

COMMERCE, PRODUCTION, AND THE FISCAL POWERS OF CONGRESS

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THE PROBLEM STATED

WHEN Randolph proposed the Virginia plan at the third session of the Constitutional Convention, it contained what has been correctly characterized as "the only sound and workable principle by which the powers of nation and states could be divided:"¹ . . . "the national legislature ought to be empowered . . . to legislate in all cases to which the separate States are incompetent, or in which the harmony of the United States may be interrupted by the exercise of individual legislation."² This was, as Professor Cushman has pointed out,³ "the statement of a principle and not the description of a method; it declared the object for which national powers were to be conferred rather than the precise mechanism by which the delegation was to be made." But one gathers from the ensuing debates that this broad statement correctly expressed the basic intention of the convention. Indeed, the final form of the instructions to the Committee of Detail, which translated this broad principle of national legislative authority into the concrete enumeration of powers embodied in article 1, section 8, of the Constitution, were, if anything, even more liberal.⁴

Thus it is clear that "the delegated powers of Congress . . . were not conferred in a miserly spirit nor with a niggardly hand. They were given to serve the broad purpose of Randolph's original resolution . . . (and) were merely the concrete embodiment in terms of the political

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1. Cushman, *Social and Economic Control Through Federal Taxation* (1934) 18 *MERR. L. REV.* 759.

2. Art. 6 of the Virginia Plan, submitted May 29, 1787. *FORMATION OF THE UNION* (1927) 117, 954, 958, 961.

3. I have borrowed rather freely in this paragraph from the lucid language of Cushman's article.

4. "The national legislature ought to possess the legislative rights vested in Congress by the confederation; and moreover, to legislate in all cases for the general interests of the Union, and also in those to which the states are separately incompetent, or in which the harmony of the United States may be interrupted by the exercise of individual legislation." Resolution 6 submitted to the Committee of Detail July 26, 1787. *FORMATION OF THE UNION* (1927) 466.

experience of the eighteenth century of the principle that the new national government was to have the powers necessary to deal with all truly national problems."⁵ Of course, the enumeration, and not the principle, marks the limits of national power; and the delegated powers do not include a broad and undefined authority to legislate for the national welfare.⁶ But the construction of any given delegated power must be made in the light of the principle underlying the enumeration. Any other construction devitalizes and stultifies what was intended to be vital and basic. If one would seek "the spirit of the Constitution"⁷ he could not do better than to find it, so far as our federal system is concerned, in this declaration of intention.

By and large the Supreme Court's interpretation of congressional powers has been in keeping with this principle. *McCulloch v. Maryland*,⁸ *Ex parte Marigold*,⁹ *Juilliard v. Greenman*,¹⁰ and *Norman v. B. & O. Rr. Co.*¹¹ attest to liberal interpretation of the fiscal power, *In re Rapier*¹² to the similar construction of the control over mails. In *Missouri v. Holland*¹³ the treaty power took on new significance as a possible basis of police legislation, while *Havenstein v. United States*,¹⁴ *United States v. Arjona*,¹⁵ and *Keller v. United States*¹⁶ lent support to expanding use of other features of the power to control international affairs. In *The Belfast*¹⁷ a mere grant of jurisdiction to the federal courts in admiralty cases was held to justify national control over the substantive law in this field. At first it appeared that a similar attitude was to be followed in the construction of the commerce clause, although it was generally utilized, to be sure, to strike down state legislation which was thought to burden commerce¹⁸ rather than to sustain federal regula-

5. Cushman, *supra* note 1, at 760.

6. Cf. LAWSON, *THE GENERAL WELFARE CLAUSE* (1926), advancing a construction of art. I, § 8, cl. 1 which the government has consistently refused to champion, and the rejection of which, in *United States v. Butler*, 56 Sup. Ct. 312, 318 (1936), was a foregone conclusion.

7. The Supreme Court has not hesitated, at times, to strike down legislation which it considered to be contrary to "the spirit of the Constitution," or even to the still more ethereal "principles of republican government" or "essential nature of free governments." *Terrett v. Taylor*, 9 Cranch 43, 49, 52 (U. S. 1815); *Wilkinson v. Leland*, 2 Pet. 627, 657 (U. S. 1829); *Hepburn v. Griswold*, 8 Wall. 603, 623 (U. S. 1869); *Loan Association v. Topeka*, 20 Wall. 655, 663 (U. S. 1875). Should not the same argument be open to those who would *sustain* legislation?

8. 4 Wheat. 316 (U. S. 1819).

9. 9 How. 560 (U. S. 1849).

10. 110 U. S. 421 (1884).

11. 294 U. S. 240 (1935).

12. 143 U. S. 110 (1892).

13. 252 U. S. 416 (1920).

14. 100 U. S. 483 (1880).

15. 120 U. S. 479 (1887).

16. 213 U. S. 138 (1909).

17. 7 Wall. 624 (1869). And see *Knickerbocker Ice Co. v. Stewart*, 253 U. S. 149 (1920), holding that in certain types of cases the clause not only authorizes, but requires, national uniformity.

18. See *Gibbons v. Ogden*, 9 Wheat. 1 (U. S. 1824); *Brown v. Maryland*, 12 Wheat. 419 (1827); *Wabash etc. Ry. Co. v. Illinois*, 118 U. S. 557 (1886); *Leisy v. Hardin*, 135 U. S. 100 (1890).

tion. And even here the liberal tradition has given us *Champion v. Ames*,¹⁹ *Second Employers' Liability Cases*,²⁰ *Hipolite Egg Co. v. United States*,²¹ *Hoke v. United States*,²² *Clark Distilling Co. v. Western Maryland Ry.*,²³ and *Brooks v. United States*.²⁴

But in *United States v. E. C. Knight Co.*²⁵ it became evident that the commerce power, unless the Supreme Court were to adopt a different test of its scope, would not suffice to accomplish the purpose set forth in Randolph's resolution. The conclusion that a combination to gain "nearly complete control of the manufacture of refined sugar within the United States" is not such a combination as falls within the regulatory powers of the nation because it relates to activities which take place *before transportation begins* is literalism run riot. Rather, it is not even literalism; for the slogan, "there is no commerce in manufacturing," is not found in the Constitution, but was invented by the Court as a premise to support its conclusion that a state statute forbidding the manufacture of intoxicants should be sustained.²⁶ The *Knight* decision has not stood, for today it is possible to successfully attack a combination under the federal anti-trust acts even though it enjoys far less of a monopoly over manufacturing in its particular field than was enjoyed by the Sugar Trust.²⁷ Yet before it passed from the picture it produced an heir in *Hammer v. Dagenhart*.²⁸

19. 188 U. S. 321 (1903).

20. 223 U. S. 1 (1912).

21. 220 U. S. 45 (1911).

22. 227 U. S. 308 (1913). And see *Caminetti v. United States*, 242 U. S. 470 (1917).

23. 242 U. S. 311 (1917).

24. 267 U. S. 432 (1925).

25. 156 U. S. 1 (1895).

26. *Kidd v. Pearson*, 128 U. S. 1, 20 (1888): "No distinction is more popular to the common mind, or more clearly expressed in economic and political literature, than that between manufactures and commerce. Manufacture is transportation. . . . The buying and selling and the transportation incidental thereto constitute commerce." The opinion makes it clear that the Court included production in general in the same category with manufacturing. *Mugler v. Kansas*, 123 U. S. 623 (1887), had held that a state, to protect the health, morals, and safety of its citizens, may forbid the manufacture or sale of intoxicants. But in the *Kidd* case counsel argued that his Iowa client only proposed to sell its product in other states, and hence that the Iowa law had no relation to the welfare of Iowans and was an interference with interstate commerce. Instead of establishing a basis for Iowa jurisdiction in the fact that liquor, although ostensibly made for the foreign market, can be relied upon to find its way into the domestic market as well, the Court reversed the syllogism and held that the nation cannot forbid such activities, therefore the state can. The difficulty with this reasoning is that it fails to establish *which* state. The Court also assumed that it was necessary to disprove national jurisdiction in order to sustain state power, a dogma exploded long ago. See Biklé, *The Silence of Congress* (1927) 41 HARV. L. REV. 200; Grant, *The Nature and Scope of Concurrent Power* (1934) 34 COL. L. REV. 995. But it was not the first time that a basic principle was erected upon a false premise.

27. See *United States v. American Tobacco Co.*, 221 U. S. 106 (1911); *United States v. International Harvester Co.*, 274 U. S. 693 (1927).

28. 247 U. S. 277 (1918).

The majority opinion in the *Child Labor Case* did yeoman work in distinguishing the previous decisions of the Court which had sustained the use of the commerce power to accomplish police power ends. Whether we are concerned with the interstate transportation of lottery tickets, of impure or adulterated food or drugs, of a woman for accomplishment of an immoral purpose, or of intoxicating liquors,²⁹ does not the evil *follow* transportation? Hence, in each of these instances, is not "the use of interstate transportation . . . necessary to the accomplishment of harmful results?" Is it not equally clear that in the case of the products of child labor the evil—for the exploitation of children is conceded to be such—is accomplished "before transportation begins," the goods shipped being "of themselves harmless" alike during and after transportation? Is it not clear, then, that in forbidding their transportation Congress is regulating production rather than commerce, and thus invading the police power of the states? This reasoning did not seem convincing to four members of the Court, nor does it seem so to the writer. Is the power of Congress to prevent gambling, fraud, prostitution, or intoxication any greater, *per se*, than its authority to prohibit the exploitation of labor? Was it not equally true that in attempting to do so it was invading the realm of the police power? Was not "interstate transportation," to use the phrase of the majority, "necessary to the accomplishment of harmful results" in the latter case equally with the former? Does not the evil—the demoralization of the labor standards of competing states—follow as directly in the one case as in the other?

