

NOTES

COMPULSORY UNEMPLOYMENT INSURANCE UNDER THE SOCIAL SECURITY ACT

I

Probably the greatest tragedy of the depression has been the devastating scourge of unemployment inflicted upon the laboring populations of the world. Millions¹ in the United States deprived of jobs, have been thrust upon the Federal Government, which, through its relief funds and public works endeavors, has formed the last bulwark against starvation. Although there have been periodical spells of unemployment before in this country, the extent and duration of the present have brought the problem of caring for the unemployed to its deserved place among the most important topics of the day. The awakening social consciousness and the efforts of a progressive administration have resulted in the formation of a plan for a systematic means of caring for the unemployed, through the Federal Social Security Act of 1935² and the state acts³ which have been rushed to passage in consequence thereof.⁴

Unemployment compensation, for which these Acts provide, is a means of dealing with the problem of unemployment which, although untried until recently by federal or state governments in the United States has been put into effect in a number of foreign countries. Great Britain has had a compulsory unemployment compensation law in effect since 1911;⁵ Germany followed the British lead with a comprehensive law in 1927;⁶ and at the present time at least eight foreign countries besides these have

1. There are no absolutely reliable figures on the number of unemployed in the United States during the depression. Probably a safe estimate is 15,000,000 at the depth of the depression in 1933 and 9,000,000 at the end of 1936.

2. 49 Stat. 620, 42 U. S. C. A. sec. 301 et seq. (1935).

3. For state acts passed up to Jan. 1, 1937, see note 15, *infra*.

4. The Federal Act set December 31, 1936, as the deadline before which state acts must be approved if they are to qualify under its credit provisions with respect to taxes payable in 1937 (see notes 81 and 82, *infra*).

5. For an account of Great Britain's experience with unemployment insurance, see Douglas and Director, *The Problem of Unemployment* (1931) 401-426; Beveridge, *Unemployment: A Problem of Industry* (1930) 253-294; Abbott, *The Social Security Act and Relief* (1936) 4 U. of Chi. Law Rev. 45, 55-56; National Industrial Conference Board, *Unemployment Insurance, Lessons from British Experience* (1934).

6. Douglas and Director, *The Problem of Unemployment* (1931) 427-463.

such laws in effect.⁷ In the United States, on the other hand, such schemes as had been devised until the recent movement were voluntary and restricted in their application.⁸ At the start of the depression it has been estimated that they embraced not more than 150,000 workers.⁹

Unemployment compensation does not solve¹⁰ the problem of unemployment, although it is hoped that the actuarial data which will result from it will be helpful in reaching a solution. It is a device which aims at alleviating the evils of unemployment by building up reserves during good times through taxes on employment in order to tide the worker over periods of unemployment by the payment of benefits, in proportion to wages formerly received, from the funds which have been accumulated. The restricted scope of plans¹¹ presently proposed invalidates any hope that they will provide a cure for such acute situations as the present. On the other hand, they will provide immediate relief to those who qualify under them, acting as a cushion against the effects of depression as manifested in reduced purchasing power and the sudden thrusting of the unemployed into the arms of private or governmental charity. More important is the possibility that they will provide the root from which a more comprehensive system may evolve.¹²

The first compulsory plan in the United States was the Wisconsin Act.¹³ Prior to that time there had been numerous in-

7. Austria, Belgium, Czechoslovakia, Denmark, France, Italy, the Netherlands, and Norway; also, many of the cantons of Switzerland.

8. Such plans as existed before the advent of compulsory laws were of three varieties: (1) Union Benefit Plans, sponsored by trade unions; (2) Employers' Plans, sponsored by business concerns; (3) plans sponsored by employers and unions jointly. For a discussion of these, see Douglas and Director, *The Problem of Unemployment* (1931) 464-480.

9. It is estimated by Douglas and Director that the Union Plans embraced approximately 34,700 workers; Employers' Plans, 47,000; Joint Plans, 69,500. See pp. 482-483.

10. After twenty-five years of unemployment compensation in Great Britain, the problem of unemployment is far from solved. See Beveridge, *Unemployment: A Problem of Industry* (1930) 418-420; Beveridge, *Causes and Cures of Unemployment* (1931) 53-59.

11. The state acts so far enacted provide for compensation only for a limited period of time; they specifically except the workers in certain occupations and do not cover all workers within those occupations covered by the act.

12. For an account of the extensions of the British system, originally covering only 2,000,000 workers, to include more and more occupations and employees, see references cited in *supra*, note 5.

13. Wis. L. 1931, c. 20, as amended; L. 1933, cc. 186, 383; L. 1935, cc. 192, 272, 446.

vestigations and attempts at passage of legislation,¹⁴ all of which had resulted in failure. The Federal Social Security Act was enacted into law on August 14, 1935, and it is this which has given to the movement the impetus which has resulted in the passage of acts in thirty-six states and the District of Columbia.¹⁵

The Federal Act does not in itself impose an insurance system.¹⁶ But through a uniform tax¹⁷ upon employers of eight or

14. The first unemployment insurance bill was introduced in the Massachusetts Legislature in 1916. Prior to the passage of the Wisconsin Act, bills had been introduced in seventeen states. Resolutions for investigation of the problem of unemployment were introduced in Congress in 1916 and 1928. State Commissions studied the subject in California, Connecticut, Illinois, Maryland, Massachusetts, New Hampshire, New York, Ohio, Pennsylvania, and Virginia.

