Urban Law Annual ; Journal of Urban and Contemporary Law

Volume 1973

January 1973

Equal Protection and the Social Security Offset to Workmen's Compensation Beneficiaries

EQUAL PROTECTION AND THE SOCIAL SECURITY OFFSET TO WORKMEN'S COMPENSATION BENEFICIARIES

After perhaps a lifetime of paying Social Security taxes, many taxpayers may consider the proceeds they may eventually receive simply as a return of past contributions. Despite popular sentiment, the Supreme Court of the United States considers the payments to be much less certain. In *Richardson v. Belcher*[1] the Court denied that Social Security disability benefits were accrued property rights. The Court also upheld a statute which, in certain instances, reduces Social Security payments to those beneficiaries who receive supplemental income from state workmen's compensation programs; the enactment was found constitutional despite the fact that the statute does not similarly offset the Social Security payments of individuals who receive funds from sources with purposes comparable to workmen's compensation.

In March 1968, Raymond Belcher broke his neck while employed by a company which participated in West Virginia's state workmen's compensation program.[2] After meeting statutory requirements,[3] he began receiving monthly payments of $203.60 from the fund. Federal Social Security disability insurance benefits[4] were granted beginning in October 1968,[5] in the amount of $329.70 per month, but in January 1969, the allowance was reduced to $225.30 pursuant to the offset provision of section 224 of the Social Security Act.[6] Section 224 provides that federal benefits will be withheld to the extent that the combined workmen's compensation and Social Security disability payments exceed 80 per cent of the worker's previous average current earnings.[7]

1. 404 U.S. 78 (1971).
2. W. VA. CODE ANN. § 23 (1970).
3. *Id.* § 23-4-1.
4. Social Security Act § 223, 42 U.S.C. § 423 (1970).
5. 42 U.S.C. § 423(c)(2) (1970) provides for a six-month waiting period before benefits become payable.
6. Social Security Act § 224, 42 U.S.C. § 424(a) (1970).
7. *Id.*

An offset is a device used to coordinate payments from various assistance sources to effectuate the policy of avoiding excessive compensation to an individual. When total payment exceeds that level considered advisable by policy, an offset reduces the stipend from one or more sources of benefits to stabilize total assistance at what is declared to be the appropriate level. Despite policy considerations, an offset would not be permitted if the legislative scheme were not constitutionally acceptable.

One commentator has suggested that Social Security and workmen's compensation are elements of an unarticulated federal-state arrangement meant to protect workers from wage losses caused by disabling injuries.[8] The object of the "system" is to provide the worker with an income approximating that of his pre-disability level. Incomplete protection under either program alone reveals a "supplementation approach":

> It is generally felt that public insurance programs, particularly Federal Old-Age, Survivors, and Disability Insurance, should provide basic protection against the major or catastrophic hazards to work income (such as permanent and total disability), and that supplemental protection should be provided by public assistance programs [such as workmen's compensation] and by private insurance.[9]

Conceptually, the "supplemental" workmen's compensation is regarded as compensation for that decrease in earning power which is due to a disabling injury.[10] Payments are received as a substitute for a common law tort action,[11] with the amount of the benefits being modest in consideration for the certainty of the recovery and the avoidance of litigation expenses.

The Social Security offset devised by Congress reflected a decision to eliminate the amount by which an individual's Social Security and workmen's compensation payments exceed 80 per cent of his pre-disability average earnings.[12] By specifying only workmen's compen-

---

8. 3 A. LARSON, THE LAW OF WORKMEN'S COMPENSATION 508.172 (1971).

9. Abraham & Wolkstein, *Workmen's Compensation and the Social Security Disability Program: A Contrast*, 16 VAND. L. REV. 1055, 1060 (1963).

10. E. BLAIR, REFERENCE GUIDE TO WORKMEN'S COMPENSATION LAW 1-2, 11-1 (1971).

11. *Id.* at 1-1.

