Constitutional Law - Due Process - Standard of Review for Economic Legislation - Retractive Application

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Constitutional Law—Due Process—Standard of Review for Economic Legislation—Retroactive Application—The United States Supreme Court has held that the retroactive application of withdrawal liability provisions of the Multiemployer Pension Plan Amendments Act of 1980 is constitutional and that the appropriate standard of review for such economic legislation when challenged as violative of due process is the minimum rationality test of *Usery v. Turner Elkhorn Mining Co.*


In 1974 Congress enacted the Employee Retirement Income Security Act (ERISA), to, among other things, protect those employees adversely affected by the termination of their private pension plans due to insufficient funding by the employer. The act provided for a plan termination insurance program to be administered by the Pension Benefit Guaranty Corporation (PBGC). Payment of guaranteed benefits by the PBGC under multiemployer pension plans was discretionary until January 1, 1978, while the guarantee of payments under single employer pension plans was effective immediately upon the Act’s passage.

Shortly before mandatory coverage of multiemployer plans was to become effective, Congress became aware of the unstable financial condition of numerous pension plans. It feared that should mandatory coverage of multiemployer plans take effect as planned under ERISA, the stability of the PBGC would be in jeopardy due

3. *Id.* Under Title IV of ERISA, the PBGC, a wholly-owned government corporation within the Department of Labor, was to collect insurance premiums from covered pension plans and provide benefits to those employees whose plans had failed due to insufficient funding. *Id.*
4. *Id.* 29 U.S.C. § 1381(c)(1) (1976). Under ERISA, a withdrawing employer from a multiemployer plan only faced contingent liability. The liability was conditioned upon the plan’s termination within five years of withdrawal. If the plan did terminate, the employer would be liable for its proportionate share. However, even if the plan did not terminate, a withdrawing employer would be liable if the PBGC decided to insure the plan’s beneficiaries. In either case, no individual employer’s liability could exceed 30% of its net worth. 29 U.S.C. §§ 1362(b)(2), 1364, 1381(c)(2)-(4) (1976).
5. 104 S. Ct. at 2714.
to the excessive liability it could be forced to assume. To safeguard the program, Congress deferred mandatory coverage of multiemployer plans until August 1, 1980. In the interim, Congress focused its attention on correcting the defects in ERISA associated with withdrawal liability.

After extensive examination of the program, Congress enacted the Multiemployer Pension Plan Amendments Act of 1980 (MPPAA). The MPPAA set forth the financial liability for employers who withdrew from multiemployer pension plans. To discourage participating employers from withdrawing before the MPPAA became effective, the withdrawal liability provisions were applied retroactively. The effective date for the withdrawal liability provisions was April 29, 1980, five months before the MPPAA was to become law.

R.A. Gray & Co. (Gray), an Oregon building and construction company, became a participant in the Oregon-Washington Carpenters-Employers Pension Trust Fund (Pension Plan) through collective-bargaining agreements with the Oregon State Council of Carpenters (Council). In February of 1980 Gray informed the Council of its decision not to renew the collective-bargaining agreement upon its termination on June 1, 1980. Gray's

6. Id.
7. See Pub. L. No. 96-293, 94 Stat. 610 (1980). The PBGC's discretionary authority to insure plans terminating during the interim was also extended. 104 S. Ct. at 2714.
8. Id. The PBGC was also directed to prepare a report analyzing the problems associated with withdrawals from multiemployer plans. On July 1, 1978, the PBGC issued its report, stating that out of 2000 covered plans, about 10% were in financial trouble, thus jeopardizing the benefits of nearly 1.3 million participants. Termination of these plans would result in liability of 4.8 billion dollars to the PBGC if it were to assume liability. Thus, one of the recommendations of the report was to provide a disincentive to voluntary employer withdrawals. See Pension Benefit Guaranty Corporation Multiemployer Study Required by P.L. No. 95-214 (1978). R.A. Gray & Co. v. Oregon Washington Carpenters-Employers Pension Trust Fund, 549 F. Supp. 531, 535 (D. Or. 1982).
10. 104 S. Ct. at 2715. Withdrawal liability was determined to be "the employer's proportionate share of the plan's 'unfunded vested benefits,' calculated as the difference between the present value of the vested benefits and the current value of the plan's assets. 29 U.S.C. § 1381, 1391." Id...
11. Id. Congress chose an effective date prior to enactment to prevent employers from avoiding the adverse consequences of withdrawal liability by withdrawing from plans while such liability was being considered. Id.
12. Id. The MPPAA was signed into law on September 26, 1980. Id.
13. 104 S. Ct. at 2715-16. The MPPAA defines a multiemployer pension plan as one "which is maintained pursuant to one or more collective bargaining agreements between one or more employee organizations and more than one employer." 29 U.S.C. § 1301(a)(3) (1982).
14. 104 S. Ct. at 2716.
continued involvement in the building and construction industry rendered its withdrawal from the pension plan complete pursuant to 29 U.S.C. § 1383(b)(2)(B).\textsuperscript{18}

Gray was notified of its withdrawal liability by the PBGC,\textsuperscript{16} since the withdrawal fell within the five month retroactive period provided by the MPPAA.\textsuperscript{17} Despite the establishment of a payment schedule by the PBGC, no payment was made by Gray.\textsuperscript{18}

Thereafter, Gray filed suit in the United States District Court for the District of Oregon seeking declaratory and injunctive relief against both the Pension Plan and the PBGC.\textsuperscript{19} Gray alleged that the retroactive application of the withdrawal liability provisions of the MPPAA violated the due process clause of the fifth amendment.\textsuperscript{20} Additionally, Gray asserted that the provisions could not not be constitutionally sustained because of the arbitrary distinction between single and multiemployer plans.\textsuperscript{21}

