁴ and could not be justified under the "general welfare" or "interstate commerce" clauses.¹⁵ Furthermore, the plaintiff had such a property right, as owner of a waterworks business and as a taxpayer who would be subject to the payment of an illegal tax, as would enable him to maintain the suit.

In *Missouri Utilities Co. v. City of California, Mo.*,¹⁶ involving similar facts, a contrary result was reached. There the court concluded that the "general welfare" clause is broad enough to allow appropriations for relief of unemployment national in scope, and the loan was, therefore, constitutional. And even assuming the unconstitutionality of the loan, the plaintiff did not have such a property right as would enable it to test the constitutionality of the loan.

It is noteworthy that neither of these courts relied on the "political question" theory, but decided the issues on the merits of the particular cases.¹⁷ The two courts reached directly divergent results as to the sufficiency of property rights adversely affected to establish a "case or controversy." As to the possibility of a property right in the private corporation's franchise, both Idaho¹⁸ and Missouri¹⁹ allow a municipality to enter the public utility business at any time without a special franchise. It therefore follows that in neither case did the private corporation have a contract right to a monopoly, but that it had, at most, a monopoly by legislative grace, subject to competition at any time by a municipality which desired to enter the electric business. On this theory, then, no property right of the plaintiff had been impaired.²⁰ In both cases Harold Ickes,

¹³ District Court, D. Idaho, No. 1268 (1934), abstracted in U.S. Law Week, Vol. 2, No. 18, page 12.

¹⁴ "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."

¹⁵ U.S. Const. Art. 1, § 8, cl. 3.

¹⁶ 8 F. Supp. 454 (D.C. Mo. 1934).

¹⁷ *Supra*, note 7. Had a political question theory been relied on, the courts would probably have been forced to use *Massachusetts v. Mellon*, *supra*, note 2, as authority. This case, although recognized by courts and by authorities as a denial of jurisdiction on this basis, is, in fact, a weak decision on this point. The court so intermingles its decision on this point with its ruling that there is no property right invaded that it might well be said that the latter is the decision of the case while the former is, at most, a dictum. Indeed, the decision of *Massachusetts v. Mellon* was stated to be "merely advisory" in *Fidelity National Bank v. Swope*, 274 U.S. 123, 134 (1927).

¹⁸ 1 Idaho Comp. Stat. (1919), §§ 2371, 4109d.

¹⁹ 2 Mo. Rev. Stat. (1919), §§ 9079, 9089.

²⁰ *Contra*, *Missouri Public Service Co. v. City of Concordia*, 8 F. Supp. 1 (W.D. Mo. 1934), wherein a Federal District court in Missouri came to a contrary result without considering the statute giving the municipality the right to enter the public service business, but relied instead

as Administrator of Public Works, was joined as party defendant. That the company would have no right as a Federal taxpayer to enjoin a government official was conclusively decided by the *Frothingham* case.²¹ A local taxpayer may enjoin illegal acts by the municipality.²² But since it is not illegal for these municipalities to enter the electric business, it is not illegal for them to accept a loan for the construction of a plant. Even if the loan is unconstitutional, the greatest harm that could come to the city would consist in the obligation to repay the loan, and this obligation it is already under if the loan is legal. The plaintiffs are, therefore, not harmed by the transaction, and their property interest as local taxpayers, since it is not adversely affected, should not warrant a suit.²³ It would therefore follow that in neither of these cases has the plaintiff such a right, on any basis, as would sustain a suit by which the constitutionality of the PWA loans must be tested.

But even assuming that such rights do exist, is the PWA beyond the scope of the "general welfare" clause? Both of the courts undertook to answer this question, with different results. The Missouri court adopted the broad construction of the clause suggested by Hamilton and followed by Judge Story,²⁴ namely: that Congress does not have power to *legislate* generally, but may *appropriate* funds for the general welfare. The court further concluded that, since unemployment exists on a national scale, and since the only means by which it can be remedied is by granting funds to places where it does prevail, the loans by the PWA were constitutional, since they were appropriations for the *general*, and not the *local*, welfare.

The Idaho court, on the other hand, adopted the view taken by a few other courts,²⁵ and disregarded the policies of the legislature and executive. By this means, it held that Congress may not appropriate for purposes beyond the scope of the enumerated powers,²⁶ and that the "general welfare" clause is no more than co-extensive with them.

Neither of the courts relied on the existence of an emergency²⁷ in an attempt

on *Frost v. Corporation Comm. of Oklahoma*, 278 U.S. 515 (1929), holding that a franchise to operate a cotton gin in Oklahoma was more than a mere license, and constituted a property right protected by the Fourteenth Amendment.

²¹ *Frothingham v. Mellon*, decided in the same opinion with *Massachusetts v. Mellon*, *supra* note 2.

²² *Crampton v. Zabriskie*, 101 U.S. 601 (1879).

²³ *City of Allegan v. Consumers' Power Co.*, 71 F. (2d) 477 (C.C.A. 6th 1934). It was here held that a power company has no standing as a Federal taxpayer or as a taxpayer and property owner of the city to question the constitutionality of a PWA loan. *Certiorari* to the Supreme Court was denied in 55 Sup. Ct. 100 (1934).

²⁴ 1 Story, *Commentaries* (5th ed.), § 975. See also 48 Harv. L. Rev. 806, 809 (1935) (note).

²⁵ *Supra*, note 3. ²⁶ U.S. Const. Art. 1, § 8, cl. 2 et seq.

²⁷ *Wilson v. New*, 243 U.S. 332 (1917); *Block v. Hirsh*, 256 U.S. 135 (1921); *Marcus Brown Holding Co., Inc. v. Feldman*, 256 U.S. 170 (1921).

to justify the act as constitutional. Nor has the Supreme Court found that an emergency national in scope exists today.²⁸ While the Missouri court, in holding that the PWA, as an aid to unemployment national in scope, was justified as an appropriation for the general welfare, came close to saying that an emergency exists, the Idaho court, in holding the PWA loan unconstitutional, made no attempt to justify it as an emergency measure. The Missouri decision logically held the loan constitutional without finding it necessary to go into the question of emergency, and it seems that courts, in considering this question, will not be forced to rely on emergency powers in supporting these loans.

In view of the history and general acceptance of the view that expenditures for a great variety of purposes are within the power of the federal government, and not subject to close control by the courts, it seems likely that loans of this sort will be found constitutional.

²⁸ See *Nebbia v. New York*, 291 U.S. 502 (1934), where emergency legislation of the state of New York was held valid without considering the existence of an emergency even within the state. See also *Atchison, Topeka and Santa Fe Ry. Co. v. U.S.*, 284 U.S. 248, 260 (1932), where the court took judicial notice of the existence of a "depression," and *Home Building and Loan Assn. v. Blaisdell*, 290 U.S. 398 (1934), where the court held that an emergency existed within the state of Minnesota.