12. Social Security Act § 224, 42 U.S.C. § 424(a) (1970).

sation as a payment which would justify offset-reduction of Social Security benefits, Congress effectively permitted any amount of private insurance or tort claim proceeds to be received by an individual without offset treatment.[13]

The primary disagreement in *Belcher* between the majority and the dissents was with respect to the constitutionality of the statutory classification. The scheme reduced the federal benefits of those recipients who concurrently received workmen's compensation but did not reduce the Social Security payments of those similarly situated and receiving other benefits. The equal protection approaches taken by the separate opinions were indicative of the different judicial philosophies now represented on the Supreme Court. The majority's traditional review did not expose the inconsistencies of the statute which were discovered by the dissenters who advocated more active judicial review. The Court's standard for review of social welfare legislation was whether the statute was "rationally based and free from invidious discrimination,"[14] quoting the 1970 case of *Dandridge v. Williams*.[15] Justices Marshall and Brennan totally disagreed with the *Dandridge* test, stating that since the funds denied Belcher by the Social Security offset were of great importance to the recipient, the judicial review should go beyond rationality to scrutinize " 'the character of the classification in question, the relative importance to individuals in the class discriminated against of the governmental benefits that they do not receive, and the asserted state [or federal] interests in support of the classification.' "[16]

The emphasis of *Dandrige* and the *Belcher* majority on "rationality" is a manifestation of the Supreme Court's recently renewed

13. One commentator has suggested that workmen's compensation is an element of the disability coverage scheme, properly subject to an offset, while tort claims are not. "[T]ort litigation is an adversary contest to right a wrong between the contestants; workmen's compensation is a system, to supply security to injured workers and distribute the cost to the consumers of the products." 1 A. LARSON, *supra* note 8, at 14. One might question the distinction for the purpose of an offset, however: (a) the employee must waive possible tort claims to be able to participate in workmen's compensation; (b) tort damages may include compensation for loss of earning power, in which case that portion of the tort award serves the same purpose as workmen's compensation. That part of a "system" substitutes for a "contest" does not alter a common purpose and effect of both—compensation to the individual for wages lost due to his disability.

14. 404 U.S. at 81.

15. 397 U.S. 471, 487 (1970).

16. 404 U.S. at 90 (Marshall & Brennan, JJ., dissenting).

sensitivity to the doctrines of separation of powers and judicial restraint. A court is limited only by its theory of restraint and the bounds of its imagination in searching for a purpose which would uphold a statutory classification as constitutional and thereby avoid the court imposing its political opinion of the state's "wisdom."[17] In equal protection questions the Supreme Court now appears to prefer deferring to decisions made by Congress or state legislatures.[18] Applying the traditional equal protection standard, it is only when the Court cannot conceive of *any* set of facts to justify a statutory discrimination that a statute is declared unconstitutional.[19]

The rationale which the Court presented to support the statutory distinction in *Belcher* was that: (1) disability insurance and workmen's compensation sometimes serve a common purpose; (2) Congress decided that workmen's compensation should take precedence in those instances of overlap where total payments exceed the policy recommendation; (3) permitting duplication of payments would result in disabled persons receiving an income greater than that earned

17. Note, *Developments in the Law—Equal Protection*, 82 HARV. L. REV. 1065, 1080 (1969) [hereinafter cited as *Developments*].

18. The *Dandridge* decision upheld a Maryland maximum welfare grant regulation, with the majority stating that "[c]onflicting claims of morality and intelligence are raised by opponents and proponents of almost every measure. . . . But the intractable economic, social, and even philosophical problems presented by public welfare assistance programs are not the business of this Court." 397 U.S. at 487. The Supreme Court appears to espouse the view that active equal protection review is appropriate only in legislation which affects Bill of Rights freedoms or "is infected with a racially discriminatory purpose or effect such as to make it inherently suspect." *Id.* at 484, 485 n.17.