The district court granted summary judgment for the Pension Plan and the PBGC, holding that the retroactive application of withdrawal liability under the MPPAA did not violate Gray's due process rights.\textsuperscript{22} Gray appealed to the United States Court of Appeals for the Ninth Circuit.\textsuperscript{23} In reversing the district court, the court of appeals held that the retroactive withdrawal liability violated Gray's due process rights under the fifth amendment.\textsuperscript{24}

An appeal to the United States Supreme Court was taken by both the Pension Plan and the PBGC.\textsuperscript{25} The Supreme Court reversed the decision of the court of appeals, holding that the retroactive imposition of withdrawal liability under the MPPAA prior to its enactment did not violate the due process clause of the fifth amendment.\textsuperscript{26}

\textsuperscript{15} Id. 29 U.S.C. § 1383(b)(2)(B) (1982) provides that a “withdrawal occurs under this paragraph if the employer continues to perform work in the jurisdiction of the collective bargaining agreement of the type for which contributions were previously required.”

\textsuperscript{16} 104 S. Ct. at 2716. Gray's withdrawal liability was assessed at $201,359. Id.

\textsuperscript{17} Id.

\textsuperscript{18} Id.

\textsuperscript{19} Id.

\textsuperscript{20} Id. The fifth amendment provides in pertinent part that “[n]o person . . . shall be deprived of life, liberty, or property without due process of law.” U.S. Const. amend. V.

\textsuperscript{21} 104 S. Ct. at 2716 & n.5. The district court rejected this argument and it was not reached by the court of appeals. Therefore, the issue of discrimination against multiemployer plans was not considered by the Supreme Court. Id. at 2716 n.5.

\textsuperscript{22} Id. See infra notes 56-59 and accompanying text.

\textsuperscript{23} 104 S. Ct. at 2717.

\textsuperscript{24} Id. at 2718. See infra notes 59-72 and accompanying text.

\textsuperscript{25} 104 S. Ct. at 2718. Jurisdiction was based on 28 U.S.C. § 1252. Id.

\textsuperscript{26} Id. at 2713.
Justice Brennan, writing for the Court, indicated that this case was one subject to the limited judicial review customarily applied to economic legislation when challenged as being violative of due process. He began his analysis by identifying the proper inquiry to be used when testing the constitutionality of economic legislation such as the MPPAA. The proper inquiry, according to Justice Brennan, was that of minimum rationality as espoused by the Court in *Usery v. Turner Elkhorn Mining Co.* Under the *Turner Elkhorn* standard, an economic statute will be upheld against a due process attack when it is supported by a legitimate legislative purpose furthered by rational means. The person complaining of the due process violation must establish that Congress has acted in an arbitrary and irrational manner. Justice Brennan therefore found that, where legislation which shifts economic burdens and benefits, such as that involved in *Gray* and *Turner Elkhorn*, comes under the scrutiny of the Court, the legislation will be granted a presumption of constitutionality. This presumption, according to the Court, applies even when an act is given retroactive effect. Under *Turner Elkhorn*, the retroactive provisions, however, still must meet the test of rationality, that is, they must be rationally related to a legitimate legislative objective. Justice Brennan recognized that the underlying purpose behind this presumption is that the Court should not interfere with congressional discretion in planning and implementing a national economic policy. Justice Brennan concluded that, under the rationality standard of *Turner Elkhorn*, an economic statute, even one involving retroactivity, will

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27. *Id.* at 2719.
28. *Id.* at 2717.
29. 428 U.S. 1 (1976). In *Turner Elkhorn*, the Supreme Court upheld the constitutionality of the retroactive application of the Federal Coal Mine Health & Safety Act of 1969. Title IV of the Act required mine operators to compensate former employees affected by pneumoconiosis even though those employees had terminated their work in the industry before the statute was enacted. After enactment of Title IV, several mine owners filed suit alleging that the retroactive application of the Act to compensate former employees violated due process. In sustaining the constitutionality of the retroactive application of the Act, the Court concluded that the retroactivity provision passed the test of minimum rationality. Thus, the Court deferred to Congress' judgment that the Act was a rational measure to spread the cost of employees' disabilities among those who profited from their work—the mine operators and consumers of coal in general. *Id.* at 15-17.
31. *Id.* at 15.
32. 104 S. Ct. at 2717-18.
33. *Id.* See infra notes 117-20 and accompanying text.
34. 428 U.S. at 17.
35. 104 S. Ct. at 2718. See infra notes 108-10 and accompanying text.
be found to be constitutional so long as it is rationally related to a legitimate legislative purpose.\textsuperscript{36}

Justice Brennan found that the MPPAA easily passed this rational purpose test; that a rational basis for retroactive application of the withdrawal liability existed was evident from the legislative history.\textsuperscript{37} Retroactive application was mandated as a necessary means of discouraging participating employers from withdrawing from the pension plans to avoid liability before enactment of the MPPAA.\textsuperscript{38} Congress, through retroactive application, was ensuring the stability of the pension plans for the benefit of the covered employees.\textsuperscript{39}

Justice Brennan then dismissed the two other contentions made by Gray: first, that retroactive application violates due process because notice was inadequate to inform employers of changes in their legal obligations;\textsuperscript{40} and second, that constitutional standards developed under the contract clause\textsuperscript{41} be applied to the federal action at issue.\textsuperscript{42} In rejecting Gray's first contention, Justice Brennan indicated that the employers had sufficient notice of withdrawal liability because it had been imposed by ERISA, and because of knowledge of congressional activity on the subject.\textsuperscript{43} As to the sec-

\textsuperscript{36} Id.