The line between evils which *follow* and those which *precede* transportation is, then, a pure invention of the judicial mind. Would it not be more logical, if only one is to serve as the basis of national legislation, to reverse the choice? Cannot the people of a state, through their own government, protect themselves against the evils of gambling and prostitution? Can they not forbid the use of intoxicants, or the sale of impure, adulterated, or misbranded foods? No doubt they can do these things more easily with national assistance, and to that extent the federal laws are beneficial; but they are scarcely indispensable, any more than national uniformity. Can the same be said of child labor? Did not the majority, in concentrating its attention upon the finished product and upon the state of manufacture, ignore the very factor upon which it purported to rest its conclusion: that ours is a *federal* system, *with no tariff walls between states?*³⁰ The "freedom of state action" which it preserved is not a freedom to govern, but a freedom to compete by stoop-

29. See cases cited in notes 19, 21-23, *supra*.

30. "If there were no Constitution and no Congress this power to cross the line would depend upon their neighbors. Under the Constitution such commerce belongs not to the States but to Congress to regulate." Holmes, J., dissenting in *Hammer v. Dagenhart*, 247 U. S. 277, 281 (1918).

ing to the same standards as the least ethical competitor. It is freedom to fight fire with fire—to the ultimate destruction of much that is dear to many of us—rather than freedom to provide a fire fighting agency.³¹ Certainly of the two constructions it is the one which least readily fits the test, “To legislate in all cases to which the separate states are incompetent, or in which the harmony of the United States may be interrupted by the exercise of individual legislation.”

Had the Court adopted, on the other hand, the view of Mr. Justice Holmes, which asked but two questions:³² Is there an evil, Does the transportation encourage the evil, the way would have been open for national legislation in keeping with the changing needs of a dynamic civilization. Instead it raised a complete barrier to even considering these questions by decreeing that, regardless of the effect upon other states, “the making of goods and the mining of coal are not commerce.”³³

The demand for national regulation did not stop with this decision. Consequently it was inevitable that Congress would not cease its efforts to regulate those aspects of production which it considers of pressing in-

31. The decision has been defended upon the ground that inability to overrule it by constitutional amendment proves that it has met with the approval of the American public. This argument overlooks several important factors. Those who have the Supreme Court on their side (even though, as here, by a bare majority) have a decided technical advantage. They need control but one house in each of 13 state legislatures, whereas the opposition must secure a two-thirds vote in each house of Congress and a majority in each house of 36 state legislatures, or 74 in all. The Court's decision also tends to cause a shift in public sentiment. Witness the statement, “This action of Congress (proposing the Child Labor Amendment) manifests the present unprecedented disrespect for constituted authority. The time was when the warning words of the Supreme Court . . . had some effect upon Congress.” (1927) 60 *Am. L. Rev.* 254, 258. This statement implies a slyster tactic of the lowest sort, but none the less clever. Yet 24 states, containing 52 per cent of the total population of the 48, have ratified the proposed amendment. Also, the public reaction to the Child Labor provisions of the N.R.A. Codes would lead one to believe that the great mass of the population would heartily approve of a national law if some way could be devised to pass it with the approval of the Court.

Analysis of the states in terms of the figures given in *Child Labor: Facts and Figures*, CHILDREN'S BUREAU PUBLICATION (1933) No. 197a 10 discredits the contention that it is fear of centralization, rather than a desire to undersell by means of lower labor standards, that is the basic factor in delaying ratification. Of the ten states which have the fewest children per thousand of population 14 to 15 years of age, inclusive, engaged in agricultural and non-agricultural occupations, nine have approved the amendment. Of the next 20 states, 13 have approved; of the remaining 18, only 2. Furthermore, over 75 per cent of the employed children between 10 and 13 are found in the 9 worst states which have not ratified. *Id.* at 4-6. The fate of the amendment, like the fate of state legislation, now rests largely in the hands of its enemies.

32. 247 U. S. 251, 277 (1918).

33. *Id.* at 272. As in the case of *Kidd v. Pearson*, 128 U. S. 1 (1888), it is again clear that the Court lumped all forms of production, including the growing and harvesting of raw materials, mining, and fabrication, in a single group, alike beyond the reach of national power. It is in this general sense that the word “production” is used throughout this article.

terstate importance until it had at least exhausted the other powers³⁴ expressly given to it by article I, section 8, the most promising of which appeared to be those embraced in the very first clause:

"The Congress shall have power to lay and collect taxes, duties, imposts and excises, to pay the debts and provide for the common defense and general welfare of the United States."

Although the clause is single, the power is dual: to tax, and to spend.

I

THE TAXING POWER

Non-revenue Motive. Even aside from the narrow construction of the commerce clause, the use of the taxing power for other than revenue purposes was a foregone conclusion. A tax measure is more liberally construed than a criminal statute. The procedure for its enforcement is simpler. Whereas one who is accused of crime may stand mute, the citizen must disclose his liability to a tax.³⁵ Hence it is not surprising to find that when Congress undertook to put an end to the issuance of paper currency by state banks it did so by means of a heavy tax, although the Supreme Court held that it could legally accomplish the same result by a prohibitive statute clearly labelled such.³⁶ Of course, the use of pro-

34. The majority opinion in the *Child Labor* case, 247 U. S. 251 (1918), by a peculiar twist of reasoning, seemed to intimate, to use a phrase of Professor Powell, that "the Tenth Amendment contains a canon of interpretation as well as a caution against trespass," and that the national commercial power cannot include authority to regulate production, because the Tenth Amendment reserves that power exclusively to the states. Although Professor Corwin baptized this doctrine with a catchy name, "dual federalism," he likewise so ably demonstrated the false logic upon which it was based that I had all but dismissed it from my mind. For is it not obvious that the reserved powers of the states are by definition merely those powers which have not been given to Congress, and that if Congress is exercising a delegated power it cannot, by the very language of the amendment, be exercising a reserved power? Corwin, *Congress' Power to Prohibit Commerce* (1933) 18 CORN. L. Q. 477; Powell, *Commerce, Pensions, and Codes* (1935) 49 HARV. L. REV. 1, 8; Cushman, *supra* note 1, at 781. But it is equally obvious that if the Court intended to follow the "dual federalism" doctrine its child labor decision would be conclusive against Congress, no matter what delegated power it purported to be exercising, whenever it should undertake to regulate production. And it has chosen to follow it. See *infra*.

35. *United States v. Sullivan*, 274 U. S. 259 (1927), holding that criminals must file income tax reports disclosing the amount of their illegal gains.

Doubtless none of these rules apply when the alleged "tax" has no revenue motive but is a penalty in disguise, but Congress may go far indeed before such a situation will be held to exist. The question does not even seem to have been raised in connection with either of the types of statutes mentioned later in this paragraph. But see *Lipke v. Lederer*, 259 U. S. 557 (1922); *Regal Drug Co. v. Wardell*, 260 U. S. 386 (1922); *United States v. One Ford Coupe*, 272 U. S. 321 (1926). And see *infra*.

36. *Veazie Bank v. Fenno*, 8 Wall. 533 (U. S. 1869), sustaining 14 STAT. 146 (1866).

hibitive tariffs as a substitute for an embargo is an accepted feature of American life.³⁷

There can be no doubt of the authority of Congress to use its taxing power primarily, or even exclusively, for purposes other than the raising of revenue when to do so will aid it in carrying out any of its delegated powers, such as the regulation of commerce. But is the statute valid if the non-revenue motive or effect concerns matters beyond Congress's legislative powers? It was clear that this must be permitted at least up to a certain point, since

"incidental regulation and control is inherent and inextricably bound up with any exercise of the taxing power. It would be impossible for Congress to levy a tax which did not have social and economic consequences of a non-fiscal character. Taxation means burden; freedom from taxation means freedom from burden. The selection by Congress of the persons and things and transactions which shall bear or escape that burden necessitates the formulation of a regulatory policy affecting the social and economic life of the nation. . . . In the levying of every tax Congress must inevitably have a purpose other than the raising of revenue since it cannot escape the responsibility of controlling in the national interest the non-fiscal regulatory effects of its distribution of tax burdens. There can, in short, be no such thing as taxation for revenue only."³⁸

That the Constitutional Fathers clearly realized this, and assumed that Congress should and would consider such effects, is evident from Hamilton's statement in number 12 of *The Federalist*.³⁹ It was doubtless the basis of the Supreme Court's statement,

"So long as the motive of Congress and the effect of its legislative action are to secure revenue for the benefit of the general government, the existence of other motives in the selection of the subjects of taxes cannot invalidate congressional action."⁴⁰

The opinion in the *McCray* case,⁴¹ although by a divided court, intimated that, so long as Congress is careful not to disclose other than a

37. See *University of Illinois v. United States*, 289 U. S. 48 (1933), in which the basis of decision is clearly broad enough to sustain such tariffs.

38. Cushman, *supra* note 1, at 764.

39. After pointing out that a national tax of one shilling per gallon on "ardent spirits" would produce a handsome revenue, he added: "That article would well bear this rate of duty; and if it should tend to diminish the consumption of it, such an effect would be equally favorable to the agriculture, to the economy, to the morals, and to the health of society."