15. The following are the acts passed up to Jan. 1, 1937: *Alabama*, Laws 1935, c. 447, as amended by Laws 1936, cc. 156, 194, 195; *Arizona*, S. B. No. 3, Special Session of 1935 Leg.; *California*, Stat. 1935, c. 352; *Colorado*, H. B. No. 1, c. 2, 3rd Special Session of 1935 Leg.; *Connecticut*, S. B. No. 5, c. 2, 1st Special Session of 1935 Leg.; *District of Columbia*, Public No. 386, 74th Congress, 1st Session, as amended (1935); *Idaho*, Id. Laws 1936, c. 12, 3rd Special Session of 23rd Leg.; *Indiana*, Ind. Acts, 1936, c. 4; *Iowa*, S. B. No. 1, 1st Special Session, 1936 Leg.; *Kentucky*, H. B. No. 1, Special Session, 1936; *Louisiana*, La. Laws 1936, H. B. No. 82; *Maine*, H. B. No. 1883, 1st Special Session of 1935 Leg.; *Maryland*, H. B. No. 1, c. 1, 2d Special Session of 1935 Leg.; *Massachusetts*, Laws 1935, c. 479; Laws 1936, cc. 12, 249; *Michigan*, H. B. No. 1, 1st Special Session, 1936 Leg.; *Minnesota*, H. B. No. 11, c. 2, 2d Special Session, 1936; *Mississippi*, Miss. Laws, 1936, H. B. No. 310, c. 176; *New Hampshire*, N. H. Laws 1935, cc. 99, 142; Laws 1936, c. 3; *New Jersey*, Ass. Bill No. 1, c. 270, 1st Special Session, 1936 Leg.; *New Mexico*, H. B. No. 1, 1st Special Session of 1936 Leg.; *New York*, N. Y. Laws, 1935, c. 468; Laws 1936, cc. 117, 697; *North Carolina*, H. B. No. 1, 1st Special Session of 1936 Leg.; *Ohio*, H. B. No. 608, 1st Special Session of 1935 Leg.; *Oklahoma*, H. B. No. 1, 1st Special Session of 1935 Leg.; *Oregon*, Ore. Laws 1935, c. 70; *Pennsylvania*, H. B. No. 1, 2d Special Session of 1935 Leg.; *Rhode Island*, R. I. Laws 1936, c. 2333; *South Carolina*, S. C. Laws 1936, Act. No. 768; *South Dakota*, S. B. No. 1, Special Session, 1936; *Tennessee*, H. B. No. 1, 2d Special Session of 1935 Leg.; *Texas*, S. B. No. 5, 3rd Special Session of 1935 Leg.; *Utah*, Utah Laws 1935, as repealed by H. B. No. 2, Laws of 1936; *Vermont*, H. B. No. 1, 2d Special Session, 1936; *Virginia*, S. B. No. 1-X, 1st Special Session of 1936 Leg.; *Washington*, Wash. Laws 1935, c. 145. *West Virginia*, H. B. No. 1, 2d Special Session of 1936 Leg.; *Wisconsin*, Wis. Laws 1931, c. 20 as amended; Laws 1933, cc. 186, 383; Laws 1935, cc. 192, 272, 446.

The Washington act was declared unconstitutional by the Washington Supreme Court because of a technical mistake in the wording of the act. *Johnson v. State*, 60 P. (2d) 681 (1936). For constitutionality of Alabama statute see note 44, *infra*.

For pending acts see Commerce Clearing House Unemployment Insurance Service. For recommendations for a Missouri act see *St. Louis Post-Dispatch*, Dec. 28, 1936, p. 1: 4.

16. The considerations probably responsible for the Federal Act imposing no Federal system are: (1) constitutional difficulties; (2) administrative

more workers in all except specifically excepted occupations,¹⁸ against which may be credited¹⁹ payments into approved state unemployment funds up to 90% of the amount of the Federal tax, the necessary stimulus has been provided.

State acts must meet certain basic requirements²⁰ before approval can be given to them by the Social Security Board and certain suggestions for state legislation have been issued by the Board,²¹ but wide latitude is in fact accorded to state legislatures in the framing of their acts. Those already enacted differ in details, although they may be considered as falling into three general groups: the employer-reserve type of law,²² the pooled system with merit-rating,²³ and the straight pooled system.²⁴ Some state acts in addition provide for guaranteed-employment systems.²⁵

In more than half the state acts compulsory contributions are made by employers alone. In the others employees as well contribute, although at a lower rate.²⁶ Conspicuous is the absence of

difficulties; (3) political theory, that the states should be allowed to experiment with their own plans. Many state acts, however, contain clauses making their operation contingent on constitutionality of the Federal Act.

17. Social Security Act, sec. 901. See note 80, *infra*. This tax was felt necessary to overcome the reluctance of states to pass laws because of fear that employers within their borders would be put at a competitive disadvantage with employers in other states.

18. *Ibid.*, sec. 907. See note 85, *infra*.

19. *Ibid.*, secs. 902, 909, 910. See *infra*, notes 81 and 82.

20. *Ibid.*, secs. 303, 903. See *infra*, notes 79 and 83.

21. See Social Security Board's *Draft Bills for State Unemployment Compensation of Pooled Fund and Employer Reserve Account Types* (1936).