19. McGowan v. Maryland, 366 U.S. 420, 426 (1961). *See also The Supreme Court, 1969 Term*, 84 HARV. L. REV. 32, 62 & n.13 (1970). *Accord*, Carmichael v. Southern Coal & Coke Co., 301 U.S. 495 (1937):

> [A legislature] may make distinctions of degree having a rational basis, and when subjected to judicial scrutiny they must be presumed to rest on that basis if there is any conceivable state of facts which would support it. . . . This restriction upon the judicial function, in passing on the constitutionality of statutes, is not artificial or irrational. A state legislature, in the enactment of laws, has the widest possible latitude within the limits of the Constitution. In the nature of the case it cannot record a complete catalogue of the considerations which move its members to enact laws. In the absence of such a record courts cannot assume that its action is capricious, or that, with its informed acquaintance with local conditions to which the legislation is to be applied, it was not aware of facts which afford reasonable basis for its action. Only by faithful adherence to this guiding principle of judicial review of legislation is it possible to preserve to the legislative branch its rightful independence and its ability to function.

Id. at 509-10.

before their disability arose, thereby impeding "rehabilitation" and the effort to get workers back to their jobs; and (4) the duplication would also cause employers (who pay part of the premiums for both workmen's compensation and Social Security) to become dissatisfied with disability programs, leading to the weakening of state programs —and that would be contrary to the Congressional policy of encouraging state workmen's compensation.[20]

Even applying the Court's rationality standard, the dissenting opinion of Justices Marshall and Brennan stated that "[t]here simply is no reasonable basis for singling out recipients of workmen's compensation for a reduction of federal benefits, while those who receive other kinds of disability compensation are not similarly treated."[21] Justice Douglas, in dissent, applied the same *Dandridge* rationality standard and found the statutory classification unconstitutional for unjustifiably imposing "special treatment" on workmen's compensation beneficiaries while not affecting others similarly situated.[22]

If the purpose of the Social Security offset contested in *Belcher* is to encourage "rehabilitation" by the economic duress of reducing one's income below that which he would receive from working so as to encourage him to go back to work, the statute is underinclusive—by its terms it does not apply to all persons similarly situated. The offset operates upon the Social Security benefits of workmen's compensation beneficiaries but not upon the benefits of persons comparably disabled but receiving damage awards or insurance proceeds. An all-inclusive statute for "rehabilitative" purposes would reduce Social Security payments of all recipients to the extent that their federal benefits plus income received due to disability from *any* other source exceeded policy level. Justice Marshall's dissents in *Dandridge* and *Belcher* would not tolerate underinclusion despite the existence of arguments that a gradual approach is necessary in administrative experiments.[23] When individuals are similarly situated they should be treated similarly.[24] An underinclusive statute is questionable

20. 404 U.S. at 82-83.

21. 404 U.S. at 91 (Marshall & Brennan, JJ., dissenting).

22. *Id.* at 85 (Douglas, J., dissenting).

23. *Developments* at 1086.

24. "[A] statutory discrimination must be based on differences that are reasonably related to the purposes of the Act in which it is found." Morey v. Doud, 354 U.S. 457, 465 (1957). Consequently, the state may not, in the provision of important services or the distribution of governmental payments,

under democratic principles since it may burden a minority which would not be affected if a comprehensive statute, affecting a larger portion of the population, were required by the courts but could not be enacted due to its political unpopularity.[25]

Under the traditional standard, the equal protection clause is not violated even if the statutory classification is underinclusive. The *Dandridge* Court stated that the judiciary should not impose its judgment in areas of social and economic regulation, even though the classification may be imperfect.[26] Experimentation by the legislature and the necessity of a step-by-step approach in dealing with a complex problem are justifications for underinclusive statutes.[27]

Equal protection standards of review should differ, according to Marshall. Rationality is an appropriate standard of review for regulation of business interests since business lobbies affect those formulations, but a more subjective analysis is the proper norm in reviewing statutes, such as that in *Dandridge*, affecting "the literally vital interests of a powerless minority."[28] A traditional legal analyst would question what interests are within the "vital" category; a traditional political analyst would dispute that a minority is disenfranchised; and Justice Marshall would respond with Warren Court decisions of a bygone era upholding more extensive active review.[29] In contrast to Marshall, the *Belcher* majority could find no reason for reviewing welfare cases with a more rigorous standard than that applied to other matters.[30]