40. *Hampton v. United States*, 276 U. S. 394, 412 (1928). And see the similar statement regarding state taxation in *Magnano v. Hamilton*, 292 U. S. 40, 47 (1934): "From the beginning of our government, the courts have sustained taxes although imposed with the collateral intent of effecting ulterior ends which, considered apart, were beyond the constitutional power of the lawmakers to realize by legislation directly addressed to their accomplishment."

41. *McCray v. United States*, 195 U. S. 27 (1904); see *Veazie Bank v. Fenno*, 8 Wall. 533 (U. S. 1866).

revenue purpose on the face of a statute, such non-federal regulatory or prohibitory purpose may be paramount, or even exclusive, and still the statute will be beyond the reach of judicial review. Clearly Congress, to prevent fraud occurring after the transportation ended, could have forbidden the interstate carriage of butter substitutes artificially colored to resemble butter. It chose, however, to place a prohibitive tax upon the sale of such artificially colored substitutes, thus reaching intrastate commerce as effectively as interstate. The majority held that "the motive or purpose of Congress in adopting the act in question may not be inquired into" where there is no evidence of such motive in the act itself; and that the mere size of the tax cannot be considered as evidence of motive.

In *United States v. Doremus*⁴² it went even further, for here the statute⁴³ was largely a series of regulations obviously intended to bring the sale of narcotics into the open and to forbid their sale for other than what Congress considered to be legitimate purposes, thereby vesting criminal jurisdiction in national hands to punish any anti-social sales. Coupled, as they were, with license fees so low that they could not possibly pay the administrative expenses of enforcing these detailed regulations, it is not too much to say that from a reading of the statute itself its purely regulatory purpose was evident. Yet the Supreme Court, reversing a ruling of the trial judge,⁴⁴ held that, although the regulations might indicate that motives other than the raising of revenue had impelled the exercise of the federal taxing power, the Court was not authorized to inquire into such other motives as long as the regulations enacted had some reasonable relation to the exercise of the taxing power conferred by the Constitution.⁴⁵ Here the regulations were sustainable because "they tend to keep the traffic aboveboard and subject to inspection by those authorized to collect the revenue."⁴⁶

This made it appear that it would be necessary for Congress to *declare*, rather than merely *disclose*, the essentially non-revenue purpose of a law in order to cause the Court to abandon this rule of self-limitation. And had it not been for the passage of the "Tax on Employment of Child Labor" this condition might well have continued.⁴⁷ But that statute was

42. 249 U. S. 86 (1919).

43. Harrison Narcotic Drug Act, 38 STAT. 785 (1914), 26 U. S. C. A. § 691 (1926).

44. *United States v. Doremus*, 246 Fed. 958 (W. D. Tex. 1918).

45. 249 U. S. 86, 93 (1919).

46. *Id.* at 94. Four judges, including two who had concurred with the majority in *McCray v. United States*, 195 U. S. 27 (1904), dissented. Possibly this shift is to be accounted for on the facts of the cases, but no doubt the additional fact that the Child Labor Tax Act, 40 STAT. 1138 (1919), was pending in Congress at the time the case was argued and was signed by the President a week before it was decided, had an important bearing.

47. But such decisions as *Lipke v. Lederer* and *Regal Drug Co. v. Wardell*, both *supra*

a little too much, being a direct challenge to the Court's decision in *Hammer v. Dagenhart*. As the majority pointed out,

"Grant the validity of this law, and all that Congress would need to do, hereafter, in seeking to take over to its control any one of the great number of subjects of public interest, jurisdiction of which the states have never parted with, and which are reserved to them by the Tenth Amendment, would be to enact a detailed measure of complete regulation of the subject and enforce it by a so-called tax upon departures from it. To give such magic to the word 'tax' would be to break down all constitutional limitation of the powers of Congress and completely wipe out the sovereignty of the states."⁴⁸

Although this had been equally clear under the earlier cases, it had not been so painfully evident, nor had Congress undertaken to use it as a subterfuge to invade production, that sacred domain of the states.

The opinion of the Court would have been quite logical, had it not been that it refused to concede that it was qualifying the old law. "Its prohibitory and regulatory effect and purpose," the Chief Justice wrote in the course of his opinion, "are palpable. All others can see and understand this. How can we properly shut our minds to it?" But was not the efficiency of the "tax" involved in the *McCray* case inversely proportional to the amount of money raised? Do we not commonly refer to the statute involved in *United States v. Doremus* as the Harrison anti-Narcotic Act? But the Court found that the Child Labor tax disclosed its regulatory purpose in the very nature of the regulations determining liability to the tax: "The amount is not to be proportioned in any degree to the extent or frequency of the departures, but is to be paid by the employer in full whether he employs five hundred children for a year, or employs only one for a day;"⁴⁹ the "tax" is not due unless the employer "knowingly" violates these regulations; factories are to be subject to inspection by agents of the Department of Labor, "whose normal function is the advancement and protection of the welfare of the workers." Passing the fact that the purpose of the Narcotic Act was equally spread upon the face of the statute, it remains that the argu-

note 35, throw added light upon the ultimate inevitability of the *Child Labor Tax Case* rule. Surely no Court could be expected to hold that a tax cannot be collected except through the accepted processes of the criminal law because it is a penalty and not a tax, yet rule that although invalid, if viewed as a penalty, because in excess of national power, it is none the less enforceable because it is a tax. To refuse to go behind the surface in the former group of cases would enable the legislature, except where other than a pecuniary penalty is desired, to evade all specific guarantees given to persons accused of crime. The Court's embarrassment would be doubly increased if both issues were to be raised in a single case, as they might well be.

48. *Bailey v. Drexel Furniture Co.*, 259 U. S. 20, 38 (1922), construing 40 STAT. 1135 (1919).

49. Of course, privilege taxes *often* are set at a fixed sum regardless of the frequency with which the privilege conferred is exercised.

ment is only convincing if a reversal of the facts would have altered the result. Suppose that Congress undertook to levy a prohibitory privilege tax upon every employer of child labor, either at so much per factory or so much per day per child, thus completely eliminating all exceptions. Would this not be a still more serious interference with the "reserved powers of the states" than the original act? Does anyone think that it would be any less unconstitutional?

This point requires further consideration. Of course, a small tax of this nature might be levied with an almost exclusively revenue motive in view, and it is entirely probable that the Court would so hold. And it is said to be axiomatic that "a tax, otherwise lawfully levied, does not become unconstitutional merely because it is unduly burdensome."⁵⁰ In the *McCray* case the Court refused to entertain any argument based upon the premise that "the tax is too high"; and in *Magnano v. Hamilton*⁵¹ it ruled that the doctrine of the *Child Labor Tax Case* had settled that the fact "that a prohibition instead of a tax was intended might not be inferred solely from its heavy burden." Yet in *Hill v. Wallace*,⁵² decided at the same time as the *Child Labor Tax Case*, the Court stated that "the imposition of 20 cents a bushel on the various grains affected by the tax is most burdensome,"⁵³ and hence constituted valuable evidence that "the manifest purpose of the tax is to compel boards of trade to comply with regulations, many of which can have no relevancy to the collection of the tax at all," and cannot be justified as embraced within the power to regulate interstate commerce. Last December it ruled,

"The exaction in question is highly exorbitant. This fact points in the direction of a penalty rather than a tax. . . . The condition of the imposition is the commission of a crime. This, together with the amount of the tax, is again significant of penal and prohibitory intent rather than the gathering of revenue."⁵⁴

In short, "a tax, otherwise lawfully levied, does not become unconstitutional merely because it is unduly burdensome;" *but the fact that it is*

50. Cushman, *supra* note 1, at 763. For the most recent statement of this doctrine, see *Grosjean v. American Press Co.*, 56 Sup. Ct. 444, 447 (1936) ("If it were increased to a high degree, as it could be if valid, it might well result in destroying both advertising and circulation").

51. 292 U. S. 40, 47 (1934) (sustaining a state tax of 15 cents per pound on all butter substitutes).

52. 259 U. S. 44, 66 (1922), holding the Future Trading Act, 42 STAT. 187 (1921), unconstitutional.

53. In reaching this conclusion it examined the current market prices of the grains affected by the "tax." *Id.* at 47, 66. Quære, what conclusion would it have been forced to reach, had it considered the current market prices of butter and butter substitutes in the case cited in note 51, *supra*?

54. *United States v. Constantine*, 56 Sup. Ct. 223, 227 (1935).

unduly burdensome may prove that it is not a tax, and hence that it is not lawfully levied.

Doubtless it is still true that motive may not be implied solely from the rate of taxation. Mere logic requires such a conclusion, for figures mean nothing of themselves. And the *Magnano* case,⁵⁵ construing the *Child Labor Tax Case*, insists that this further evidence must be derived from a reading of the act itself. But must the Court, in construing the statute, ignore outside evidence which throws further light upon the real meaning and effect of these provisions? The opinions in the *Child Labor Tax Case* and *Hill v. Wallace*⁵⁶ would not seem to intimate as much; and certainly this was not done in the *Hoosac Mills Case*,⁵⁷ where the majority, to prove that the alleged "tax" was not a true tax, not only resorted to other, although clearly supplementary, statutes but to statements of the Department of Agriculture. Some may indulge a private suspicion that they were aware of some of the statements of the President himself, and that they did not try to forget them, even while weighing their decision.

The recent decision in *Grosjean v. American Press Co.*⁵⁸ further substantiates this conclusion. Explaining why the Louisiana tax on periodicals of large circulation violates the "due process" guarantee of freedom of the press, Mr. Justice Sutherland wrote:

"It is bad because, in the light of its history and of its present setting, it is seen to be a deliberate and calculated device in the guise of a tax to limit the circulation of information to which the public is entitled."