22. The Wisconsin law, cited in *supra*, note 15, is an example of the employer reserve type. Under this type of law special accounts are maintained for each employer out of which contributions are paid to those in his employ who subsequently become unemployed. The Indiana and Kentucky laws combine characteristics of this and the pool type. The Vermont law gives the employer the option of establishing a separate reserve account or joining a state pooled fund. Utah, which originally had an employer reserve plan, has now changed to the pooled fund type. For discussion, see Brandeis, *The Employer-Reserve Type of Unemployment Compensation Law* (1936) 3 *Law and Contemp. Prob.* 54.

23. This is the most common type of law. Under it contributions are pooled into a state fund, out of which all benefits are paid. Individual employer accounts are kept for purposes of merit-rating (see *infra*, note 30). See Rubinow, *State Pool Plans and Merit Rating* (1936) 3 *Law and Contemp. Prob.* 65.

24. The Maine, Mississippi, New York, N. Carolina, Pennsylvania, Rhode Island, S. Dakota, and Virginia laws set up no plans for merit-rating.

25. California, Idaho, Indiana, Minnesota, Oregon, and Wisconsin treat specially employers guaranteeing employment. The Federal Social Security Act provides for guaranteed-employment accounts in sec. 910 (c).

26. The general provision where contributions by employees are contemplated is that they shall contribute one-half of the amount due from

state contributions, one of the features of the British system.²⁷ Payments are assessed at a fixed percentage²⁸ of the total payrolls of employers affected,²⁹ although adjustments³⁰ on the basis of the employer's employment record may be made and are provided for in the Federal Act.³¹

Benefits are payable to unemployed who have been employed a required number of weeks³² during a stipulated preceding period,³³ have been unemployed for a designated period of time denominated a "waiting period,"³⁴ are available for work, and are not subject to certain disqualifications.³⁵ These benefits are as-

their employers. See Massachusetts Unemployment Compensation law, sec. 3(b).

27. In Great Britain the state has been called upon to contribute about one-third or a little less. In the United States there are contributions from the Federal Government through grants-in-aid (Social Security Act, secs. 301-303), but no state acts provide for state contributions.

28. The state acts generally follow the tax provisions of the federal act in the assessment of contributions: for the first year, 1% or 0.9%; for the second year, 2% or 1.8%; for the third year and thereafter, except as affected by merit-rating, 3% or 2.7%.

29. Most state acts except those employers excepted by sec. 907 of the Social Security Act (see *infra*, note 80). Coverage is also limited by provisions which make the act applicable only to employers of a certain number of employees: *e. g.*, Oklahoma, 8 or more; Connecticut, 5 or more; New York, 4 or more. The District of Columbia, Idaho, and Pennsylvania acts provide for contributions of employers of one or more.

30. Some states, like Massachusetts, provide for a commission to adjust rates on the basis of employment records. Others set up a definite mathematical formula by which rates are adjusted after the employer's contributions over and above the amount of benefits paid out have reached a certain percentage of his annual payroll. The Oklahoma Act, *e. g.*, provides for a reduction from 2.7% to 1.8% when this percentage has reached 7.5%; when it has passed 10%, there is a further reduction to 0.9%. Provision also is made for increase of contribution rate to 3.6% if benefits for a certain period exceed contributions. Some states provide for a complete release from payments on the basis of employment records: *e. g.*, Indiana.

31. Social Security Act, secs. 909 and 910.

32. State provisions vary. Generally they follow the Federal Draft Act, which provides for payments to a person who has had at least 13 weeks of employment during the year preceding unemployment. Fed. Draft Act, sec. 4(c). Some states require as much as 26 weeks, *e. g.*, California and Oregon.

33. During a year or two years.

34. Generally, two or three weeks. The Washington act requires six weeks. Workers are not charged with more than one waiting period during a single year.

35. Certain acts of the employee will disqualify him under the unemployment compensation acts altogether or will result in adding to the waiting period and reducing the duration of benefits. Under the Massachusetts act, *e. g.*, disqualifications enumerated include: discharge for misconduct, labor dispute, voluntary leaving, refusal of suitable employment, unemployment by reason of commitment to a penal institution, wilful failure to give correct amount of earnings when filing claim. If the applicant for compensation is receiving benefits under Workmen's Compensation, he is disqualified except as to the amount by which unemployment benefits may exceed his Workmen's Compensation benefits.

essed at a rate approximately 50% of the average full-time wages received by the claimant, with maximum and minimum limits as to amount.³⁶ To date few of the acts include provisions for adjustment on the basis of need of the recipient.³⁷ Benefits, once they become payable, continue for a definite number of weeks,³⁸ at the end of which time the employee, if he has not found work elsewhere, is thrust back upon other forms of relief. An important element of the acts is the establishment of employment bureaus for the purpose of securing re-employment.

The legislation has been greeted with a great deal of comment and criticism. There are obstacles which may prevent it from becoming established in its present form at the present time, but even if this is so it is important as evidencing popular recognition of the need for a more systematic handling of the intense unemployment problem. One such obstacle is presented by the procedural requirements³⁹ of certain state constitutions. Most

36. Most acts require that benefits shall not exceed \$15 per week. Nor shall benefits be less than a certain amount, *e. g.*, \$5 (Mass.), \$7 (Cal.), \$8 or three-quarters of the weekly full-time wage whichever is the lesser (Okl.).