\textsuperscript{37} Id. at 2718-19. Senator Matsunaga during debate on the MPPAA stated that the retroactive effective date was necessary "to prevent any employer from withdrawing from a plan under the lenient rules in current law. To permit the withdrawal of these opportunistic employers without imposition of liability, would shift the entire burden on employers remaining as plan participants." 126 Cong. Rec. S10156 (daily ed. July 29, 1980) (remarks of Sen. Matsunaga). See also id. at S10099-10102 (statement of Sen. Javits).

\textsuperscript{38} 104 S. Ct. at 2719. See supra notes 4 & 11.

\textsuperscript{39} 104 S. Ct. at 2718.

\textsuperscript{40} Id. at 2719.

\textsuperscript{41} U.S. CONST. art. I, § 10, cl. 1 provides in pertinent part that "[n]o state shall . . . pass any law impairing the obligation of contracts . . . ." Id.

\textsuperscript{42} 104 S. Ct. at 2719. For cases applying a contract clause analysis, see Allied Structural Steel Corp. v. Spannaus, 438 U.S. 234 (1978), where the Supreme Court declared unconstitutional the application of the Minnesota Private Pension Benefit Protection Act to an Illinois corporate pension plan. The Court found the Act to be violative of the contract clause since it changed private contractual rights by imposing a pension funding charge which increased many employers' liability under their pension plans. Id. at 244-51. See also United States Trust Co. v. New Jersey, 431 U.S. 1 (1977), where the Supreme Court declared unconstitutional as violative of the contract clause the retroactive repeal of the 1962 covenant between New Jersey and New York which limited the ability of the Port Authorities of both states to subsidize rail passenger transportation from revenues and reserves pledged as security for consolidated bonds. The Court held that this repeal violated the contract rights of the bondholders by eliminating an important security interest. Id. at 28-32.

\textsuperscript{43} 104 S. Ct. at 2719. The numerous proposals debated by Congress before enactment of the MPPAA uniformly included retroactive effective dates. Id.
ond contention, Justice Brennan stated that the principles found in the due process clause of the fifth amendment are not coextensive with prohibitions under the contract clause of state impairments of pre-existing contracts. Justice Brennan therefore concluded that the standard of review under the contract clause did not differ in degree from the rationality standard of *Turner Elkhorn*.

On the basis of this analysis, the Court concluded that the retroactive application of the withdrawal liability provisions of the MPPAA were not violative of due process since a rational basis was established for the legislation.

Prior to the *Gray* decision the courts were at odds in determining the applicable test to be used in appraising the constitutionality of the retroactive withdrawal liability imposed by the MPPAA. Economic legislation, such as the MPPAA, when challenged as violative of due process, had been traditionally subjected to the rational purpose test as recently reflected in *Turner Elkhorn*. Although the rational purpose test thus seemed to be the appropriate inquiry to resolve the MPPAA due process challenge, the courts were confused by the Seventh Circuit’s decision in *Nachman Corp. v. Pension Benefit Guaranty Corp.*

In deciding what was to be the appropriate inquiry in assessing the constitutionality of the retroactive liability effect of ERISA, the *Nachman* court appeared to have developed a hybrid test to be used when analyzing a due process challenge to economic legislation. The *Nachman* court recognized that the traditional test for analyzing such legislation was the rational purpose test of *Turner Elkhorn*. To assess rationality, however, the court adopted a four
factor test. In applying this test, a court is to look first to the reliance interests of the parties involved; second, to whether the impairment of the private interest is affected in an area previously subjected to regulatory control; third, to the equities of imposing the legislative burden; and fourth, to the inclusion of statutory provisions designed to limit and moderate the impact of the burden imposed. In establishing these four factors, the Nachman court denied that it was breaking with the rationality standard of Turner Elkhorn. Consideration of these factors, the court asserted, was merely to be undertaken so that a meaningful determination of rationality could be made. Without a consideration of these factors, the court felt that no meaningful assessment of rationality was possible.

In light of the Nachman decision, the district courts were uncertain as to whether the applicable test in analyzing the constitutionality of the retroactive withdrawal liability was still the rational purpose test of Turner Elkhorn, or whether it had been replaced by the four factor test. Most district courts recognized that both tests were applicable; however, the Nachman test was the prevalent standard used by the courts in assessing the constitutionality of the retroactive withdrawal liability of the MPPAA.

An example of this judicial uncertainty is illustrated in the district court decision in R.A. Gray & Co. v. Oregon Washington Carpenters-Employers Pension Trust Fund. In Gray, the court adopted the Nachman test as the appropriate standard of review when it was faced with deciding the constitutionality of the retroactive liability. A consideration of the four rationality factors required by Nachman resulted in a determination by the court that the retroactive withdrawal liability of the MPPAA was constitutional. In reaching this determination, the court found that there

50. Id. at 960.
51. Id.
52. Id.
53. Id.
54. Id. & n.26.
56. 549 F. Supp. 531 (D. Or. 1982).
57. Id. at 535.
58. Id. at 535-38. Specifically, the court found: (1) Gray's reliance on the contingent liability under ERISA to be outweighed by the employee's interest in receiving his vested retirement benefits; (2) pension plans have been substantially regulated in the past, thus the MPPAA was not novel legislation; (3) the congressional purpose for imposing retroactive
was rational support for Congress' decision to impose retroactive liability to discourage employer withdrawals before the enactment of the MPPAA.  

