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TAXING AND SPENDING: THE LOADED DICE OF A FEDERAL ECONOMY

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A National Administration, bent on social reform, has again focused attention on the Tax Clause of the Federal Constitution. Statutes designed by their advocates to ameliorate the ills of the body politic have given the Supreme Court an opportunity to point out familiar landmarks and to chart new courses. Old doctrines concerning the power to tax have been taken from the cupboard, dusted off, and pressed into service again to decide further controversy. Also, new doctrines were established when the Supreme Court, for the first time, was called upon to decide the scope of the complementary power to spend.

It is the purpose of this introduction to sketch a picture of the Federal taxing power, its scope and limitations. One of these limitations, the Tenth Amendment in the Bill of Rights, will be examined in greater detail. It is hoped that against this background the learned discussions that follow in this symposium will take on added perspective.

I. THE SCOPE OF THE TAX CLAUSE

It would be well at the outset to take a glance at the language of the Tax Clause. Article I, Section 8, Clause 1, of the United States Constitution declares that:

> "The Congress shall have Power to lay and collect Taxes, Duties, Imposts, and Excises, to pay the Debts and provide for the Common Defence and General Welfare of the United States; but all Duties, Imposts and Excises shall be uniform throughout the United States;"

Chief Justice Chase, in the *License Tax Cases,*[1] had occasion to point out the scope of the plenary[2] power to tax in the following words: "It is true that the power of Congress to tax is a very extensive power. It is given in

[1] 5 Wall. 462 (1866).

[2] It is established that the Tax Clause empowers the Federal Government to levy "every form of tax appropriate to sovereignty." Steward Machine Co. v. Davis, 57 Sup. Ct. 583 (1937).

the Constitution, with only one exception and only two qualifications.[3] Congress cannot tax exports,[4] and it must impose direct taxes by the rule of apportionment[5] and indirect taxes by the rule of uniformity. Thus limited, and thus only, it reaches every subject, and may be exercised at discretion."

Today, however, the statement of the Chief Justice should not be taken too literally in view of later developments. Within a few years after Chase had spoken, the Court decided *Collector v. Day*.[6] In that case, an implied limitation was laid upon the federal taxing power to prevent taxation of the instrumentalities of the several states.[7] A half century later, the Supreme Court found in the Constitution another limitation on the federal taxing power. It held that the Congress could not levy an income tax on the salary of a Federal Judge, in view of the constitutional provision that the Judges, "both of the Supreme and Inferior Courts, shall hold their offices during good behavior, and shall at stated times, receive for their services a compensation which shall not be diminished during their continuance in office."[8]

Since the power to tax is a legislative one conferred upon the Congress, it is, of course, subject to the doctrine of separation of powers,[9] and, therefore, the Congress cannot delegate its power to tax either to the Executive or Judicial branches of Government.

Further limitations on the federal taxing power are to be found in the Bill of Rights to the Federal Constitution. The two amendments which have been the basis for decision in this connection are the Fifth Amendment, providing that no property shall be taken without due process of law, and the Tenth

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[3]Strictly speaking, it would seem there are three qualifications. The third one not mentioned by Chief Justice Chase is to be found in Article I, Section 9, Clause 6: "No preference shall be given by any regulation of commerce or revenue to the ports of one State over those of another; nor shall vessels bound to, or from, one state be obliged to enter, clear, or pay duties in another."

[4]Article I, Section 9, Clause 5.

[5]Article I, Section 9, Clause 4. Whether a tax is direct or indirect, has been a fruitful source of controversy since the early days of the Republic. See Hylton v. United States, 3 Dall. 171 (1796). In Pollock v. Farmers Loan & Trust Co., 158 U. S. 601 (1895), a tax on income derived from real and personal property was held to be a direct tax, and, therefore, subject to the rule of apportionment. The Sixteenth Amendment was adopted to overcome this difficulty. It has been held that the ouly effect of the Sixteenth Amendment is to obviate apportionment in levying income taxes and not to grant any new power of taxation to the Federal Government. See Evans v. Gore, 253 U. S. 245 (1920).

[6]11 Wall. 113 (1871).