37. The District of Columbia act provides for benefits to 40% of the claimant's prior wages, with additions of 10% for a dependent spouse, 5% for each dependent relative, to a maximum of 65% or \$15.

38. Most acts provide for a duration of one-fourth of a week for each week of employment during the preceding two years, with, however, a maximum of about twelve weeks of compensation within a year.

39. In Missouri possible obstacles to the enactment of an unemployment compensation law may be met in sections 15 and 19 of article X of the Missouri Constitution. Section 15 requires the State Treasurer to deposit all funds in the treasury "in such bank or banks as he may, from time to time, with the approval of the Governor and the Attorney-General, select, the said bank or banks giving security, satisfactory to the Governor and the Attorney-General, for the safe-keeping and payment of such deposit when demanded. . . ." The Social Security Act requires, by Section 904(a), deposit "directly with the Secretary of the Treasury or with any Federal reserve bank or member of the Federal Reserve System designated by him for such purpose." California (Article XI, Section 16½) has in its Constitution a similar provision to Missouri's, (although it does not require security) and the California Court has held in *Gillum v. Johnson*, 4 U. S. Law Week 420 (Cal., 1936), that the California Act was not unconstitutional on this ground, saying, "Since the state act has been approved by the proper federal authority, it must be assumed that such approval carried with it an approval of the state act as it could operate in this state and that some national bank or banks in this state would be designated for the deposit of the state unemployment funds."

Section 19 requires that "No moneys shall ever be paid out of the treasury of this State, or any of the funds under its management, except in pursuance of an appropriation by law. . . ." Such a provision should not be allowed to prevent the payments from "special funds" without specific appropriations. A similar New York provision, (New York Const., Art. III, sec. 21) has been so construed. *Kings County Lighting Co. v. Maltbie*, 280

important are difficulties which may be encountered by the state and federal acts under the United States Constitution.

II

Fear that the Supreme Court would declare unconstitutional the state unemployment insurance acts thus far enacted has been in large part allayed by the recent action of the Court in affirming without opinion,⁴⁰ by a 4 to 4 vote, the decision of the New York Court of Appeals in *Chamberlain v. Andrews*,⁴¹ holding constitutional the New York State Act.⁴² Mr. Justice Stone did not participate in the decision, but it is felt that, had he been on the bench, he would have voted in favor of the act's constitutionality. The inference from the Court's action is that other state acts will likewise be sustained, since the New York Act is one of the most liberal of the acts passed.⁴³ It is auspicious that the decision came before other courts, which might be inclined to stricter constitutional interpretation than the New York Court, had had a chance to rule on other state acts, although despite the Supreme Court's action the United States District Court in Alabama recently declared the Alabama State Act unconstitutional.⁴⁴ In California and Massachusetts, on the other hand, the state supreme courts have held the state acts constitutional.⁴⁵

There seems to be little justification for considering the constitutional issues involved in these state laws from the standpoint of their validity as taxing measures.⁴⁶ In their general

N. Y. Supp. 560 (1935). But in Missouri the holdings are not so clear. Ex parte Lucas, 160 Mo. 218, 61 S. W. 218 (1901), however, indicates a similar result, allowing a State Board of Examiners to collect license fees, retain them, and disburse them. See also, State ex rel. v. Thompson, 305 Mo. 57, 264 S. W. 598 (1924).

40. 4 U. S. Law Week 301 (1936).

41. 271 N. Y. 1, 2 N. E. (2d) 22 (1936). See Comments, 5 Fordham L. Rev. 499 (1936); 31 Ill. L. Rev. 386 (1936); 14 N. Y. U. L. Q. Rev. 95 (1936).

42. New York Labor Law, sec. 500 et seq.; N. Y. Laws 1935, c. 468, as amended.

43. No merit-rating system is set up by the New York Act. See supra, note 30.

44. Gulf States Paper Co. v. Carmichael, So. Coal & Coke Co. v. Carmichael, 4 U. S. Law Week 450 (D. C. D. Ala., Dec. 15, 1936).

45. *California*: Gillum v. Johnson, 4 U. S. Law Week 420 (1936); *Massachusetts*: Howes Bros. Co. v. U. C. C. (1936).

46. See Rice, A Note on the Constitutionality of State Unemployment Compensation Laws (1936) 3 Law & Contemp. Prob. 138, 139-142. For constitutional issues which might arise were the contributions considered as taxes, see Epstein and Malisoff, Some Constitutional Obstacles to Unemployment Insurance (1935) 9 Social Security, No. 9, p. 3.

nature they resemble the workmen's compensation acts,⁴⁷ the constitutionality of which the courts have regarded as dependent upon their validity as exercises of the states' police power.⁴⁸ The majority of the New York Court of Appeals took the view that it was immaterial whether the measure should be considered as embodying a tax or an exercise of the police power,⁴⁹ but the dissenting justices plainly considered it as the latter.⁵⁰ The California, Massachusetts, and Alabama Federal Courts have considered similar acts as exercises of the police power.⁵¹ Furthermore, there are provisions in the state acts which are patently inconsistent with those of the usual taxing measures.⁵² The important constitutional issues therefore center in the applicability of limitations in the Fourteenth Amendment to the state unemployment insurance acts as exercises of the police power of the states.