Obviously neither this "history" nor "present setting" are intrinsic to the statute.

Even *Nigro v. United States*,⁵⁹ although substantially an affirmation of the *Doremus* decision,⁶⁰ expanded the bases of judicial review. The opinion in *Hampton & Co. v. United States*,⁶¹ decided in the same year, intimated that both the motive and the effect of a tax, to be sustained as such, must be the raising of revenue; and *Grosjean v. American Press Co.*⁶² clearly has raised this *dictum* to a rule of law. The *Nigro* case

55. 292 U. S. 40, 47 (1934).

56. See note 53, *supra*.

57. *United States v. Butler*, 56 Sup. Ct. 312, 322 (1936). Apparently what is evidence of motive in spending is also evidence of motive in imposing a regulatory or prohibitory "tax." In any case, the future bearing of the majority's conclusions is evident, as it ignored this distinction in insisting that it was discussing an identical situation with that of the *Child Labor Tax Case*. And see the discussion of the Bankhead Cotton Control Act in the *Butler* case, discussed *infra*.

58. 56 Sup. Ct. 444, 449 (1936).

59. 276 U. S. 332 (1928).

60. 249 U. S. 86 (1919).

61. 276 U. S. 394 (1928).

62. 56 Sup. Ct. 459 (1936). Its ruling cannot possibly be reconciled with an assumption that the actual raising of even a large sum of money can cure the defect of non-revenue motive. If this is true of a state statute, is it not equally true of a federal one?

held that the fact that the amended narcotic act actually yielded an income of a million dollars a year settled the second, while it apparently felt that the first was foreclosed by the earlier ruling. But if the account books can be resorted to to prove a profit, are they not equally available to prove a lack of the same? Indeed, the judges may even in time set up their own criteria of cost accounting, for the net revenue is obviously the gross income less the expense of collection, *including* in the latter item the enforcing of all regulations intended to "keep the traffic aboveboard and subject to inspection by those authorized to collect the revenue." The fact that it has never yet undertaken to do so is not significant.⁶³ After all, *Bailey v. Drexel Furniture Co.* itself is less than 14 years old, and we have come far in that time.

A pending problem or the most recent ruling, contingent upon one's views concerning *stare decisis* and the *ratio decidendi* of a case, concerns the claims to recovery of taxes paid under the Bankhead Cotton Control Act of 1934,⁶⁴ later copied in the Tobacco⁶⁵ and Potato⁶⁶ acts, all of which have recently been repealed.⁶⁷ These statutes provided for the determination of the total probable requirements of the market and the allotment to each farmer of his share of this total. The sale of any products produced in excess of this allotment was subject to a tax which was clearly intended to be prohibitory, the rate in the case of cotton being 50 per cent of the average central market price, of tobacco 33 1/3 per cent of the actual price for which it is sold, and of potatoes 3/4 of one cent per pound. The cotton tax was levied upon the ginner, but the tobacco and potato taxes were paid by the producer.⁶⁸ The issuance of tax exemption stamps to each producer in the full sum of his allotment aided in the administration of the law, since all products were thus required to bear stamps, either "tax paid" or "tax exempt," and also enabled the farmer suffering from a crop failure to realize an income from the sale of his stamps to some other farmer who had had such a

63. Many of the most remarkable expansions of judicial review have occurred through rulings that seemed at the time to be very narrow, indeed. *Calder v. Bull*, 3 Dall. 386 (U. S. 1798), restricted the *ex post facto* clause to the field of crimes, yet it helped to prepare the way for later cases, whereby the Court's view of the "reasonableness" of civil statutes has become the test of their validity. *C. B. & Q. Ry. v. Chicago*, 166 U. S. 226 (1897), reversing the ruling in *Davidson v. New Orleans*, 96 U. S. 97, 104 (1878), held that "due process" guarantees just compensation in eminent domain cases, although it sustained an award that seemed pitifully small. In the long run it has been the general doctrine, rather than this specific application of it, that has assumed significance.

64. 48 STAT. 598, 7 U. S. C. A. § 701 et seq. (1934).

65. 48 STAT. 1275, 7 U. S. C. A. § 751 et seq. (1934).

66. 49 STAT. 782, 7 U. S. C. A. § 801 et seq. (1935).

67. P. L. No. 433, 74th Cong. (1936).

68. This distinction, even if it were not clearly superficial, is of no importance. Ginning, like growing, is a phase of "production," and occurs "before transportation begins."

good crop as to exceed his quota. Those who declined to cooperate with the entire crop reduction program of the AAA received neither allotment nor tax exemption certificates, and consequently were taxed upon their entire production to the extent that it was marketed.

Apparently these statutes were drafted under the impression that the Court would sustain national regulation of production of crops the larger portion of which is ultimately destined for use in interstate or foreign commerce, since they clearly revealed their motive to be to restrict "the ginning of cotton in excess of . . . probable market requirements,"⁶⁹ "to more effectively balance production and consumption of tobacco,"⁷⁰ and "to establish and maintain such balance between the production, sale, and consumption of potatoes"⁷¹ as would restore the farmer's income to its pre-depression purchasing power. But whatever hopes may have existed on that score were effectively dissipated by the fate of the processing taxes under the original AAA act. Will the Court, notwithstanding, refuse to examine the evidence of motive and sustain these statutes as taxing measures? Dismissal of *Moor v. Texas* and *N. O. Ry. Co.*⁷² and the anticipated dismissal of *Georgia v. Morgenthau*⁷³ is thought by some to hold the question open until it can reach the Court in a suit to recover taxes paid under protest. The author's own view is that the majority definitely ruled upon these taxes in the *Hoosac Mills Case*⁷⁴ and held them invalid. The trial is over; only the official funeral remains.

In belaboring the point that the original AAA act was intended to regulate the production of basic agricultural products—a point which I believe all will concede, including those who feel that the case was improperly decided—Mr. Justice Roberts wrote:

69. 48 STAT. 599, § 3, 7 U. S. C. A. § 703 (a) (1934).

70. 48 STAT. 1276, § 2, 7 U. S. C. A. § 752 (1934). The 1935 amendments, 49 STAT. 778, added the phrase "to raise revenue." One can almost hear the Court thunder, "That proves that it was an afterthought!"

71. 49 STAT. 784, 7 U. S. C. A. § 803 (1935). The refusal of the government in the *Hoosac Mills* case to defend the original A. A. A. act as a valid exercise of the commerce power thus virtually amounted to throwing the cotton, tobacco, and potato acts to the wolves. Doubtless, this tactic was based upon a fear, by no means groundless, that such an argument would only antagonize certain members of the Court and hence imperil the chances for victory under the spending power. The present majority does not wish to have the correctness of *Hammer v. Dagenhart* questioned.

72. 56 Sup. Ct. 372 (1936), the Court stating that the granting or refusal of the particular remedy sought was discretionary with the trial judge.

73. As the state grows cotton on its prison farms, it was permitted to file an original petition in the Supreme Court to enjoin the collection of the tax, 56 Sup. Ct. 176 (1935). With the repeal of the tax, it would seem that the case no longer involves a living controversy.

74. *United States v. Butler*, 56 Sup. Ct. 312 (1936).

"It is pointed out that, because there still remained a minority whom the rental and benefit payments were insufficient to induce to surrender their independence of action, the Congress has gone further and, in the Bankhead Cotton Act, used the taxing power in a more directly minatory fashion to compel submission. This progression only serves more fully to expose the coercive purpose of the so-called tax imposed by the present act. It is clear that the Department of Agriculture has properly described the plan as one to keep a non-cooperating minority in line. This is coercion by economic pressure. The asserted power of choice is illusory."⁷⁵

Funk and Wagnalls define "minatory" as "threatening, as with destruction or punishment." If the majority had any intention of considering the matter further they would have chosen a less expressive word; and certainly they would not have stated that "Congress has gone further" in the Bankhead act than it had gone in the original act, which one gathers from the opinion was in itself *much* too far. And it is not expecting a little too much even to hope that a Court which will turn a double back somersault in its logic in order to invalidate a regulatory measure based upon the spending power will be open to a suggestion that it permit the same result under the taxing power?⁷⁶ Apparently the Administration was of such opinion, for the new farm relief measure⁷⁷ makes no use of such "taxes."

The 1935 session of Congress also gave us two other "tax" provisions which must ultimately face this test of validity of motive. The Bituminous Coal Stabilization Act⁷⁸ levies an excise of 15 per cent of the selling price of such coal at the mines, those who accept the regulatory provisions of the act receiving a rebate of 90 per cent of their tax. Obviously this is merely another way of saying that those who refuse to come under the Code shall pay ten times the tax paid by their competitors who do so, the difference as clearly being a penalty as any ever adopted by Congress. Unless the law is to become a shambles, such a levy can only be sustained on the ground that Congress has authority under the commerce power to impose these regulations upon this industry.

More is to be said for the "tax on employers of eight or more" levied by the Social Security Act,⁷⁹ which permits credits up to 90 per cent of the federal tax to employers contributing to a state unemployment insurance fund. As the credits may actually exceed the payments made

75. *Id.* at 321.

76. There is the added difficulty that the proceeds of these taxes, like the processing taxes themselves, were earmarked for use in carrying on the illegal activities of the A. A. A. Hence they are clearly within the rule of the *Hoosac Mills* case. But that is another story, which is discussed in the following section.

77. P. L. No. 461, 774th Cong. (1936).

78. 49 STAT. 991, § 3, 15 U. S. C. A. §§ 801, 804 (1935); for a comprehensive survey of the constitutional law problems raised by the act, see Comment (1935) 45 YALE L. J. 293.