When a legislature adopts a statute which is ostensibly the mandate of its constituency, a court arguably should not declare the statute unconstitutional simply because the court politically or theoretically disagrees with the legislature as to the propriety of the enactment. Despite that gap in Marshall's advocacy of active judicial review, his

---

supply benefits to some individuals while denying them to others who are similarly situated. *See, e.g.*, Griffin v. County School Board of Prince Edward County, 377 U.S. 218 (1964). 397 U.S. 471, 519 (Marshall & Brennan, JJ., dissenting). *But see* James v. Valtierra, 402 U.S. 137 (1971).

25. *Developments* at 1086.

26. 397 U.S. at 485.

27. *Developments* at 1085.

28. 397 U.S. at 520 (Marshall & Brennan, JJ., dissenting). *See* note 16 *supra* and accompanying text.

29. *See, e.g.*, cases cited in 397 U.S. at 521 & n.15 (Marshall & Brennan, JJ., dissenting). *See generally Developments* at 1087-1132.

30. 404 U.S. at 81.

concern is well-founded when he argues that the offset provision had an erratic legislative history of enactment in 1956,[31] repeal in 1958,[32] then perhaps poor consideration before the 1965 reenactment.[33] Can a court which utilizes restrained review evaluate a statute more strictly when it may have been inadequately deliberated by Congress? When a statute involves the interests of a small minority[34] in opposition to business organizations,[35] can the court give extra attention to the less established position in an effort to be "fair"? The answers of the *Dandridge* and *Belcher* courts would be *no*—the court should neither impose its political opinion on a statute nor police the procedures under which Congress chooses to operate; a political decision is most appropriately made in the politically representative branch of government under established methods.

A less contested query in *Belcher* was whether Social Security benefits are vested property rights of a constitutional magnitude or merely statutory gratuities established (and therefore revocable) by Congress. *Flemming v. Nestor*[36] involved a similar question. Nestor immigrated in 1913, became eligible for Social Security old-age benefits in 1955, but was deported in 1956[37] for having been a member of the Communist Party between 1933 and 1939. As a result of Nestor's

31. Social Security Amendments of 1956 § 103(a), 70 Stat. 815 (1956).

32. Social Security Amendments of 1958 § 206, 72 Stat. 1025 (1958).

33. Social Security Amendments of 1965 § 335, 42 U.S.C. § 424(a) (1970). The legislative history of the Social Security offset was discussed in Lofty v. Richardson, 440 F.2d 1144 (6th Cir. 1971) and included a portion of the testimony of Secretary Celebrezze of the Department of Health, Education and Welfare which suggested that Congress study the question further before acting on it. The suggestion was disregarded. *Id.* at 1150.

34. In his dissent to *Belcher*, Justice Douglas revealed that only 1.4% of all Social Security disability beneficiaries also receive workmen's compensation payments. 404 U.S. at 86-87 & n.6 (Douglas, J., dissenting).

35. "[E]mployer advocates of the offset amendment outweighed their opponents in numbers of spokesmen and of exhibits tendered" at the 1965 hearings. 440 F.2d at 1150. Also opposed generally to federal disability coverage is the state insurance industry; approximately 80% of state workmen's compensation business (as indicated by amount of net premiums) is handled by private carriers, leading to their encouraging a strong state program with minimal federal influence. P. BRINKER, ECONOMIC INSECURITY AND SOCIAL SECURITY 174, table 8-3 (1968).

36. 363 U.S. 603 (1960).