[7]The converse of this proposition, the prohibition of state taxation of federal instrumentalities, had already been established in McCulloch v. Maryland, 4 Wheat. 316 (1819) and in Dobbins v. Commissioners of Erie County, 16 Pet. 435 (1842). For the latest development in the field of reciprocal immunity from the taxation: Brush v. Commissioner of Internal Revenue, 57 Sup. Ct. 495 (1937) (Federal income tax levied on local waterworks engineer) and People *ex. rel* Rogers v. Graves, 57 Sup. Ct. 237 (1937) (State income tax levied on General Counsel to the Panama R. R., a Federal officer).

[8]Evans v. Gore, 253 U. S. 245 (1920). cited *supra* note 5. See further, Miles v. Graham, 268 U. S. 501 (1925); O'Donoghue v. United States, 289 U. S. 516 (1933); Williams v. United States, 289 U. S. 533 (1933).

[9]*In re* Kollock, 165 U. S. 526 (1897); United States v. Butler, 297 U. S. 1 (1936).

Amendment, reserving to the several states and the people, respectively, powers not delegated to the Federal Government.[10]

II. The Fifth Amendment

The restraint on the taxing power imposed by the Fifth Amendment is "less narrow and confining," than that imposed on the states' taxing power by the Fourteenth Amendment since the Fifth Amendment has no equal protection clause. No federal law has ever been invalidated on the ground of unreasonable classification either as to objects or persons subjected to taxation.[11] The due process clause of the Fifth Amendment, nevertheless, does limit the taxing power both in procedure and in substance.[12] Thus, defective methods of valuation, assessment, collection or remission, may amount to lack of

[10]Although the situations have not arisen wherein the Federal Government has attempted to use the taxing power in such manner as to violate any of the other amendments in the Bill of Rights, it would seem that on principle the other provisions in the Bill of Rights limit the federal taxing power. A recent case bears out this suggestion. In Grosjean v. American Press Co., 297 U. S. 233 (1936), the Supreme Court, in an unanimous opinion, held that Louisiana could not use its taxing power to violate the freedom of speech and press impliedly guaranteed by the due process clause of the Fourteenth Amendment. It would seem to follow, therefore, that a similar attempt by the Federal Government to circumvent the *express* guarantee of freedom of speech and press in the First Amendment to the Constitution would be invalid. Further, both the majority and minority Justices in the case of The Associated Press v. National Labor Relations Board, 57 Sup. Ct. 650 (1937) assumed that the First Amendment limits the commerce power, although they differed on their application of the rule to the particular case.

[11]Knowlton v. Moore, 178 U. S. 41 (1900); Treat v. White, 181 U. S. 264 (1901); Patton v. Brady, 184 U. S. 608 (1902); McCray v. United States, 195 U. S. 27 (1904); Brushaber v. Union Pacific Railway Co., 240 U. S. 124 (1929) Steward Machine Co. v. Davis, *supra* note 2. *Cf.* Miller v. Standard Nut Margarine Co., 248 U. S. 498 (1932) (Arbitrary classification by an administrative officer).

[12]For a long time, the qualifying infiuence of the Fifth Amendment was not appreciated. One can find many expressions in the Supreme Court Reports to the effect that the Fifth Amendment could not be a limitation on the taxing power. The reasoning proceeds on a "whole or nothing" basis; that is, the Constitution does not grant a power in one clause and then vitiate that grant in another. See License Tax Cases, 5 Wall. 462 (1886); Flint v. Stone Tracy Co., 220 U. S. 107 (1910); Billings v. United States, 232 U. S. 261 (1913); Brushaber v. Union Pacific Railway, 240 U. S. 1 (1916). In the Billings case, *supra*, 282, Chief Justice White stated the proposition as follows:

"It is also settled beyond dispute that the Constitution is not self-destructive. In other words, that the powers which it confers upon the one hand it does not immediately take away on the other; that is to say, that the authority to tax which is given in express terms is not limited or restricted by the subsequent provisions of the Constitution or the amendments thereto, especially by the due process clause of the Fifth Amendment. McCray v. United States, 195 U. S. 27, and authorities there cited."