On appeal Gray was consolidated with Shelter Framing Corp. v. Carpenters Pension Trust (Shelter Framing I). The district court in the latter case, via the Nachman test, reached a contrary decision to that of the Gray district court, holding that the retroactive withdrawal liability of the MPPAA was unconstitutional as violative of due process.  

The United States Court of Appeals for the Ninth Circuit upon consideration of the two cases in Shelter Framing Corp. v. Pension Benefit Guaranty Corp. (Shelter Framing I) upheld the Shelter Framing I court's conclusion that the retroactive withdrawal liability of the MPPAA was unconstitutional.  

The court's analysis in Shelter Framing II illustrates the broad discretion that a court has under the Nachman test to pass judgment on economic legislation. The Nachman test, by authorizing consideration of factors such as the reliance interests and the inclusion of moderating features in the legislation, effectively allowed the court to determine not only whether the choice made by the legislature was rationally related to a legitimate state interest, but whether it was a wise choice as determined by the court. For example, in applying the Nachman test in Shelter Framing II, the court gave greater weight to the employer's reliance on existing law than did the court in Gray. Under Nachman, the weight to be given to each of the four factors was within the exclusive discretion of the court, thus, in effect, allowing the reviewing court to emphasize withdrawal liability outweighed the employer's desire to avoid liability; and (4) the MPPAA contained sufficient moderating features designed to ease the burden of retroactive liability.  

59. Id. at 538. See supra notes 4-11 and accompanying text.  
60. 543 F. Supp. 1234 (C.D. Cal. 1982), consolidated on appeal in 705 F.2d 1502 (9th Cir. 1983).  
61. 543 F. Supp. at 1249-54. The court found: (1) the employer's reliance on existing law to be reasonable since, outside the tax area, no one should be expected to predict congressional action which imposes liability on them; (2) no prior legislation in the pension plan area was as drastic in scope as the MPPAA; (3) other less burdensome alternatives besides imposing retroactive withdrawal liability were available to Congress; and (4) the MPPAA lacked adequate moderating features. Thus, the court found the retroactive withdrawal liability unconstitutional under the Nachman test. Id.  
62. 705 F.2d 1502 (9th Cir. 1983).  
63. Id. at 1515.  
64. Id. at 1511. The court stated that no one should be expected to anticipate congressional action which imposes new liability on them, especially where the proposed statute changed in substance numerous times, as did the MPPAA, while pending in Congress. Id.
those factors which it considered to be the most important. The discretionary nature of the test is further illustrated by the Shelter Framing II court's treatment of the other Nachman factors. With respect to the second factor, the court again disagreed with the district court in Gray as to whether there had been substantial regulation in the pension plan area prior to the MPPAA. The Shelter Framing II court determined that for such a statute to be valid, it must be similar in nature and degree to previous regulation in the area. In the court's opinion, the MPPAA imposed such unexpected and drastic liability that it clearly was not similar to any prior regulation. Thus, the court was imposing its own requirement for economic regulation and not merely deciding whether retroactivity was related to a legitimate legislative purpose.

In balancing the equities of imposing the legislative burden, as required by the third factor of Nachman, the Shelter Framing II court found in favor of the withdrawing employers. In support of this determination, the court suggested that other types of programs would achieve the goal of ensuring the stability of pension plans without imposing the harsh retroactive liability of the MPPAA. The court's analysis of the third factor clearly demonstrates how a court could use the Nachman test not merely to determine whether the minimum rationality standard is satisfied, but to pass judgment on the wisdom of the actual policy decision made by Congress. In finding that the equities weighed against imposing retroactive liability, the Shelter Framing II court was not merely

65. See generally Washington Star Co. v. International Typographical Union Negotiated Pension Plan, 729 F.2d 1502, 1507-09 (D.C. Cir. 1984), where the court noted the discretionary nature of the Nachman test by recognizing that the test provides "no standards other than 'mere judicial approval or disapproval of the balance struck by Congress' to guide courts in their review." Id. at 1508 (quoting Nachman, 592 F.2d at 960). See also text accompanying notes 124-25.
66. 705 F.2d at 1512.
67. Id. To support this conclusion, the court relied on FHA v. The Darlington, Inc., 358 U.S. 84 (1958), where the Supreme Court upheld an amendment to regulations regarding the rental of property financed by federally insured loans, holding that the amendment was merely a clarification of existing law and not a new policy. Id. at 90-92.
68. 705 F.2d at 1512.
69. See id. The court was, in effect, using the Nachman test to usurp a properly made legislative judgment, an action the Nachman court warned against in its opinion. See Nachman, 592 F.2d at 960.
70. 705 F.2d at 1514. The balancing of the equities involved a weighing of the individual burdens imposed on the withdrawing employers against the policies furthered by Congress' decision to impose retroactive liability. Id.
71. Id. The court also noted that the withdrawing employers were still subject to contingent liability under ERISA. Id.
inquiring into whether Congress' decision was founded upon a rational purpose, but whether it made the best choice. The court suggested that there were other alternatives available to Congress, such as modification of ERISA that would have provided a "safety net" for a pension plan that failed.72

An examination of the Shelter Framing II court's analysis of the fourth Nachman factor, the inclusion of statutory moderating features, also demonstrates the court's imposition of its judgment over that of the legislature.73 The court found the legislature's choice of statutory moderating features to be grossly inadequate, noting that ERISA included more effective mitigating features than the MPPAA.74 In effect, the court was judging the wisdom of the statutory moderating features and was not determining whether they were rationally related to a legitimate state interest.75 Thus, the use of the Nachman test clearly represented a break from traditional judicial deference to Congress in economic matters by allowing the court to impose its judgment on the policy choice made by Congress.