37. Deportation was pursuant to the Immigration and Nationality Act § 241(a)(6)(C)(i), 8 U.S.C. § 1251(a) (1970).

deportation, Social Security Act section 202(n)[38] operated to terminate his old-age benefits. Justice Harlan spoke for the majority of the Court and emphasized that an individual's Social Security benefits are not substantive contractual interests. Although eligibility for the program may arise from extensive contributions, benefits

> are not dependent on the degree to which [one] was called upon to support the system by taxation. It is apparent that the noncontractual interest of an employee covered by the Act cannot soundly be analogized to that of the holder of an annuity, whose right to benefits is bottomed on his contractual premium payments.
>
> . . . .
>
> To engraft upon the Social Security system a concept of "accrued property rights" would deprive it of the flexibility and boldness in adjustment to ever-changing conditions which it demands.[39]

A legal right is enforceable through constitutional authority or legislative directive. A constitutional right is inalterable by the legislature, while statutory rights may be revised or repealed by a subsequent statute.[40] Much of the confusion as to the legal status of Social Security benefits is due to the many similarities between private contract insurance and the government program, although significant differences also exist.[41] Proponents of Social Security as a constitutional right emphasize the contributory nature of the program, seeking to establish it as a contract, thereby according it property status and fifth amendment protection against taking without just compensation:

> No form of government largess . . . is more clearly earned by the recipient, who, together with his employer, contributes to the Social Security fund during the years of his employment. No

38. Social Security Act § 202(n), 42 U.S.C. § 402(n) (1970). The statute provides for termination of benefits to one who is deported on grounds there specified after September 1, 1954 under the Immigration and Nationality Act § 241(a), 8 U.S.C. § 1251(a) (1970).

39. 363 U.S. at 609-10.

40. Lynch v. United States, 292 U.S. 571, 576-77 (1934). *See* R. CLARK, ECONOMIC SECURITY FOR THE AGED IN THE UNITED STATES AND CANADA 38 (1959); W. GELLHORN & C. BYSE, ADMINISTRATIVE LAW CASES AND COMMENTS 548-49 (1970); W. MYER, VESTED RIGHTS 96 (1891).

41. R. CLARK, *supra* note 40, at 25-47.

> form is more obviously a compulsory substitute for private property; the tax on wage earner and employer might readily have gone to higher pay and higher private savings instead. No form is more relied on, and more often thought of as property.[42]

However, severe problems exist in the contract argument. Since Congress established the Social Security program, it may modify or abandon it at will.[43] A contract would be binding in its terms on future generations regarding the distribution of the national income, and would preclude flexibility and experimentation.[44]

Ten years after the *Nestor* decision announced that Social Security benefits were not property rights, the Supreme Court in *Goldberg v. Kelly*[45] reviewed the constitutionality of cancelling welfare benefits without a pre-termination evidentiary hearing. *Kelly* continued the trend toward denying certain distinctions between "rights" and "privileges"[46] by mandating procedural safeguards to public assistance recipients whose eligibility is disputed. Since "due process" protection is extended by the fifth and fourteenth amendments to challenges to "property," the Supreme Court might conceivably be

---

42. Reich, *The New Property*, 73 YALE L.J. 733, 769 (1964).

43. *E.g.*, Kurz v. Celebrezze, 225 F. Supp. 528 (E.D.N.Y. 1963) (right to benefits arises by statute, not by equity); Price v. Folsom, 168 F. Supp. 392 (D.N.J. 1959) (a person only has a right to Social Security payments to the extent that such right is supported by provisions of the statute and where there is strict adherence to the conditions of the Social Security law).

44. Wallenberg, *Vested Rights in Social Security Benefits*, 37 ORE. L. REV. 299, 359 (1958). In the old-age insurance context of Social Security, where a contract might also be contended, Congress dealt specifically with the question of a right to payment. The original Social Security Act provided for a lump sum in the nature of a refund to those individuals who contributed to the system but were ultimately ineligible for benefits. The government's old-age program was initially based upon the model of private pensions in which the participant acquired a definite contractual right. The 1939 amendments to the Social Security Act abolished the lump sum payments, effectively eliminating the pension concept. Despite some employees having contributed Social Security taxes and ultimately not qualifying for either benefits or a return of their tax money, "[t]housands of individuals have qualified for OASDI [Old-Age, Survivors, and Disability Insurance] benefits on the basis of earnings records where no social-security taxes were paid and even where no tax liability was incurred. The OASDI benefit must, therefore, be considered a gratuity." *Id.* at 302-03, 312-13.