79. 49 STAT. 639, §§ 901-910, 42 U. S. C. A. §§ 1101-1110 (1935).

to the state under an approved law, whereas no credits are allowed on account of payments under a state law which has not been approved by the Social Security Board, they cannot be defended solely as efforts to lessen the hardships of double taxation, as in the case of inheritance taxes.⁸⁰ Nor can the tax, as qualified by this credit system, be defended solely as a means of protecting firms in a state which adopts an unemployment insurance act from the advantages that might otherwise accrue to their competitors in states without such laws, as its effect is by no means restricted to interstate commerce. It is clearly intended to force a state to adopt this form of social insurance or see the money which it could otherwise use for this purpose disappear into the coffers of the nation, to be used, of course, in large part, to support federal activities in other states.

This is the very antithesis of revenue motive. As in the case of the oleomargarine tax sustained in *McCray v. United States*,⁸¹ the success of the act is to be measured by its failure to raise a substantial sum. Yet the normal line of reasoning is not available to attack it. The child labor "tax" was a penalty imposed upon those who employed children. In the *Constantine* case,⁸² the levy was a penalty for violating state or local laws. But here the taxpayer can do nothing personally to comply with the credit clauses of the act. He is not penalized for persisting in a given line of conduct, but for living in a particular state. Unless a state is a proper party to protest against this effort to force its hand,⁸³ or unless a private citizen can protest against this effort to force the hand of his state government,⁸⁴ the taxpayer will do better to attack it as a tax which is invalid because it violates the rule of uniformity.⁸⁵ When all is said and done, the ultimate decision will probably hinge upon the majority's attitude toward federal compulsion to speed up the adoption of state systems of social insurance.

80. The Federal Estate Tax allows a credit up to 80 per cent because of death duties paid to a state. 44 STAT. 70, § 301 (b) (1926), as amended, 47 STAT. 278, 26 U. S. C. A. § 413 (b) (1934). See *Florida v. Mellon*, 273 U. S. 12 (1927).

81. 195 U. S. 27 (1904).

82. 56 Sup. Ct. 223 (1935).

83. *Massachusetts v. Mellon*, 262 U. S. 447 (1923), would seem to indicate that it is not. See the discussion of this case *infra*.

84. Likewise *Frothingham v. Mellon*, 262 U. S. 447 (1923), is not to be taken as precluding such a possibility. There the taxpayer was not a proper party because he had no direct interest at stake, the money being taken from the general fund. Here he is resisting a tax as a link in an illegal chain, and as the tax is to be paid by him he has a direct pecuniary interest. Compare *United States v. Butler*, 56 Sup. Ct. 312, 315-317 (1936). Both cases are discussed *infra*.

85. "All duties, imposts and excises shall be uniform throughout the United States." U. S. CONST. Art I, § 8, cl. 1. And see *Heiner v. Donnan*, 285 U. S. 312 (1932), which would seem to hold that the Fifth Amendment forbids arbitrary classifications in violation of "equal protection of the laws."

Summary. The present status of the law in this field is best summarized by Professor Cushman. The more recent cases have only served to illustrate the prophetic vision of his statement.

"The *Magnano case*, which relies upon and thus reaffirms and re-establishes the *McCray case* of 1904, shows that the Court desires to eat its cake and keep it too in the matter of the validity of destructive taxation. No amount of logical analysis will disclose any inherent differences in kind between the child labor tax and the oleomargarine taxes upheld in the *McCray case* and now in the *Magnano case*. In both cases the legislative intention was regulation and destruction *per se*, and all intelligent people, including the Court, were well aware of that fact. But the Court preserves two different techniques for dealing with such statutes. When it wishes to uphold the statute, it utilizes the doctrine of the *McCray* and *Magnano cases*, which may be called the doctrine of judicial obtuseness, and refuses to see or know anything about the tax which does not appear in the language of the act. If, however, the act pushes too far and impinges upon interests which the Court feels are entitled to protection, it falls back upon the doctrine of the child labor tax case, takes judicial notice of the palpable legislative intention to destroy rather than to raise money, and declares the act void on the ground that it is not a tax at all but a regulation."⁸⁶

How lenient the Court intends to be in exercising this new power only time will tell. But one thing should be evident from the *Child Labor* and *Hoosac Mills* cases. It has no intention to permit Congress to regulate production.

Illegal Purpose. In the cases which we have just considered the taxes were not held void because the motive was to raise money to be spent for an illegal purpose, but because the motive was not to raise money. They were not taxes for illegal purposes; they simply were not taxes. If the proceeds, assuming that there are to be any, are to be paid into the general fund, there to be mixed with other revenues and used for any purpose for which money may lawfully be withdrawn from that fund, the argument that it is not really a tax is the only one available aside from the normal ones of jurisdiction, equality of treatment, and the like. But it is an axiom of American constitutional law that taxes may only be levied for a public purpose,⁸⁷ a "Requirement (which) has regard to the use which is to be made of the revenue derived from the tax."⁸⁸ Hence if the proceeds are earmarked for a certain purpose, which the Court finds to be other than a public one, the invalidity of the appropriation may taint the entire transaction and invalidate the tax. In

86. Cushman, *Constitutional Law in 1933-34* (1935) 29 AM. POL. SCI. REV. 36, 51.

87. This is now a requirement of "due process of law," although it was originally applied as a principle of natural justice. See *Loan Association v. Topeka*, 20 Wall. 655 (1874); *Cole v. La Grange*, 113 U. S. 1 (1885); Grant, *The Natural Law Background of Due Process* (1931) 31 COL. L. REV. 56, 64.

88. *Magnano v. Hamilton*, 292 U. S. 40, 43 (1934).

the case of the national government there is the additional requirement that the appropriation must be for a purpose for which Congress, under its delegated powers, may validly spend money; for as Chief Justice Marshall once said, "The Congress is not empowered to tax for those purposes which are within the exclusive province of the states."⁸⁹ Or as the Court has more recently phrased it in the *Hoosac Mills Case*, "The power to appropriate is as broad as the power to tax;"⁹⁰ and conversely, the power to tax is as narrow as the power to spend.⁹¹

It was the latter set of facts which faced the Court in the *Hoosac Mills Case*. The processing taxes were passed with as exclusively revenue motives in view as it is possible to entertain, and their efficiency in accomplishing this purpose is confirmed by the fact that up to last October, when a flood of petitions for injunctions against their collection impounded some \$200,000,000 in federal courts, they had yielded just a few millions shy of a billion dollars.⁹² Unlike the taxes of the Bankhead act,⁹³ they were not "themselves the instruments of regulation." If they suffered from any congenital constitutional infirmity, it was solely due to the purpose for which the money was to be spent.

The minority concluded that these facts establish that the processing taxes are true taxes,⁹⁴ although they conceded that this still left open the question of their validity. But the majority insisted:

"The whole revenue from the levy is appropriated in aid of crop control; none of it is made available for governmental use. . . . The statute not only avows an aim foreign to the procurement of revenues for the support of Government, but by its operation shows the exaction laid upon processors to be the necessary means for the intended control of agricultural production. . . . It is inaccurate and misleading to speak of the exaction . . . as a tax, or to say that as a tax it is subject to no infirmity. A tax, in the general understanding of the term, and as used in the Constitution, signifies an exaction for the support of the Government. The word has never been thought to connote the expropriation of money from one group for the benefit of another. We may concede that the latter sort of imposition is constitutional when imposed to effectuate regulation

89. *Gibbons v. Ogden*, 9 Wheat. 1, 199 (1824). This is not, as so many seem to have assumed, a statement of the limits of the spending power. See *infra*.

90. *United States v. Butler*, 56 Sup. Ct. 312, 319 (1936).

91. Although this second phrase does not occur in the opinion it is implicit in the reasoning of majority and minority alike.

92. *N. Y. Times*, Jan. 7, 1936, at 1, col. 4.

93. 48 STAT. 598, 7 U. S. C. A. § 701 et seq. (1934).

94. "The levy is not any the less an exercise of the taxing power, because it is intended to defray an expenditure for the general welfare rather than for some other support of government. Nor is the levy and collection of the tax pointed to as effecting the regulation. . . . Here regulation, if any there be, is accomplished not by the tax but by the method by which its proceeds are expended, and would equally be accomplished by any like use of public funds, regardless of their source." Stone, Brandeis, and Cardozo, J. J., dissenting, *United States v. Butler*, 56 Sup. Ct. 312, 325 (1936).

of a matter in which both groups are interested and in respect of which there is a power of legislative regulation. But, manifestly, no justification for it can be found unless as an integral part of such regulation. The exaction cannot be wrested out of its setting, denominated an excise for raising revenue and legalized by ignoring its purpose. . . . To do this would be to shut our eyes to what all others can see and understand. . . . The exaction (is) not a true tax."⁹⁵

This line of reasoning presents several problems, and not a few difficulties, of a logical nature. Does the majority mean to imply that a tax is not a tax unless its proceeds are paid into the general fund for undesignated purposes? Would a surtax upon the incomes of those in the higher brackets cease to be a tax because it was earmarked for use in paying a soldiers' bonus or constructing a battleship, a gasoline tax because it was earmarked for use in constructing and repairing highways, or a liquor sales tax because it was appropriated in advance to a campaign for temperance? Even conceding the power of whichever government might be concerned to pay a soldiers' bonus, construct a battleship, or carry on temperance propaganda, would it be necessary to prove that millionaires "are interested" in the payment of a soldiers' bonus and the construction of a larger navy, and saloon keepers and night club operators in the theory and practice of temperance, in order to sustain such taxes? Is this not to convert all earmarked taxes from such into "special assessments," and hence measurable only on the basis of benefit and not on that of ability to pay or some other acceptable criterion of taxation? But the fact which is most to be deplored is that the reasoning, in the course of its argument, switches subjects, only to return to its starting point when it desires to draw as a conclusion the same statement with which it opened as a major promise. "It is inaccurate and misleading to speak of the exaction . . . as a tax, or to say that as a tax it is subject to no infirmity." This is a dual statement, and the two parts have no necessary connection. One may concede that it is subject to a *fatal* infirmity—being levied, as the majority holds, for an illegal purpose—without this concession having the slightest bearing upon the first statement. Apparently what the majority meant—but one hesitates to even venture an opinion as to what they meant, except that they proposed to put an end to the AAA, at least in its present form—is that there can be no such thing as an unconstitutional tax, for the very fact that it is unconstitutional proves, not that it is an invalid tax, but that it is not a tax.⁹⁶ Thus the law is at least made simple, and the great mass of erudition on the subject of "the recovery of unconstitutional taxes"⁹⁷ is relegated to limbo.