Under the traditional rational purpose test of Turner Elkhorn, the role of the reviewing court was not to determine whether the choice made by Congress was grounded in logic, but whether the choice was in fact based upon a rational purpose.76 As the Supreme Court stated in Williamson v. Lee Optical Co.,77 "[even if a statute] may exact a needless, wasteful requirement in many cases, [the choice is up to the legislature]. . . . It is enough that there is an evil at hand for correction, and that it might be thought that the particular legislative measure was a rational way to correct

72. Id. The court suggested that employers could have been required to post a bond upon their withdrawal to secure funds in the event that the plan failed. Id.

73. Id.

74. Id. The court noted the absence of three major moderating features of ERISA: the contingent nature of the liability, the liability limit of 30% of an employer's net worth, and the calculation based solely on the amount guaranteed by the PBGC, rather than the full value of the employees' vested benefits. Id.

75. See id. The court failed to discuss whether or not the statutory provisions were rational, but was merely pointing out their ineffectiveness. For example, the court stated that the assessment of liability in monthly installments, as opposed to a lump sum payment, failed to mitigate the burden of withdrawal liability. Id. This clearly is a judgment on the policy choice made by Congress, and outside the scope of judicial review espoused by the Turner Elkhorn Court.

76. See supra notes 29-36 and accompanying text.

77. 348 U.S. 483 (1955). In Williamson, the Supreme Court upheld an Oklahoma statute requiring a prescription from an optometrist before an optician could fit eyeglass lenses into frames. Id. at 491.
Recent Decisions

The Nachman test was, in essence, changing the role of the court in reviewing economic legislation by subjecting the economic legislation to a form of heightened scrutiny.

Other courts, however, refused to accept the Nachman test as appropriate in analyzing due process challenges to the MPPAA. Instead, they chose to follow the traditional rational purpose test of Turner Elkhorn. 79

The Seventh Circuit in Peick v. Pension Benefit Guaranty Corp. 80 expressly rejected the idea that the MPPAA should be subjected to any form of heightened scrutiny, including that of the Nachman test. 81 The correct standard by which the MPPAA was to be assessed, according to the Peick court, was the traditional rational purpose test of Turner Elkhorn, since the statute involved a matter of economic policy. 82 To allow otherwise, the court warned, would give a court the opportunity to substitute its judgment for that of Congress on economic policy, an area where Congress has been granted great deference in its policy decisions. 83

Having identified the appropriate inquiry, the Peick court examined the circumstances leading to the enactment of the MPPAA to determine the constitutionality of the retroactive withdrawal liability. 84 The court evaluated the necessity for retroactive liability, questioning whether such action was essential to achieve the legislative purpose. Considering the congressional purpose in enacting the MPPAA, the court found the imposition of retroactive withdrawal liability to be rational. 85 Without retroactive liability, em-

78. Id. at 487-88.
79. See, e.g., Pacific Iron & Metal Co. v. Western Conference of Teamsters Pension Trust Fund, 553 F. Supp. 523 (W.D. Wash. 1982) (constitutionality of the retroactive withdrawal liability of the MPPAA upheld under the Turner Elkhorn test). See also Washington Star Co. v. International Typographical Union Negotiated Pension Plan, 729 F.2d 1502 (D.C. Cir. 1984), where the court similarly upheld the the retroactive withdrawal liability of the MPPAA. In its opinion, the court expressly rejected the use of the Nachman test in reviewing economic legislation, stating that the test was inconsistent with the long settled standard of review for economic legislation, and that the test provided no other standard besides mere judicial approval or disapproval of the balance struck by Congress to guide the court in their review. Id. at 1508.
80. 724 F.2d 1247 (7th Cir. 1983).
81. Id. at 1263. The Peick court noted that higher levels of scrutiny are normally applied only in cases involving fundamental rights, or where supervision is required to prevent a distortion of regular democratic processes. Id. at 1265.
82. Id.
83. Id.
84. Id. at 1251-56.
85. Id. at 1266. The court deferred to Congress' determination that retroactive liability was necessary to prevent encouragement of early withdrawals. Id.
ployers, by withdrawing early, would be able to take advantage of the lengthy legislative process by shifting the financial burden to the remaining employers and the PBGC.\textsuperscript{86} The Peick court emphasized that the retroactive withdrawal liability was carefully tailored to minimize its impact on withdrawing employers.\textsuperscript{87} The decision to impose retroactive liability was found to be rationally related to a legitimate state interest, thus surviving the judicial scrutiny based on the \textit{Turner Elkhorn} standard.\textsuperscript{88}

Even though the Peick court determined that the appropriate standard was that of minimum rationality, it also subjected the retroactive withdrawal liability of the MPPAA to the \textit{Nachman} test. This reflects the confusion of the courts in deciding whether the \textit{Nachman} test was to replace the minimum rationality standard of \textit{Turner Elkhorn}.\textsuperscript{89} In Peick, the court concluded that even if the more stringent \textit{Nachman} test was used, the retroactive withdrawal liability of the MPPAA still passed constitutional muster.\textsuperscript{90}