It seems, however, that the Chief Justice was merely stating a rule of caution in applying the Fifth Amendment to Congressional enactments in view of his statement two years later in Brushaber v. Union Pacific Railway, *supra*. He there said:

". . . and no change in the situation here would arise even if it be considered, as we think it must be, that this doctrine would have no application in a case where although there was a seeming exercise of the taxing power, the act complained of was so arbitrary as to constrain to the conclusion that it was the exertion of taxation by a confiscation of property, that is, a taking of the same in violation of the Fifth Amendment, or, of its equivalent thereto was so wanting in basis for classification as to produce such a gross and patent inequality as to inevitably lead to the same conclusion."

procedural due process.[13] And lack of substantive due process may be found in the attempt of a statute to set up a conclusive presumption on certain factual bases where there is no connection between the facts and the conclusion;[14] or substantive due process may be found lacking where an attempt is made to make a tax law unreasonably retroactive in its application.[15]

III. The Tenth Amendment

A goodly number of taxing statutes have come before the courts with some complainant alleging that the Congress was seeking to control certain fields over which it had no expressly delegated power, and that this was violative of the Tenth Amendment. These cases will be discussed below in accordance with the type of regulation attempted by the Congress.[15a] Reference will also be made to those instances of attempted Congressional regulation which have never been litigated at all.

The Tenth Amendment to the Federal Constitution declares that "the powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States, respectively, or to the people."

It is hardly necessary to point out that the Tenth Amendment merely makes explicit what is implicit in the framework of the Constitution. Since the Federal Government is one of delegated powers, it is axiomatic that it cannot exercise a power not granted. When we say generally, therefore, that the Tenth Amendment is a limitation on the taxing power, it should be borne in mind that this is only a happy phrasing of the rule of constitutional law that the Congress eannot exercise the taxing power to achieve a control in a field over which it cannot legislate directly under the expressly delegated powers. As is the case with most rules of law, the statement of the rule is simple; its application to specific facts involves decided difficulty: After all, rules do have their exceptions.

The field of federal tax law is strewn with attempted regulation. In some measures the Congress has appended numerous regulations to the tax itself presumably to deal with the facilitation of tax collection in a complex national

[13]See Anniston Mfg. Co. v. Davis, 301 U. S. 337 (1937).

[14]Heiner v. Donnan, 285 U. S. 312 (1932). *Cf.* Schlesinger v. Wisconsin, 270 U. S. 230 (1926).

[15]Nichols v. Coolidge, 274 U. S. 531 (1927); Blodgett v. Holden, 275 U. S. 142 (1927); Untermeyer v. Anderson, 276 U. S. 440 (1928). *Cf.* Brushaber v. Union Pacific Railway, 240 U. S. 1 (1916); Billings v. United States, 232 U. S. 261 (1913); United States v. Hudson, 57 Sup. Ct. 309 (1937); Milliken v. United States, 283 U. S. 15 (1931). For an analogous situation involving retroactive taxation by a state, see Coolidge v. Long, 282 U. S. 583 (1931).

[15a]This discussion will be confined generally to the field of excise taxation. No attempt will be made to cover the income, estate and gift tax laws which do afford many examples of tax impositions which primarily are for the purpose of regulating individual conduct, e.g., the undistributed profits tax provisions in the corporate income tax laws, 49 Stat. 1165 (1936) 26 U. S. C. A. 27 (1936 Supplement).

economy. In others, the Congress set up a standard of socially desirable conduct and gave the concerned parties a choice of complying, or paying a wholly new tax, or an increased tax.

The types of statute listed above make for regulation, by either the imposition of a tax or the exemption from a tax. A different type of situation is presented where the attempted regulation consists of methods to make effective the spending of the proceeds of a tax.

Before proceeding to a discussion of the statutes and cases, we should define the key word, regulation. It may mean either a command to do something upon pain of penalty or a guidance of conduct by granting benefits. When it is said that a federal tax regulates an individual, all that is meant is (1) a burden is imposed upon him, a tax is levied, or (2) he is exempted from burden, a tax rebate is had, or (3) he is given some of the tax proceeds collected from other citizens, a bounty.[16] Theoretically, the Federal Government can only regulate by a tax in the sense of command where it has an express power to command directly. If the express power be lacking, taxation can only regulate in the sense of guidance. When the Court decides that a federal tax is a command, and there is no express power to so command, the tax is denominated a penalty and the Tenth Amendment is invoked with the declaration that the Congress is attempting to penalize conduct over which it has no direct control, and, therefore, the control is invalid. Since the imposition of either a tax or a penalty is burdensome, and *vice versa,* the cases do not lay down any hard and fast rule. The distinction is one of degree. Therefore, each litigated fact situation will have to be examined carefully.