Compulsory unemployment insurance was thought by many to be legislation beyond the scope of the police power. While this power justifies the enactment of measures reasonably related to great public needs,⁵³ the courts have seen fit to lay down limitations upon the exercises of the legislatures' powers.⁵⁴ Thus a measure will not be sustained which involves "a palpable invasion of rights secured by fundamental law."⁵⁵ Nor will it be sanctioned where the courts can say that its object is not legiti-

47. Like the Workmen's Compensation Acts, the Unemployment Insurance Acts impose a new liability upon employers and shift a new risk to business, for the protection of employees. Both are mechanically similar, involving contributions to a state fund and the payment of benefits therefrom.

48. The constitutional aspects have been considered as if they were exercises of the police power. See *Mountain Timber Co. v. Washington*, 243 U. S. 219, 37 S. Ct. 260, 61 L. ed. 685 (1917); *New York C. R. Co. v. White*, 243 U. S. 188, 37 S. Ct. 247, 61 L. ed. 667 (1917). In *Sayles v. Foley*, 38 R. I. 484, 96 Atl. 343 (1916), the court refused to consider cases having to do with taxes.

49. 2 N. E. (2d) 22, 26. The court found that the power to enact such legislation necessarily existed in the state; hence, it was unnecessary to decide whether it was an exercise of the taxing or of the police power.

50. 2 N. E. (2d) 22, 30.

51. *Supra*, notes 44 and 45.

52. The acts are not in the form of revenue measures; merit-rating is inconsistent with the provisions of a taxing statute; funds are limited to payment of benefit claims; penalties inconsistent with taxes are prescribed.

53. *Noble State Bank v. Haskell*, 219 U. S. 104, 31 S. Ct. 186, 55 L. ed. 112 (1911).

54. See *Brown, Due Process, Police Power, and the Supreme Court* (1927) 40 *Harv. L. Rev.* 943, 953; *Powell, The Supreme Court and State Police Power, 1922-1930* (1932) 18 *Va. L. Rev.* 597.

55. See *Mugler v. Kansas*, 123 U. S. 623, 661, 8 S. Ct. 273, 31 L. ed. 205 (1887).

mate, as where it unduly restricts liberty to engage in a lawful business.⁵⁶ Legislation, furthermore, must be reasonably related to a legitimate object and not arbitrary. The Supreme Court refused to sustain a state act requiring partners and members of corporations owning drug stores to be licensed pharmacists because it did not bear a reasonable relation to the legitimate object of safeguarding the public health.⁵⁷ Legislation has been sustained where it imposed limitations of working hours upon workmen in mines and smelteries⁵⁸ and upon women workers in certain occupations⁵⁹ and where it regulated hours and payment for overtime work,⁶⁰ but the court has refused to find in minimum wage legislation a reasonable exercise of the police power.⁶¹

In the Supreme Court's attitude on the minimum wage cases cited above there was ground for belief that compulsory unemployment compensation would be declared unconstitutional as arbitrary legislation which deprived employers of their property without due process. It should be noted, however, that in the minimum wage cases the court was concerned with the legislation's result of depriving employers and employees of the right to bargain as to wage scales.⁶² In the unemployment insurance laws there is no such consequence and there is ample authority to sanction the sustaining of such acts. The decision in the *Railroad Retirement* case,⁶³ where the Federal act⁶⁴ in question bore some resemblance to the state unemployment insurance laws, is not in point because of the absence of police power in the Federal Government outside the field of interstate commerce.⁶⁵ State

56. *Adams v. Tanner*, 244 U. S. 590, 37 S. Ct. 662, 61 L. ed. 1336 (1917).

57. *Liggett Co. v. Baldridge*, 278 U. S. 105, 49 S. Ct. 57, 73 L. ed. 204 (1928).

58. *Holden v. Hardy*, 169 U. S. 366, 18 S. Ct. 383, 42 L. ed. 780 (1898).

59. *Muller v. Oregon*, 208 U. S. 412, 28 S. Ct. 324, 52 L. ed. 551 (1908).

60. *Bunting v. Oregon*, 243 U. S. 426, 37 S. Ct. 435, 61 L. ed. 830 (1917).

61. *Adkins v. Children's Hospital*, 261 U. S. 525, 43 S. Ct. 394, 67 L. ed. 785 (1923); *People ex rel. Tipaldo v. Morehead*, 298 U. S. 587, 56 S. Ct. 918 (1936). The U. S. Supreme Court has granted certiorari to review the Washington Supreme Court's action in sustaining a Washington minimum wage law. *West Coast Hotel v. Parrish*, 57 S. Ct. 40 (1936). The U. S. District Court for So. District Ohio recently upheld an Ohio minimum wage law. *Walker v. Chapman*, 4 U. S. Law Week 332 (1936).

62. *Adkins v. Children's Hospital*, 261 U. S. 525, 43 S. Ct. 394, 67 L. ed. 785 (1923).

63. *R. R. Retirement Board v. Alton R. R. Co.*, 295 U. S. 330, 55 S. Ct. 758, 79 L. ed. 1458 (1935), holding unconstitutional the Federal Act.

64. 48 Stat. 1283, 45 U. S. C. A. sec. 201 et seq. (1934). The act established a compulsory retirement system for employees of all railroad carriers in interstate commerce. Through the compulsory contributions from the carriers a fund was to be provided for the payment of pensions.