Whatever else may be said of this reasoning, it had the advantage

95. *Id.* at 317.

96. But see note 111, *infra*.

97. See FIELD, *THE EFFECT OF AN UNCONSTITUTIONAL STATUTE* (1935) c. X.

of making the *Child Labor Tax Case* appear in point, and thus furnished a semblance of precedent for the Court's ruling. It also furnished a basis for deciding the *Rice Millers' Cases*⁹⁸ in favor of the petitioners, which might otherwise have proved a very difficult task. The 1935 amendments to the AAA act had specifically declared that neither injunctive proceedings nor an action to secure a declaratory judgment should lie against such taxes,⁹⁹ yet at the same time undertook to force the processor to absorb the tax as a condition precedent to bringing an action to recover them when paid under protest, the burden being placed upon him to prove that they had not been passed back to the farmer or on to the consumer.¹⁰⁰ Had the Court denied the injunction on the basis of the 1935 amendment, all processors whose taxes had been held up pending the decision of this test case would have been forced to pay and then sue to recover. This would have had the advantage of treating all processors alike, but it would have given the Court but two alternatives: to sustain the statute limiting the right to recover, thus in effect validating the collection and retention of taxes even after they had been held unconstitutional, or to hold this provision invalid, thus opening the door to a still more serious drain on the national treasury. Either would have caused an appreciable period of uncertainty and a flood of litigation, which might have reacted unfavorably against the courts, and would have sacrificed the opportunity for a spectacular *coup* that might well serve as a telling blow against the "New Deal"¹⁰¹ by hitting the Administration in its pocketbook.¹⁰² But the second alternative, *as a sup-*

98. *Rickert Rice Mills v. Fontenot*, 56 Sup. Ct. 374 (1936).

99. 49 STAT. 770, § 30 (a), 7 U. S. C. A. § 623 (a) (1935).

100. 49 STAT. 770, § 30 (d), 7 U. S. C. A. § 623 (d) (1935).

101. The majority has been extremely careful to avoid any intimation that it is the philosophy of those now in high places which it finds distasteful. It has not always been so. See *Pollock v. Farmers' Loan & Trust Co.*, 158 U. S. 601, 627 (1895), in which the majority, reversing *Springer v. United States*, 102 U. S. 586 (1880), and holding a national income tax unconstitutional, referred to "the speculative views of political economists or revenue reformers." Counsel, however, do not seem to have been impressed by this linguistic quiescence. See Mr. Beck's argument in the *T. V. A.* case as reported in a United Press dispatch for December 20, 1935; or Mr. Pepper's closing phrase in the *Hoosac Mills* case: "I pray Almighty God that not in my time will the land of the regimented be substituted for the land of the free." *N. Y. Times*, December 11, 1935, at 8, col. 4.

102. The public, however, which in reality paid the AAA processing taxes in the form of higher prices, pyramided through the various stages of the commercial process, will continue to pay them in new taxes, for the farmer must still receive his bonus although the taxes originally levied to pay it cannot be collected because it was not legal to pay them in the first place. That such is the present law is beyond dispute. See *United States v. Realty Co.*, 163 U. S. 247 (1896), which is discussed *infra*. And this is one rule of constitutional law which the laws of politics decree cannot be changed, at least for the present.

Such situations as that in which we now find ourselves reveal the essential weakness, not to mention inaccuracy, of the classic statement that "an unconstitutional statute is not a

plement to the injunction in cases where the processor has already paid the tax, is still a possibility, the Court having refrained from expressing any opinion as to its validity. However, as there is authority for the rule that a court, at common law, should deny recovery where the taxpayer has passed on the tax and has manifested no intention of reimbursing the ultimate sufferers or is not in a position to do so,¹⁰³ it would be strange indeed to hold that Congress cannot give statutory status to such a rule. As a question of abstract justice, as well as of practical administration, it has much to commend it.

Of course, the processor, in suing to recover these payments, may stress the ruling that they "are not taxes." It is unfortunate that the majority did not go a step further and tell us what, then, they are. True, in stating the form of the injunction it did refer to them as "exactions." But that is an innocuous word which the dictionary defines as including taxes. In such cases as *Bailey v. Drexel Furniture Co.*¹⁰⁴ the answer is simple—they are penalties. The same is true of cases falling in the category with *Regal Drug Co. v. Wardell*.¹⁰⁵ But it is equally clear that the processing taxes are not penalties. They are not intended to force the processor to do or not to do anything whatever except to pay the tax. We may safely venture the prediction that so far as recovery suits are concerned the Court will apply the law of taxation for the very simple reason that there is no other law to apply.

When one seeks to find the legal basis for the granting of these injunctions in the *Rice Millers' Cases*, he finds that the opinion is far from clear. In *Lipke v. Lederer*¹⁰⁶ a statute of general application providing that "no suit for the purpose of restraining the assessment or collection of any tax shall be maintained in any court,"¹⁰⁷ was held not to apply

law; it confers no rights; it imposes no duties; it affords no protection; it creates no office; it is, in legal contemplation, as inoperative as though it had never been passed." *Norton v. Shelby County*, 118 U. S. 425, 442 (1886). After all, a court can annul a marriage, but it cannot annul the child. Perhaps there is more merit than most Americans have been willing to concede in the Austrian plan whereby a statute is considered as valid until it is held unconstitutional by the Supreme Constitutional Court, the decision having prospective force only, the court even having an option to permit the act to continue in force for a limited period while it is being replaced by a constitutional one. See ADAMOVICH, *DIE PRÜFUNG DER GESETZE UND VERORDNUNGEN DURCH DEN ÖSTERREICHISCHEN VERFASSUNGSGERICHTSHOF* (1927); EISENMANN, *LA JUSTICE CONSTITUTIONNELLE ET LA HAUTE COUR CONSTITUTIONNELLE D'AUTRICHE* (1928); Grant, *Judicial Review of Legislation Under the Austrian Constitution of 1920* (1934) 28 AM. POL. SCI. REV. 670; Kelsen, *La Garantie Juridictionnelle de la Constitution* (1929) ANNUAIRE DE L'INSTITUT INTERNATIONAL DE DROIT PUBLIC 52; 1-5 KELSEN, *KOMMENTAR ZUR BURDESVERFASSUNG* (1919-22); AUSTRIAN CONST. OF 1934, Art. 163.

103. See FIELD, *op. cit. supra* note 97, at 254-5.

104. 259 U. S. 20 (1922).

105. 260 U. S. 386 (1922).

106. 259 U. S. 557 (1922).

107. 14 STAT. 475 (1867), 26 U. S. C. A. § 154 (1926).

to taxes in form but penalties in fact. In *Miller v. Standard Nut Margarine Co.*¹⁰⁸ "special and extraordinary" circumstances were held, as a matter of statutory interpretation, to remove a case from the application of this provision. But such decisions are scarcely in point where, as here, the statute referred specifically and solely to processing taxes, and was obviously passed with the "special and extraordinary" circumstances surrounding the collection of those taxes in mind. Under such conditions changing the name of the tax to a penalty is of no avail. Yet the opinion simply stated:

"The exaction still lacks the quality of a true tax. It remains a means for effectuating the regulation of agricultural production. . . . As yet the petitioner has not paid the taxes to the respondent, and, in view of the decision in the *Butler* case, hereafter can not be required so to do. If the respondent should now attempt to collect the tax by distraint he would be a trespasser, . . . decree enjoining collection. . . ."¹⁰⁹

As this could not have been statutory interpretation, it follows that the Court has held the provision forbidding injunctions unconstitutional as applied to an invalid tax, at least where the tax has been held unconstitutional in a prior decision, and the Court concludes that because of this unconstitutionality it is not a true tax. Yet it did so in the absence of proof of even the normal requirements of equity jurisdiction, since it stated that "We have no occasion to discuss or decide whether section 21 (d) affords an adequate remedy at law."¹¹⁰ This is truly a remarkable ruling.¹¹¹

Hence we may conclude that if the proceeds of a tax are earmarked for use for an illegal purpose, the person subject to the tax may plead this illegal use and thus avoid payment. In the AAA cases the Supreme Court based this conclusion upon the rule that such an exaction is not a true tax, although obviously it is not a penalty either. This particular line of reasoning is less important than the fact that the taxpayer can assert a claim based upon the use to be made of the funds. It would have been easier, perhaps, and certainly no less logical, to have

108. 284 U. S. 498 (1932). And see Note (1935) 49 HARV. L. REV. 109.