45. 397 U.S. 254 (1970).

46. *See* K. DAVIS, ADMINISTRATIVE LAW TEXT 126-45 (1959); *The Supreme Court, 1969 Term*, 84 HARV. L. REV. 1, 103 (1970); Van Alstyne, *The Demise of the Right-Privilege Distinction in Constitutional Law*, 81 HARV. L. REV. 1439, 1454 (1968).

regarded as having recognized benefit-entitlements as property rights by according recipients procedural rights in the benefit review process. The Court did suggest, in a footnote, that the time may have come to recognize qualification for welfare benefits as being more like a property right than a governmental gratuity.[47]

Soon after the *Kelly* decision, a United States district court reviewed Raymond Belcher's prayer for relief from the Social Security offset provision in *Belcher v. Richardson.*[48] Hypothesizing a Supreme Court doctrinal reversal of *Nestor* by *Kelly,*[49] the lower court construed *Kelly* as tending "to elevate entitlement to welfare to the status of a property right. . . ."[50]

The Supreme Court in *Richardson v. Belcher,* however, explicitly declined to extend the *Kelly* decision beyond its holding as to requisite procedures, leaving the substantive question of legal entitlements to Congress.[51] Writing for the *Belcher* majority, Justice Stewart briefly dismissed the property argument by a reference to *Nestor* and a cursory denial that either contribution to the Social Security program or expectation of benefits would vest a participant with an enforcible contractual interest. In dissent, Justices Marshall and Brennan considered Social Security payments to be an annuity or insurance benefit, therefore a contractual obligation.[52] The consistency and near unanimity of the Supreme Court in deciding against the notion that Social Security is property and the soundness of the *Nestor* rationale under traditional principles preclude recognition of

47. 397 U.S. at 262 n.8.

48. 317 F. Supp. 1294 (S.D.W. Va. 1970).

49. In *Nestor,* the applicant had contributed to the Social Security fund from which he sought benefit, but no property right was found. Conversely, in *Kelly* an applicant who had not contributed to the welfare funds which she sought was tacitly recognized as having a limited "property right" when the Court mandated that procedural safeguards are necessary in the termination of welfare benefits. 317 F. Supp. at 1299. Less superficially, however, it is apparent that the cases involved different issues: *Nestor* was an unsuccessful substantive contention that Social Security is property, while *Kelly* was a declaration of procedural standards, disregarding "right-privilege" differences.

50. 317 F. Supp. at 1297.

51. 404 U.S. at 81.

52. *Id.* at 96 n.10 (Marshall & Brennan, JJ., dissenting). Justice Black took this dissenting position in *Nestor*: "[Terminating benefits to one deported for past Communist affiliation,] it seems to me, takes [one's] insurance without just compensation and in violation of the Due Process Clause of the Fifth Amendment." 363 U.S. at 622 (Black, J., dissenting).

public assistance as a matter of constitutional right, even when an individual has contributed substantial sums in expectation of a return.

The significance of *Richardson v. Belcher* is largely that it continues the recent trend of the Supreme Court in equal protection questions toward markedly less stringent review. For the Court to acquiesce in extensive Congressional discretion may be an abdication of judicial responsibility to thoroughly scrutinize acts of Congress for inconsistencies or it may be an affirmation of the theory that Congress is the more appropriate body for making policy decisions. The Supreme Court in *Belcher* reviewed the disputed offset statute and found it basically rational and devoid of invidious discrimination. When a reduction of Social Security benefits is imposed on only one class of recipients, however, one might question whether Congress has slighted fairness and similar treatment in the exercise of its broad prerogatives. The Court's perception of its "limited function under the Constitution"[53] required that it review the statute only for rationality and invidiousness. Other courts—and surely the *Belcher* dissenters—with a different judicial philosophy, would have actively reviewed the offset and would have declared the provision unconstitutional. The inconsistency has been exposed to Congress, and further action is incumbent upon it.

William F. Greer, Jr.

53. 404 U.S. at 84.