At the outset it would be well to dispose of those cases which involve the use of the taxing power to carry into execution another power expressly vested in the Federal Government. There are three notable instances in which the Congress has used the taxing power as a convenient method of regulation in a field where it has plenary power.[17]

[16]A regard for balance makes it necessary for us to remember that the motivation of specific human conduct is not always the *raison d'etre* of a given tax. It may be rather that the imposition is for the purpose of securing some broader social policy. Any government fiscal system which taxes the rich and spends the proceeds for the moral and physical welfare of the masses is obviously engaged in a method of wealth re-distribution. Usually the courts sanction the use of the public treasury as a syphon of wealth where they agree that the expenditure is for a "public purpose". But if the court sees no justification, it will condemn the taxing and spending as an "expropriation of wealth", to be castigated and prevented.

[17]Recent years have witnessed various Congressional attempts to use the taxing power as a means of regulating commerce: The Bituminous Coal Conservation Act of 1935, Pub. L. No. 402, 74th Cong., 1st Sess. (Aug. 30, 1935), was invalidated in Carter v. Carter Coal Co., 298 U. S. 238 (1936). This year Congress enacted the substitute Bituminous Coal Act of 1937, Pub. L. No. 48, 75th Cong., 1st Sess. (April 26, 1937). See also Potato Act of 1935, Title II of Pub. L. No. 320, 74th Cong. 1st Sess. (Aug. 24, 1935); Kerr Tobacco Act, Pub. L. No. 483, 73d Cong. (June 28, 1934); Bankhead Cotton Control Act, Pub. L. No. 16, 73d Cong. (Apr. 21, 1934). These three statutes were repealed by Pub. L. No. 433, 74th Cong. 1st Sess. (Feb. 10, 1936).

The most ambitious attempt was in the Railroad Retirement Act of 1934. 48 STAT.

In 1866, the Congress laid a tax of ten percentum on state bank notes.[18] In *Veazie Bank v. Fenno*,[19] the statute was held valid. The complainant pressed the argument, among others, that the tax was so excessive as to work a destruction of the thing taxed and that this was not permissible under the Constitution. Chief Justice Chase answered that the destruction of property by prohibitory taxation was a political question, not a judicial one;[20] and more important that the prohibition of state bank notes was valid under the fiscal powers of the Congress.[21]

In 1880 the Congress passed "An Act to Regulate Immigration."[22] A duty of fifty cents per person was levied on foreigners arriving in the United States, the tax to be paid by the master, owner, agent, or consignee of the transporting vessel. The funds collected were to be deposited into a special immigrant fund to be used to "defray the expense of regulating immigration under this Act, and for the care of immigrants arriving in the United States, for the relief of such as are in distress, and for the general purpose and expense of carrying this Act into effect." The statute was held valid in the *Head Money Cases*.[23] Mr. Justice Miller decided that "the burden imposed on the shipowner by this statute is a mere incident of the regnlation of commerce—of that branch of foreign commerce which is involved in immigration."

In 1928, nearly a century and a half after the passage of the first protective tariff in 1789, the Supreme Court, in *Hampton & Co. v. United States*,[24] was called upon to decide the constitutionality of the Tariff Act of 1922.[25] The assailant of the statute urged the invalidity of the Tariff Act on the ground that its declared purpose was to protect home industry. Chief Justice Taft disposed of the contention with the statement that the tariff was a valid revenue measure although the Congress may have had the collateral motive of protection. He pointed out that tariffs could not be unconstitutional because the very men who

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1283, 45 U. S. C. A. 201-214 (1934). This Act was invalidated in the case of The Railroad Retirement Board v. Alton R. R. Co., 295 U. S. 330 (1935). Congress then enacted two substitute acts: 49 STAT. 967, 45 U. S. C. A. 215-228 (1935); 49 STAT. 974, 45 U. S. C. A. 241-253 (1935). These met further judicial objection in the case of Alton R. R. Co. v. Railroad Retirement Board, 16 Fed. Supp. 955, U. S. Dist. Ct. (D. C. 1936). The Congress answered with two amended acts in 1937: Pub. No. 162—75th Congress, first session (June 24, 1937) and Pub. No. 174—75th Congress, first session, (June 29, 1937).