\textit{Pension Benefit Guaranty Corp. v. R.A. Gray \& Co.}\textsuperscript{91} presented the Supreme Court for the first time with the issue of whether the standard to be used in evaluating the constitutionality of the retroactive withdrawal liability of the MPPAA should be the traditional rational purpose test of \textit{Turner Elkhorn}, or the four factor test of \textit{Nachman}. Ending the confusion in the lower courts, the Supreme Court held that the appropriate standard should be the traditional rational purpose test of \textit{Turner Elkhorn}.\textsuperscript{92}

The decision in Gray is significant not only because it decided the appropriate test for determining the constitutionality of the retroactive withdrawal liability of the MPPAA, but also because it curtailed the danger of heightened scrutiny by the courts of eco-

\begin{itemize}
  \item \textsuperscript{86} \textit{Id.} at 1267. \textit{See supra} notes 9-12 and accompanying text.
  \item \textsuperscript{87} \textit{724 F.2d} at 1269. Initially the bill had an effective date of February 27, 1979. As the bill moved closer to enactment, Congress moved the effective date forward to April 29, 1980 so that the final date chosen would encompass the minimum time period necessary to prevent abuse. \textit{Id.}
  \item \textsuperscript{88} \textit{Id.} at 1270.
  \item \textsuperscript{89} \textit{See id.}
  \item \textsuperscript{90} \textit{Id.} at 1270, 1271-74. Specifically, the court found: (1) that it was rational for Congress to conclude that corrective measures were necessary to make withdrawal liability effective; (2) that the employees' interest in receiving vested benefits outweighed the employers' reliance interest either in the existing law or in withdrawing without liability; (3) that the withdrawal liability imposed on employers was reasonable when considered with the congressional purposes in enacting the MPPAA; and (4) that the MPPAA contained adequate moderating features. \textit{Id.}
  \item \textsuperscript{91} \textit{104 S. Ct.} 2709 (1984).
  \item \textsuperscript{92} \textit{Id.} \textit{See supra} note 29 and accompanying text.
\end{itemize}
nomic legislation presented by the Nachman test. By rejecting the Nachman test, the Court maintained its policy of granting deference to congressional decisions regarding matters of economic policy. Adoption of the Nachman test would have redefined the role of the courts in reviewing economic legislation. The court's approach in Nachman was not one of deference to legislative judgment on matters of economic policy, but one of judging the wisdom and utility of the policy, which traditionally has been for the legislature to decide.

In Gray, the Supreme Court has continued its longstanding practice of granting deference to Congress in matters of economic policy. This practice can be traced to the Court's landmark decision in Nebbia v. New York. The Supreme Court in Nebbia held that due process required that the economic law in question not be unreasonable, arbitrary or capricious, and that the means selected be substantially related to a legitimate legislative purpose.

Nebbia is significant for the Court's move away from the stringent position it had earlier taken in Lochner v. New York. In Lochner, the Court held that the means selected for enforcement of a regulatory policy must have a direct and substantial relationship to the end sought to be attained. The Lochner Court required more than minimum rationality and gave no deference to the legislative findings of fact. Instead, the Court concluded, based on its own judgment, that the statute was unwise. This

93. See generally Peick v. Pension Benefit Guaranty Corp., 724 F.2d 1247, 1265 (7th Cir. 1983).
94. See infra notes 97-110 and accompanying text.
95. See generally Washington Star Co. v. International Typographical Union Negotiated Pension Plan, 729 F.2d 1502, 1508 (D.C. Cir. 1984); Peick v. Pension Benefit Guaranty Corp., 724 F.2d 1247, 1265 (7th Cir. 1983).
97. 291 U.S. 502 (1933). In Nebbia the Court upheld against a due process challenge a New York regulatory scheme for setting milk prices. The action of the New York legislature in passing the law was held not to be arbitrary and capricious since it was aimed at preventing evils in the milk industry. Id. at 530-39.
98. Id. at 525. Although a state statute was at issue in Nebbia, the Court noted that the fifth amendment, in the area of federal lawmaking, requires that congressional action conform with due process. Id.
99. 198 U.S. 45 (1905). A New York statute which limited the number of hours that a bakery employee could work was struck down by the Court as violative of due process by interfering with a person's liberty to enter into contracts. Id. at 52-53, 65-66.
100. Id. at 57-58.
101. See id. at 58.
102. See id. at 58-59. The Court disagreed with the legislature's determination that the statute was designed to enhance the public comfort, welfare and safety. The Court
approach is in stark contrast to the \textit{Nebbia} standard, under which the courts will give broad deference to the legislative findings of fact and will not question the legislative findings and intent which support the policy.\textsuperscript{103}

After \textit{Nebbia}, the Court consistently afforded Congress wide latitude in enacting economic policy.\textsuperscript{104} Illustrative of this deference is the Court’s decision in \textit{United States v. Carolene Products}.\textsuperscript{105} In \textit{Carolene Products}, the Court concluded that legislative findings of fact should be deferred to when considering whether a rational basis exists for economic legislation.\textsuperscript{106} Furthermore, the statute was granted a presumption of constitutionality which could be rebutted only if Congress was found not to have acted rationally.\textsuperscript{107} Later, in \textit{Ferguson v. Skupra},\textsuperscript{108} the Supreme Court virtually abandoned the use of the due process clause to strike down economic legislation deemed to be unwise.\textsuperscript{109} \textit{Ferguson} marked a high point in the Court’s deference to legislative motives in enacting economic policy. The \textit{Ferguson} Court held that the role of courts in reviewing economic legislation is not to sit as a “superlegislature to weigh the wisdom of legislation,” but merely to judge the rationality of the choice made by the legislature.\textsuperscript{110} The \textit{Nachman} test, however, changed the deferential policy of these cases by encouraging courts

stated that bakery employees were protected by other laws, thus the new law was unnecessary and constituted an invalid exercise of the police power of the state. \textit{Id.} at 58, 61-62.