109. *Rickert Mills Co. v. Fontenot*, 56 Sup. Ct. 374, 375 (1936).

110. *Ibid.*

111. Cf. *State Railway Tax Cases*, 92 U. S. 575 (1875), holding that the general act validly forbade enjoining taxes which, for purposes of the decision, were considered to be unconstitutional. The only distinction would seem to be that in that case no prior ruling on the question of constitutionality had been rendered. Of course, there is also the possibility that the Court in the instant case is applying a new variation of "dual federalism," and that somehow the fact that the proceeds of the processing taxes are to be used in order to control production places them in a distinct category from other taxes levied for an illegal purpose, depriving them of their character as taxes and rendering them more subject to control by equity processes. Certainly the opinion in the *Hoosac Mills* case, in deciding the principal issue, applied the "dual federalism" doctrine in a thorough-going fashion. See *infra*.

placed it upon the standard doctrine that a taxpayer has a special interest in the use to be made of the funds exacted from him.¹¹² When we come to the second side of the story—*when* is this earmarked use illegal—we face the issue which was the real bone of contention in the *Hoosac Mills Case*: What is the scope of the national spending power?

II

THE SPENDING POWER

When the Constitution declares that Congress may appropriate money "to pay the debts and provide for the common defense and general welfare of the United States," what does it mean? Is this clause merely ancillary to the other delegated powers, intended solely to enable the national government to raise and spend money to carry on its normal functions without the necessity of resorting, as under the Articles of Confederation, to the state legislatures for the raising of the desired funds? Or is it an independent grant of power, enabling Congress to spend money for the accomplishment of purposes over and above its other delegated powers? If so, how much broader is its power to spend than its power to govern? To what extent can it use this spending power as a basis of governing?

The Decisions Prior To 1936

Although these questions have been subject to constant discussion from the time of *The Federalist Papers* to the present day, the Court until this year was a non-participant in the controversy. Despite the fact that the issue had been raised on numerous occasions, the judges had never found it either necessary or expedient to pass upon it. Marshall, to be sure, did state that "Congress is not empowered to tax for those purposes which are within the exclusive province of the states,"¹¹³ from which it follows, of course, that it is not empowered to spend the tax moneys for those purposes. But that statement throws no light upon the real issue: What purposes, so far as *spending* is concerned, are within the exclusive province of the states?

In *Field v. Clark*¹¹⁴ the Court's attention was directed to the sugar bounty clauses of the Tariff Act of 1890,¹¹⁵ the validity of which was conceded to rest upon a broad construction of the spending power. Al-

112. This doctrine can be more conveniently considered in connection with the question, who can contest the validity of an appropriation from the general fund? See *infra*.

113. *Gibbons v. Ogden*, 9 Wheat. 1, 199 (1824).

114. 143 U. S. 649, 695 (1892).

115. 26 STAT. 567, 583 (1890). Those desiring to participate in these bounties were required to post a bond guaranteeing compliance with the terms of their license agreement.

though somewhat similar to the rental and benefit payments under the AAA they were intended to stimulate, rather than reduce, production, and had been placed in the act as compensation for the abandonment of tariff protection. An importer, resisting the collection of duties on other articles, contended that the bounties were unconstitutional and that their invalidity voided the entire tariff schedule. The Court, however, stating, "It would be difficult to suggest a question of larger importance, or one the decision of which would be more far-reaching," concluded that it need not pass upon it, since "even if the position of the appellants with respect to these bounties were sustained, it is clear that the parts of the act in which they are interested . . . would remain in force."

The 1894 act,¹¹⁶ which restored the tariff on sugar, repealed these bounty provisions, but not until many producers had already signed license agreements and entered upon the production of their 1894-95 crops. When the administration construed this repealer to forbid payments under such existing licenses its interpretation was challenged by producers, who sought to force payment through mandamus proceedings. Counsel for the government then raised the additional contention that the original bonus act had been unconstitutional. The District of Columbia Court of Appeals held¹¹⁷ for the government on both grounds, although it is not clear if its ruling on the constitutional issue was based in part on a narrow construction of the spending power or solely on the conclusion that these particular bounties, not being made for a public purpose, violated the Fifth Amendment.

Before the question could reach the Supreme Court, Congress had provided¹¹⁸ that all bounties due under existing licenses should be paid. But the Comptroller of the Treasury, of opinion that both the original bounty act and this act were unconstitutional, refused to honor any warrants to pay such claims.¹¹⁹ In this modified form the question was carried to the Supreme Court,¹²⁰ which again refused to pass upon the validity of the original act.

"The question (of the scope of the national spending power) is one of the very gravest importance," it stated, and "should not be decided without very mature investigation and deliberation, and only when absolutely necessary. . . . In the view we take . . . the rights of the parties may be passed upon . . . without our entering upon a discussion as to the validity of the bounty."

It then held that producers who had governed their actions in accord-

116. 28 STAT. 509, 521 (1894).

117. *Miles Planting Co. v. Carlisle*, 5 App. D. C. 138 (1894).

118. 28 STAT. 910, 933 (1895).

119. *In re Sugar Bounty*, 2 Dec. Comp. Treas. 98 (1895).

120. *United States v. Realty Co.*, 163 U. S. 429, 433-434 (1896). And see note 102, *supra*.

ance with the terms of their licenses under the act of 1890, even if that act was unconstitutional, "acquired claims upon the government of an equitable, moral or honorable nature," and that "The power of Congress extends at least as far as the . . . payment of claims . . . which are thus founded."

In rendering this decision it ventured the opinion that the validity of such an appropriation "can rarely, if ever, be the subject of review by the judicial branch of the government." Apparently it meant by this that the validity of a moral claim is a political question, to be decided by Congress. Certainly it could not have meant that the question could not be raised in court for lack of a proper party plaintiff, since the case then before it demonstrated one way in which a living controversy between parties in interest might easily arise. Indeed, the whole tenor of this opinion, as well as of that in *Field v. Clark*, was one of willingness to pass upon the scope of the "general welfare" clause whenever that question should be determinative of the rights of the parties before it. But before many years had passed other decisions had rendered it exceptionally difficult to find a proper party to raise such an issue in court unless, as in *United States v. Realty Co.*, the administration itself forced the issue by refusing to obey the statute.

It is idle to expect those who profit from the government's largess to refuse to accept its bounties even though they doubt both their constitutionality and their economic wisdom; for as others have remarked it is hard to object to Santa Claus. Even if some were to do so this would not give us a test case, since the government would scarcely undertake judicial proceedings, even if it were possible to do so, to force them to accept either gift or loan. Consequently some remedy must be available to those who are injured if there is to be any judicial check upon the spending propensities of our legislatures. In normal cases the only parties injured are those who pay but do not receive, or at least pay more than they receive, and so the all but unanimous rule has recognized the right of any taxpayer, on his own behalf or that of taxpayers in general, to enjoin the spending of money pursuant to an unconstitutional appropriation.¹²¹ Of course, where his contributions are definitely des-

121. See, among many, *Burke v. Snively*, 208 Ill. 328, 70 N. E. 327 (1904); *Rippe v. Becker*, 56 Minn. 100, 57 N. W. 331 (1894); *Fischer v. Marsh*, 113 Neb. 153, 202 N. W. 422 (1925); *White Eagle Oil Co. v. Gunderson*, 48 S. D. 608, 205 N. W. 614 (1925); *Boleses v. Frear*, 148 Wis. 456, 135 N. W. 164 (1912). Occasionally, as in *Jones v. Reed*, 3 Wash. 57, 27 Pac. 1067 (1891), proof of special injury to the complainant is required. Consult Horack, *Federal-State Co-operation for Social Security* (1935) 30 ILL. L. REV. 292, 309. Cases involving spending by local governments are legion, and almost never require proof of special injury.

It is quite common to grant an injunction even where the money is to be used for a self-liquidating project and there is no evidence of probable loss and hence no proof of any danger of increased taxation. See *Fischer v. Marsh* and *White Eagle Oil Co. v. Gunderson*,

ted for this illegal use his injury is direct and its extent is evident; but even where the money is to be taken from the general fund his interest is no less real, since every illegal expenditure from this fund leaves a correspondingly smaller amount for the payment of legitimate expenses and must necessarily result in increased taxation. Hence the justice of the rule requiring neither special interest nor special injury.

Not only has the Supreme Court accepted this standard rule in the case of municipal corporations,¹²² but it has applied it as recently as 1920 to state appropriations as well. In *Hawk v. Smith*¹²³ there was no mention of special injury, and as only a small sum was at stake—the cost of printing and distributing ballots for a referendum on the legislature's ratification of the Eighteenth Amendment—there could have been but little financial injury at best. Yet the Supreme Court, reversing the state tribunal, granted the injunction. In *Green v. Frazier*¹²⁴ the appropriations were sustained, but no question was made of the standing of the petitioning taxpayers to raise the issue of their validity. One would normally think that the same rule should apply to the nation. Yet as early as 1899¹²⁵ the Court questioned the availability of this remedy in the case of federal expenditures; in 1907¹²⁶ it intimated that the petitioner must at least "disclose the amount of his interest"; and finally, in 1923¹²⁷ it clearly established the doctrine that a taxpayer, even though a millionaire, does not have a sufficient interest at stake to enjoin the spending of a few millions of dollars, taken from the general fund, for a purpose allegedly beyond the constitutional powers of Congress.