65. See 2 N. E. (2d) 22, 26-27.

legislation has been sustained where exactions were required which were supported by an ulterior public advantage and characterized by a sharing in a scheme of mutual benefits, such as the establishment of a depositors' guaranty fund.⁶⁶ Most convincing is the authority of the compulsory workmen's compensation acts, where the courts have recognized that accidents are foreseeable consequences of the employment relation⁶⁷ and that exactions for the purpose of providing payments under them are reasonable exercises of the police power.⁶⁸ Although unemployment is caused by factors in large part beyond the employer's control, still it is a consequence of the employer-employee relationship which might reasonably be charged as a cost upon industry.⁶⁹

Merit-rating provisions in most state acts provide for rewarding employers with good employment records by lower contribution rates,⁷⁰ thus reducing the effectiveness of the argument that the acts are arbitrary schemes by which employers with good records will carry the burden,⁷¹ although in the New York Act, sustained by the Supreme Court, no such provision is included. That the acts are unconstitutional because of arbitrary classification in that they are applicable only to employers of a specified number of employees⁷² and that they are not applicable to certain excepted occupations are objections which do not involve the principle of the acts and could be overcome by amendment. However, if the classification is based on a principle which bears a reasonable relation to some legitimate object and if the law presumably hits the evil where it is most felt, it is not to be overthrown because there are other instances where it might have

66. *Noble State Bank v. Haskell*, 219 U. S. 104.

67. *Mountain Timber Co. v. Washington*, 243 U. S. 219.

68. *New York C. R. v. White*, 243 U. S. 188.

69. Mr. Justice Holmes, concurring, in the *Arizona Employers' Liability Cases*, 250 U. S. 400, 433, 39 S. Ct. 553, 63 L. ed. 1058 (1919), suggested with regard to the Employers' Liability Acts in question that, "It is reasonable that the public should pay the whole cost of producing what it wants and a part of that cost is the pain and mutilation incident to production. By throwing the loss upon the employer in the first instance we throw it upon the public in the long run and that is just." Might not this reasoning be extended to include suffering and hardship from unemployment?

70. *Supra*, note 30.

71. See *Gulf States Paper Corp. v. Carmichael*, 4 U. S. Law Week 450.

72. See case cited *supra*, note 71. The court there suggested possible unfair competitive conditions in the same industry between employers of seven or less employees and those of eight or more because of higher costs in the latter due to the Alabama Act's applying only to employers of eight or more. But the same considerations are presented by the New York law, applying to employers of four or more, sustained by the Supreme Court.

been applied.⁷³ To be unconstitutional, classification must produce unreasonable and arbitrary inequality.⁷⁴

III

More difficult problems of constitutionality are presented by the unemployment compensation sections of the Federal Social Security Act. These sections are Title III,⁷⁵ providing for grants to states for unemployment compensation administration, and Title IX,⁷⁶ providing for a tax to be levied on employers of eight or more and for certain credits to be allowed against that tax.

There is little doubt as to the constitutional validity of the provisions of Title III. This part of the Act is modelled after the Sheppard-Towner Maternity Act,⁷⁷ providing for similar grants-in-aid, sustained by the Supreme Court in *Massachusetts v. Mellon* and *Frothingham v. Mellon*.⁷⁸ Under it the grants are conditioned upon the state acts' including certain general characteristics⁷⁹ which are not dissimilar from the requirements of the Maternity Act.

Title IX of the Act provides for a tax⁸⁰ on employers of eight or more with provisions for credit⁸¹ against the tax of the amount

73. *Radice v. New York*, 264 U. S. 292, 44 S. Ct. 325, 68 L. ed. 690 (1924), citing *Keeokee Coke Co. v. Taylor*, 234 U. S. 224, 34 S. Ct. 856, 58 L. ed. 1288 (1914).

74. *Fidelity Mutual Life Ass'n v. Mettler*, 185 U. S. 308, 325, 22 S. Ct. 662, 46 L. ed. 922 (1902).

75. Social Security Act, secs. 301-303.

76. *Ibid.*, secs. 901-910.

77. 42 Stat. 224, 42 U. S. C. A. sec. 161 (1921).

78. 262 U. S. 447, 43 S. Ct. 597 (1922). It was held in this case that neither the state nor a taxpayer could challenge the validity of the Act since, the state being under no obligation to accept the federal offer, it had suffered no violation of any right, and since the citizen's interest in the general funds of the Treasury was too minute and indeterminable to furnish a basis for challenge of the use of such funds.

79. Social Security Act, sec. 303, provides: Acts must be approved by the Social Security Board and include provisions which assure adequate methods of administration; payment of benefits through public employment offices; opportunity for fair hearing and trial for disappointed claimants; payment of receipts to Unemployment Trust Fund of the Treasury; expenditure of all money drawn out of the Fund by the State in the payment of unemployment compensation; the making of reports to the Social Security Board; availability of information on recipients of compensation to other agencies of the United States.

80. *Ibid.*, sec. 901. Taxes are levied upon employers with respect to having individuals in their employ equal to percentages of the total wages payable by him as follows: (1) 1% during the year 1936; (2) 2% during the year 1937; (3) 3% after Dec. 31, 1937.