\textsuperscript{103} \textit{See Nebbia}, 291 U.S. at 525.

\textsuperscript{104} \textit{See, e.g., Olsen v. Nebraska ex rel. Western Reference & Bond Ass’n}, 313 U.S. 236 (1941), where the Court held valid a state statute fixing maximum compensation for services rendered by private employment agencies. Reaffirming its retreat from judicial activism in economic regulation, the \textit{Olsen} Court stated that “\ldots we are not concerned \ldots with the wisdom, need, or appropriateness of the legislation. Differences of opinion on that score suggest a choice which ‘should be left where \ldots it was left by the Constitution—to the States and to Congress.’” \textit{Id.} at 246-47 (quoting Ribnik v. McBride, 277 U.S. 350, 375 (dissenting opinion)). \textit{See also} \textit{West Coast Hotel Co. v. Parrish}, 300 U.S. 379 (1937), where the Supreme Court upheld a state minimum wage law for women, stating that the statute was a reasonable exercise of the police power of a state. \textit{Id.} at 393. \textit{See also} \textit{Day-Brite Lighting, Inc. v. Missouri}, 342 U.S. 421 (1942), where the Court upheld as a valid exercise of the police power of the state a Missouri statute which provided that employees could absent themselves from work for four hours on election days. \textit{Id.} at 424-25.

\textsuperscript{105} 304 U.S. 144 (1938). The \textit{Carolene Products} Court upheld the constitutionality of the Filled Milk Act, which prohibited the shipment of filled (skim) milk in interstate commerce. \textit{Id.}

\textsuperscript{106} \textit{Id.} at 148-52.

\textsuperscript{107} \textit{Id.} at 152-53.

\textsuperscript{108} 372 U.S. 726 (1963). In \textit{Ferguson}, a Kansas statute which made it a misdemeanor for any person to engage in the business of debt adjusting, except as incident to the practice of law, was held to be constitutional. \textit{Id.} at 732-33.

\textsuperscript{109} \textit{See id.} at 729-32.

\textsuperscript{110} \textit{Id.} at 731 (quoting \textit{Day-Brite Lighting, Inc. v. Missouri}, 342 U.S. 421, 423 (1952)).
Recent Decisions

... to make their own decisions on the wisdom of the legislation through consideration of four subjective factors.\textsuperscript{111}

It was through these post-\textit{Lochner} decisions that the minimum rationality test espoused in \textit{Turner Elkhorn} evolved.\textsuperscript{112} Subsequent to the \textit{Nebbia} decision, the Court has taken a limited role in reviewing economic legislation, relying instead on the wisdom of the legislature. \textit{Nebbia} foreshadowed the \textit{Turner Elkhorn} minimum rationality test by requiring deference to the legislature's policy decision, and by holding that the legislature must have acted in an arbitrary and capricious manner for the statute to be invalid.\textsuperscript{113} \textit{Carolene Products} added the presumption that economic statutes will be found constitutional when challenged as being violative of due process.\textsuperscript{114} Finally, \textit{Ferguson} confirmed that the role of the court in reviewing economic legislation was to be only as an assessor of the rationality, rather than the wisdom of the legislation.\textsuperscript{115} The \textit{Turner Elkhorn} standard of minimum rationality represented the culmination of this historical line of cases. The \textit{Nachman} test threatened to cut into the \textit{Turner Elkhorn} standard\textsuperscript{116} by requiring a more active role by the courts in reviewing congressional economic legislation.

An important point to be noted is that the standard of review is not heightened because the economic legislation under review contains retroactive provisions. \textit{Nebbia}, although it did not involve retroactivity, established the deferential standard of review for economic legislation.\textsuperscript{117} Retroactive aspects of economic legislation, however, when challenged as violative of due process, must independently meet the test of rationality;\textsuperscript{118} for the retroactive provisions to be valid, they must likewise be rationally related to a legitimate legislative purpose.\textsuperscript{119} Thus, the prevailing consideration in

\textsuperscript{111.} See \textit{Washington Star}, 729 F.2d at 1508. See \textit{supra} notes 64-75 and accompanying text.
\textsuperscript{112.} See \textit{supra} text accompanying notes 27-36.
\textsuperscript{113.} See, e.g., \textit{Nebbia}, 291 U.S. at 525 (1933). See also \textit{supra} note 97 and accompanying text.
\textsuperscript{114.} See \textit{Carolene Products}, 304 U.S. at 152. See \textit{supra} notes 106-07 and accompanying text.
\textsuperscript{115.} \textit{Ferguson}, 372 U.S. at 731. See \textit{supra} notes 108-10 and accompanying text.
\textsuperscript{116.} See \textit{Turner Elkhorn}, 428 U.S. at 15-19. See \textit{supra} notes 29-36 and accompanying text.
\textsuperscript{117.} 291 U.S. at 525.
\textsuperscript{118.} 428 U.S. at 16-17.
\textsuperscript{119.} \textit{Id.} The \textit{Turner Elkhorn} Court stated that precedent was clear that legislation readjusting rights and burdens was not unconstitutional solely because it upset otherwise settled expectations, even if the effect of the legislation was to impose liability on past acts.
review of the retroactive provisions is that they are contained in an economic statute which warrants review under the minimum rationality standard of *Turner Elkhorn*.\(^1\)

The *Gray* decision, in upholding the use of the minimum rationality standard of *Turner Elkhorn*, has maintained the Court's long standing practice of affording the legislature great deference in enacting economic policy. It is submitted that application of stricter scrutiny by the Court would be an infringement on our democratic form of government, where "it is up to legislatures, not [the] courts, to decide on the wisdom and utility of legislation."\(^2\)

If the *Gray* Court had, conversely, adopted the *Nachman* test, a danger of reverting back to the *Lochner* philosophy would have been the result. A court would be free to substitute its judgment for that of the legislature on matters of economic policy, using the due process clause to strike down such legislation disfavored by the court.\(^3\) Although the court in *Nachman* warned that these factors were not to be used by a court to superimpose its judgment over that of the legislature,\(^4\) the use of the test had precisely that effect.