"The party who invokes the interference of a court of equity," the Court stated, "must be able to show not only that the statute is invalid but that he has sustained or is immediately in danger of sustaining some direct injury as the result of its enforcement, and not merely that he suffers in some indefinite way in common with people generally." It added that the taxpayer's interest in the moneys of the national treasury "is shared with millions of others; is comparatively minute and indeterminate; and the effect upon future taxation, of any payment out of the funds, so remote, fluctuating and uncertain, that no basis is afforded for an appeal to the preventive powers of a court of equity."

supra. Such a rule cannot be based upon any normal application of the doctrines of equity jurisdiction, and can only be explained upon the basis of the maxim that for every wrong (including every unconstitutional effort to spend money) there should be a remedy.

122. *Crampton v. Zabriskie*, 101 U. S. 601, 609 (1879).

123. 253 U. S. 221 (1920).

124. 253 U. S. 233 (1920).

125. *Bradford v. Roberts*, 175 U. S. 291, 295 (1895). And see *Millard v. Roberts*, 202 U. S. 429, 438 (1906).

126. *Wilson v. Shaw*, 204 U. S. 24, 31 (1907).

127. *Frothingham v. Mellon*, reported together with *Massachusetts v. Mellon*, 262 U. S. 447 (1923).

One may grant everything which the opinion says, and still doubt the soundness of applying a different rule in the case of the nation than in that of the states. There are, to be sure, more national than state taxpayers; but there are also more national taxes. That the interest of the average taxpayer is any more direct or substantial in one case than the other seems open to question. Whatever may be said of "the peculiar relation of the corporate taxpayer to the corporation, which is not without some semblance to that subsisting between stockholder and private corporation,"¹²⁸ the relation of the taxpayer to the nation is essentially the same as his relation to the state. Of course it is possible that the Court intended the rule of the *Frothingham* case to apply to both.¹²⁹ Although such a construction is quite out of keeping with the general tendency to expand the scope of judicial supervision over state activities, it must be borne in mind that in its opinion in *Green v. Frazier*¹³⁰ the Court had indicated a willingness to forego an independent judgment as to the validity of a state appropriation.¹³¹ If this be so, the judges had apparently decided that, at least as to the great majority of appropriations, whether state or federal, the taxpayer should carry his grievance "to the polls, and not to the courts." But in any case it indicates that the Court hesitated to become a perpetual censor of the correctness of congressional interpretations of the scope of the national spending power.

Under a different system of judicial review such a ruling would have no such far reaching effect. In Austria¹³² any state (*Land*) can take the nation (*Reich*) to court, so that the opposition need only control a single state government to be assured of easy and direct access to the court of last resort. But at the same time that the Court decided *Frothingham*

128. *Id.* at 487. Cf. Note (1924) 37 HARV. L. REV. 750, 751: "As the object of relief in all these cases . . . is to protect the citizen from immediately increased taxation due to the unconstitutional expenditure, it seems doubtful whether any line of demarcation between state or federal and municipal taxpayers is warranted."

129. This is the interpretation which was apparently adopted in the Note just cited. Such a construction need not necessarily constitute a reversal of *Hawk v. Smith*, 253 U. S. 221 (1920), and *Green v. Frazier*, 253 U. S. 233 (1920), as both were heard on appeal from state courts. Doubtless a state can liberalize the requirements of equity jurisdiction and still meet the requirements of the doctrine forbidding federal courts to render advisory opinions, which is equally applicable to appeal from state and federal courts. See *Nashville, C. & St. L. Ry. v. Wallace*, 288 U. S. 249 (1933). The difficulty is that the opinion in *Frothingham v. Mellon*, 262 U. S. 447 (1923), clearly intimated that to consider such a person a proper party would do violence to the doctrine.

130. 253 U. S. 233 (1920).

131. But in that case the appropriation had already been sustained by the state court. Quære, did the opinion mean to invite such courts, by adopting the rule of *Frothingham v. Mellon*, to free a large part of the spending power of state legislatures from all judicial supervision?

132. See the references given in note 102, *supra*.

v. Mellon it also decided *Massachusetts v. Mellon*,¹³³ holding that a state is not a proper party to enjoin a national appropriation. Of course, normally a state pays no taxes; and we may assume that where it does¹³⁴ it is to be treated as any other taxpayer and hence comes within the *Frothingham* rule. The contention that the statute constituted an effort to usurp the reserved powers of the state was treated as merely another way of stating that it was unconstitutional, and hence not in point in an effort to prove that the state was a proper party plaintiff.¹³⁵ Nor can a state sue on behalf of its citizens, since

“it is no part of its duty or power to enforce their rights in respect of their relations with the federal government. In that field it is the United States and not the state, which represents them as *parens patriae*.”¹³⁶

At the same time that the Court was refusing to draw limits to the national spending power, it was also meticulously careful, aside from a single sentence in an 1896 opinion,¹³⁷ to refrain from any statement which might have the appearance of a commitment to a broad view of the scope of that power. Yet the opportunities for taking such a stand were ample indeed. *United States v. Realty Co.*,¹³⁸ *Wilson v. Shaw*,¹³⁹ or *Frothingham v. Mellon*¹⁴⁰ would have made excellent vehicles for such a statement, not as *obiter dictum*, but as the doctrine of the case.¹⁴¹ In others such a ruling would have lent support to an otherwise somewhat tenuous conclusion. This is particularly true of *Arizona v. California*,¹⁴²

133. 262 U. S. 447 (1923).

134. See *South Carolina v. United States*, 199 U. S. 437 (1905); *Ohio v. Helvering*, 292 U. S. 360 (1934).

135. 262 U. S. 447, 482 (1923). The assertion that such a question “is political and not judicial in character” may be passed as having been added purely for its decorative effects. Certainly the Court has not hesitated, when the proper parties were before it, to strike down a statute because it “invades the reserved rights of the states.”

The core of the Austrian theory of “parties in interest” is that when either government trespasses upon the powers of the other, the latter is a proper party to protest. A similar doctrine is to be found in Canada. See CAN. REV. STAT. (1906) c. 139, § 60; *Attorney-General for Ontario v. Attorney-General for the Dominion*, [1912] A. C. 571.

136. 262 U. S. 447, 485-486 (1923).

137. *United States v. Gettysburg Electric Ry. Co.*, 160 U. S. 668 (1896), sustaining the right of Congress to authorize the taking of the battlefield of Gettysburg by eminent domain. The conclusion was based largely upon the war power, but the Court also stated, “Congress has power to declare war, and to create and equip armies and navies. It has the great power of taxation, to be exercised for the common defense and general welfare. Having such powers, it has such other and implied ones as are necessary and appropriate for the purpose of carrying the powers expressly given into effect.”

138. 163 U. S. 429 (1896).

139. 204 U. S. 24 (1907).

140. 262 U. S. 447 (1923).

141. For example, in the last case cited the Court might have adopted the technique followed in *Bradford v. Roberts*, and *Millard v. Roberts*, both *supra* note 125, and held that, “passing the . . . alleged defect of parties,” the appropriation was a valid one.

142. 283 U. S. 423 (1931). And see *Smith v. Kansas City Title and Trust Co.*, 255 U. S. 180 (1921), sustaining the Federal Farm Loan Act on the ground that Congress might,

where the Boulder Canyon Project Act¹⁴³ was sustained as an exercise of Congress' power to regulate navigation. Yet "all others can see and understand" that power development and the securing of an ample supply of water for domestic and agricultural uses were the primary purposes of that act, any benefits to navigation being largely, possibly even purely, incidental. Indeed, candor forced the Court to concede that the Colorado River Compact, to the terms of which the act was expressly made subject, "makes the improvement of navigation subservient to all other purposes." This was stating it somewhat mildly, as article four (a) of the Compact reads,

"Inasmuch as the Colorado River has ceased to be navigable for commerce and the reservation of its waters for navigation would seriously limit the development of its basin, the use of its waters for purposes of navigation shall be subservient to the uses of such waters for domestic, agricultural, and power purposes."

Consequently the ruling was as superficial as it would be to hold that the vast undertakings of the T.V.A. are merely incidental to a desire to improve the navigability of the Tennessee River and furnish a source of nitrates for use in case of war.¹⁴⁴ Failure on the part of the Court even to mention the "spending power" would seem to indicate either that it was unwilling to sanction the construction of such gigantic public works on this clause, or that for particular reasons peculiar to the case it could not do so here.¹⁴⁵

As a result of this long continued judicial self-limitation we entered the most severe depression in our history with no intimation from the Court as to how far Congress can legitimately go in using the purse in attacking the problem of the day. Yet when a new administration decided to outdo even its predecessor in the effort to speed recovery through spending, the scope of this power became the most important constitutional issue of the day, although it was, to be sure, temporarily overshadowed by talk of "executive dictatorship" in contravention of the "separation of powers" and efforts under the N.I.R.A. to reopen the question of the scope of the commerce power. At the same time certain factors made it evident that the Court could not postpone facing the issue much longer, even if it preferred to do so.

[To be continued]

at some future date, wish to use the banks created under it as federal fiscal agencies. In an excellent brief filed by Charles E. Hughes, the Court was invited to sustain the act as a valid exercise of the spending power.

143. 45 STAT. 1057, 43 U. S. C. A. § 617 (1928).

144. Does *Ashwander v. T. V. A.*, 56 Sup. Ct. 66 (1936) foreshadow such a ruling? This case is discussed *infra*.

145. Quære, does the spending power, to the extent that it exceeds the normal powers of Congress, carry with it the right to ignore the police regulations of a state? See *infra*. Arizona law prohibited the construction of a dam without first meeting certain requirements which the nation had not undertaken to fulfill.