81. *Ibid.*, sec. 902. "The taxpayer may credit against the tax . . . the amount of contributions, with respect to employment during the taxable year, paid by him . . . into an unemployment fund under a State law. The total credit allowed to a taxpayer under this section for all contributions paid into unemployment funds . . . shall not exceed 90 per centum of the tax against which it is credited. . . ."

of contributions, with respect to employment, paid into an unemployment fund under a state law, up to 90% of the tax against which they are credited. Certain additional credit is provided for in other sections of the Act,⁸² so that consideration may be given to state acts containing provisions for reduction in contributions of employers with acceptable employment records. Conditions are given for the approval of state laws.⁸³ An unemployment trust fund is created;⁸⁴ and the term "employment" as used in the Act is qualified.⁸⁵

The provisions for credit against the Federal tax are obviously aimed at encouragement, if not compulsion, of the passage by the states of unemployment compensation acts. A similar plan was used in the Revenue Act of 1926⁸⁶ where a credit was allowed against the Federal inheritance tax of amounts paid under state acts, not to exceed 80% of the Federal tax. This provision was held constitutional in *Florida v. Mellon*.⁸⁷ There was no ques-

82. *Ibid.*, secs. 909 and 910.

83. *Ibid.*, sec. 903. State laws must provide that: (1) all compensation is to be paid through public employment offices in the State or such other agencies as the Board may approve; (2) No compensation shall be payable with respect to any day of unemployment occurring within two years after the first day of the first period with respect to which contributions are required; (3) all money received in the unemployment fund shall immediately, upon such receipt be paid over to the Secretary of the Treasury to the credit of the Unemployment Trust Fund; (4) All money withdrawn from the Unemployment Trust Fund by the State Agency shall be used solely in the payment of compensation, exclusive of expenses of administration; (5) Compensation shall not be denied in such State to any otherwise eligible individual for refusing to accept new work under certain specified conditions . . .; (6) All the rights, privileges, or immunities conferred by such law or by acts pursuant thereto shall exist subject to the power of the legislature to amend or repeal such law at any time.

84. *Ibid.*, sec. 904.

85. *Ibid.*, sec. 907 (c) "The Term means any service performed within the United States by an employee for his employer, except—(1) Agricultural labor, (2) Domestic service in a private home, (3) Service performed as an officer or member of the crew of a vessel on the navigable waters of the United States; (4) Service performed by an individual in the employ of his son, daughter, or spouse, and service performed by a child under the age of twenty-one in the employ of his father or mother; (5) Service performed in the employ of the United States Government or of an instrumentality of the United States; (6) Service performed in the employ of a state, a political subdivision thereof, or an instrumentality of one or more states or political subdivisions; (7) Service performed in the employ of a corporation, community chest, fund, or foundation, organized and operated exclusively for religious, charitable, scientific, literary, or educational purposes, or for the prevention of cruelty to children or animals, no part of the net earnings of which enures to the benefit of any private shareholder or individual."

86. 44 Stat. 9, 69, 70, 26 U. S. C. A. sec. 413 (1926).

87. 273 U. S. 12, 47 S. Ct. 265, 71 L. ed. 511 (1927).

tion in that case of the constitutionality of the taxing measure itself, but its relevancy in the present issue is that it indicates that the tax, if otherwise constitutional, will not be invalidated because of the provisions for credit.

Fatal defects must be found elsewhere if they in fact exist. It is under the taxing power of Congress⁸⁸ that the unemployment insurance sections of the Social Security Act must stand or fall. In many decisions the Supreme Court has sustained taxes which in their practical effect have amounted to regulations. Among those sustained were: a tax upon the circulating notes of state banks,⁸⁹ a tax on oleomargarine,⁹⁰ the Harrison Narcotic Drug Act, imposing a tax on the manufacture, importation, sale, or gift of narcotics.⁹¹ In the latter case four justices dissented on the ground that the statute was a mere attempt by Congress to exert a power reserved to the states.⁹² Shortly after the decision was handed down the Court ruled unconstitutional the taxes contested in the *Child Labor Tax Case*⁹³ and in *Hill v. Wallace*⁹⁴ on the ground that the taxes were not for the purpose of raising revenue, but that they showed on their face that they were regulatory measures, attempts under the guise of the taxing power to accomplish something not reasonably related to the raising of revenue.

In the *A. A. A.* case⁹⁵ the Court said, in declaring unconstitutional the processing tax in the Agricultural Adjustment Act,⁹⁶ that an "exaction cannot be wrested out of its setting, denominated an excise for raising revenue and legalized by ignoring its purpose as a mere instrumentality for bringing about a desired end."⁹⁷ The Court consequently looked at the purpose of the

88. U. S. Constitution, Art. I, Sec. 8.

89. *Veazie Bank v. Fenno*, 8 Wall. 533, 19 L. ed. 482 (1869).

90. *McCray v. U. S.*, 195 U. S. 27, 24 S. Ct. 769, 49 L. ed. 78 (1904).

91. *U. S. v. Doremus*, 249 U. S. 86, 39 S. Ct. 214, 63 L. ed. 493 (1919).

92. Chief Justice White, Justices McKenna, Van DeVanter, and McReynolds. 249 U. S. 86, 95 (1919).

93. *Bailey v. Drexel Furniture Co.*, 259 U. S. 20, 42 S. Ct. 449, 66 L. ed. 817 (1922), where the act in question imposed a tax on employers who employed children under a certain age.