The *Nachman* test gave the courts virtually unbridled discretion.

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\(^1\) Id. at 16. See, e.g., Welch v. Henry, 305 U.S. 134 (1938), where the Court upheld the retroactive application of a Wisconsin income tax statute which made taxable all corporate dividends, which when received in the previous year were deductible from gross income. Id. at 146-51. See also Funkhouser v. Preston Co., 290 U.S. 163 (1933), where the Court upheld the retroactive application of an amendment to section 480 of the New York Civil Practice Act, which provided that interest was to be added to recoveries for unliquidated damages caused by breach of contract, even though earlier contracts did not demand such payment. Id.

\(^2\) 428 U.S. at 16. For a further discussion of the Supreme Court's review of retroactive legislation, see Hochman, *The Supreme Court and the Constitutionality of Retroactive Legislation*, 73 Harv. L. Rev. 692 (1960). Hochman suggests that the Court primarily considers three factors in determining the constitutionality of retroactive legislation: the nature and strength of the public interest served by the statute; the extent to which the statute modifies or abrogates the associated preenactment right; and the nature of the right which the statute alters. Additionally, the author points out that curative legislation containing retroactive provisions are granted a strong presumption of constitutionality. The Court has often held that the legislative purpose is of itself sufficient to justify the concomitant retroactivity. Id. at 697-706.

The retroactive withdrawal liability of the MPPAA would appear to be constitutional as a curative act, since it was intended to remedy the defect in ERISA which encouraged withdrawals from multiemployer plans. See 104 S. Ct. at 2713.

\(^3\) 121. *Ferguson*, 372 U.S. at 729.

\(^4\) 122. See Washington Star, 729 F.2d at 1508.

\(^5\) 123. See 592 F.2d at 960. The court warned that "[a]lthough explicit consideration of these factors might suggest a risk of judicial usurpation of properly legislative judgments, failure to consider them might ultimately result in no meaningful scrutiny of the legislative process, a result prohibited by the Due Process Clause." Id. at n.26.
to weigh the four factors as they thought best. No standards were applied by the court to promote uniformity in application of the test. Shortly before the *Gray* decision, the court in *Washington Star Co. v. International Typographical Union Negotiated Pension Plan,*\(^{124}\) recognized the danger of the *Nachman* test, stating that "the four factors are sweeping, relatively unweighted, highly malleable and, thus, easily manipulatible."\(^{128}\) This discretion undoubtedly led to the disparate results reached by the courts concerning the constitutionality of the retroactive withdrawal liability of the MPPAA.\(^{126}\)

As discussed above, adoption of the *Nachman* test clearly would have changed the Court's role in reviewing economic legislation to a role reminiscent of the *Lochner* philosophy, whereby the Court would be judging the wisdom of the policy choice made by Congress.\(^{127}\) Yet this role had been abandoned by the Court for nearly fifty years.\(^{128}\) The *Gray* Court, by rejecting the *Nachman* test, has curtailed any trend toward subjecting economic legislation to any form of heightened scrutiny that was suggested by *Nachman.* By upholding the traditional rational purpose test of *Turner Elkhorn* when analyzing a due process challenge to an economic statute, the Court is remaining consistent with its deferential stance towards such legislation.\(^{129}\) More importantly, *Gray* upholds our democratic system, precluding the courts from second guessing the wisdom of the legislature which has been elected to enact economic policies which are, presumably, thought to be in the nation's best interests.

Although Congress, as part of the Deficit Reduction Act of 1984,\(^{130}\) nullified the holding in *Gray* by eliminating the retroactive withdrawal liability provisions\(^{131}\) of the MPPAA, the overall significance of the case remains untouched. The Supreme Court, by upholding the use of the minimum rationality standard when reviewing economic legislation, curtailed any attempt by the courts, through use of the *Nachman* test, to broaden their discretion when

124. 729 F.2d 1502 (D.C. Cir. 1984). In *Washington Star* the court sustained the constitutionality of the retroactive application of the MPPAA against a due process challenge. See supra note 65.
125. *Id.* at 1508.
126. See supra notes 49-72 and accompanying text.
127. Accord *Peick*, 724 F.2d at 1265 & n.23.
128. See supra notes 93-109 and accompanying text.
129. *Id.*
130. Pub. L. No. 98-369, 98 Stat. 899 (1984). Additionally, any amounts paid by withdrawing employers on account of such liability are to be refunded. *Id.*
reviewing such legislation. The precedential value of the Gray decision does not lie with the upholding of the retroactive withdrawal liability of the MPPAA provisions, but rather in the re-affirmation of its long-standing practice of affording broad deference to Congress in economic matters. Thus, the significance of the Court's analysis in Gray remains as a statement of the Court's policy in reviewing economic legislation.

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