94. 259 U. S. 44, 42 S. Ct. 453, 66 L. ed. 822 (1922), where the act in question imposed a tax upon all contracts for the sale of grain for future delivery except sales on Boards of Trade designated by the Secretary of Agriculture upon fulfillment by such boards of certain requirements set forth in the act.

95. *U. S. v. Butler*, 297 U. S. 1, 56 S. Ct. 312, 80 L. ed. 287 (1935).

96. 48 Stat. 31, 7 U. S. C. A. sec. 601 et seq. (1933).

97. 297 U. S. 1, 61. In *U. S. v. Doremus*, supra, note 91, the Court had said that it could not hold, with regard to the Harrison Act, that Congress could not find the regulations necessary in order to prevent evasion of the

whole Act, which it found to be the regulation of agricultural production; it found that the tax was a mere incident of the regulation; and that since the regulation was beyond the power of Congress as limited by the Tenth Amendment,⁹⁸ the tax was unconstitutional.

There can be little doubt that if the Court wishes the language of the *A. A. A.* case can be stretched to include the exaction under the Social Security Act with the result that it could be held to be a measure primarily regulatory and not sufficiently connected with the raising of revenue. Among the features of the Act which the Court would cite to support such a conclusion would be: the true purpose of the Act as reflected in its title⁹⁹ and in the intentions of its framers;¹⁰⁰ regulatory provisions which the Court could find were not reasonably related to the raising of revenue and hence an unwarranted attempt to accomplish indirectly, through taxing and spending, what Congress could not achieve by more direct means. Among such provisions undoubtedly would be included the credit allowed to taxpayers in states enacting approved unemployment compensation acts¹⁰¹ and the necessity of approval of state acts by the Social Security Board as a condition of credits against the Federal tax.¹⁰² The Court could find that these provisions are an attempt to set up a system of unemployment insurance under the taxing power, and thus to inject the Federal Government into a field which it could not enter by more direct means since unemployment insurance is a matter of state concern, reserved to the states under the Tenth Amendment.¹⁰³

On the other hand there are obvious differences between the

tax and to assist in raising revenue, although the revenue there was purely incidental to the regulatory purposes of the Act.

98. U. S. Constitution, Art. X: "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."

99. "An Act: To provide for the general welfare by establishing a system of Federal old-age benefits and by enabling the several States to make more adequate provisions for aged persons, blind persons, dependent and crippled children, maternal and child welfare, public health, and the administration of their unemployment compensation laws; to establish a Social Security Board; to raise revenue; and for other purposes." The mention of revenue appears from the wording of the title to be secondary.

100. 79 Cong. Rec. 5468 (1935).

101. *Supra*, notes 79 and 83.

102. *Supra*, notes 81 and 82.

103. See Denby, *The Case Against the Constitutionality of the Social Security Act* (1936) 3 *Law & Contemp. Prob.* 315; Armstrong, *The Federal Social Security Act and Its Constitutional Aspects* (1936) 24 *Cal. L. Rev.* 247.

tax in the Social Security Act and the taxes in the Agricultural Adjustment Act, the Child Labor Tax Act, and the Grain Exchange Tax Act, which would justify the Court in holding it a constitutional use of the taxing power. First is the general truth that unemployment relief is a field which the Federal Government has already entered and from which it cannot, without great difficulty, withdraw.¹⁰⁴ Then there are certain differences in the provisions of the Act itself. Among these are the substantial revenue which will go into the general Treasury¹⁰⁵ over and above the credit extended to employers in states which have approved regulation and the absence of detailed regulation of individual producers which characterized the A. A. A.¹⁰⁶ Under the Social Security Act these regulations are left to the states. All that is required is conformity to a minimum of Federal requirements.

IV

At the time of this writing there has been but one Federal decision on the constitutionality of the Federal Act. In *Davis v. Boston & Maine R. R.*¹⁰⁷ the Federal Act was declared by the United States District Court in Boston to be a proper exercise of the taxing power. A Supreme Court decision will, of course, be needed¹⁰⁸ before the validity of the Act is finally settled. Certain general conclusions, however, may be stated. If the Act is declared unconstitutional some other means must be devised for dealing with such a vital and continuing problem. If it is ruled constitutional, the Act will be a landmark in American legislation. For here is a means by which the Federal Government can force the states to act in fields where it could not act directly, subject, of course, to the limitations in the Fifth and Fourteenth Amendments.

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104. During the depression Federal aid was extended to the unemployed not only through direct grants of money, but through such emergency agencies as the C. C. C., W. P. A., P. W. A., F. E. R. A., etc. In the regulations attempted in the acts questioned in the A. A. A. case, the Child Labor case, and *Hill v. Wallace*, the Federal Government had no such established interest.

105. 10% of the tax is to be collected from employers under all circumstances.

106. Under the Social Security Act the detailed regulations are left to the states. Only general requirements of state acts are specified. See *supra*, notes 79 and 83. In the A. A. A. the most minute details of planned crop reduction, marketing agreements, issuance of licenses, etc., were left to the Secretary of Agriculture. See 7 U. S. C. A. sec. 601 et seq.

107. 4 U. S. Law Week 416 (1936).

108. 4 U. S. Law Week 429 (1936). Cert. denied Jan. 4, 1937.