[18]14 STAT. 146 (1866).

[19]75 U. S. 533 (1869).

[20]This hearkens back to Marshall's famous dictum in McCulloch v. Maryland, 4 Wheat. 316 (1819) that the power to tax involves the power to destroy. *Cf.* Mr. Justice Holmes in Panhandle Oil Co. v. Mississippi, 277 U. S. 218 (1928) that "the power to tax is not the power to destroy while this Court sits."

[21]The Court in the Child Labor Tax Case rested the decision in the Veazie case on this second ground. 259 U. S. 20, 40.

[22]22 STAT. 214 (1880).

[23]112 U. S. 580 (1884).

[24]276 U. S. 394 (1928).

[25]42 STAT. 858 (1922).

framed the Constitution enacted a protective tariff as their second legislative act in the New Congress.

Five years later, in *Board of Trustees of the University of Illinois v. United States,*[26] the Court was called upon expressly to decide whether customs duties had their basis in the taxing power or the commerce power. The State University claimed that customs duties were federal taxes pure and simple and, therefore, the state in carrying on the *governmental* function of education was immune from taxation under the settled doctrine of reciprocal immunity of state and federal governmental instrumentalities.[27] Chief Justice Hughes held that the University of Illinois would have to pay customs duties on imported scientific apparatus because the levying of customs duties for protection had its basis in the plenary power of the Congress over foreign commerce, and that the states could not be said to have implied immunity from Congressional regulation of foreign commerce as they do from the Congressional power to tax.[28]

Granted the Congressional privilege of using the taxing power to execute some other expressly delegated power, we still have the further problem as to whether the exaction is a true tax or a penalty. The series of cases under the Eighteenth Amendment involving taxation presented the problem acutely in that it was necessary to determine whether the exaction was a tax for the purpose of deciding whether the general body of tax procedure rules applied to the collection of the so-called tax. Needless to say, if the exaction were construed as a penalty, a summary tax procedure like distraint could not be had, since this would amount to an administrative punishment for a crime, in violation of due process of law. Whether a person from whom the exaction is demanded may sue in equity for an injunction presents a further problem. If the exaction be a tax, he can not of course, under Revised Statute 3224, prohibiting injunctions against the collection of taxes. But if the exaction be denominated a penalty, he may resort to the equity jurisdiction. Also, where the exaction is a tax there must be notice and hearing at some stage of the proceeding before the tax becomes final; if a penalty, there need not be notice and hearing. The further question of double jeopardy may arise where the exaction is based upon the same set of facts which supported a previous criminal prosecution. If a penalty, former conviction would be a bar; if the exaction, however, be termed a tax, there is no double jeopardy.

In *United States v. Yuganovitch*[29] and *United States v. Stasoff,*[30] the Supreme Court by way of dictum stated that Congress under the broad author-

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[26]289 U. S. 48 (1933).
[27]See note 7 *supra.* South Carolina v. United States, 199 U. S. 437 (1905).
[28]289 U. S. 48, 54 (1933).
[29]256 U. S. 450 (1920).
[30]260 U. S. 477 (1923).

ity of the taxing power could tax intoxicating liquors, notwithstanding their production was prohibited and punished, and cited the *License Tax Cases.*

In *United States v. One Ford Coupe,*[31] a simple basic tax on illegally manufactured liquor was held to be a valid tax and, therefore, under Revised Statute 3450 the vehicle used for the purpose of transportation was forfeited to the Government.

In *United States v. Murphy,*[32] the defendants had been acquitted of the charge of maintaining a nuisance in violation of Section 21 of the National Prohibition Act.[33] Subsequently, the Government, under Section 22 of the Act, brought this suit in equity to enjoin the use of the premises for one year. The statute provided that the court might order that the premises should not be occupied or used for one year thereafter, or might permit occupation if the owner or occupant posted a bond for not less than $500 nor more than $1,000 that intoxicating liquor would not be manufactured, sold, or kept therein. The defendants claimed that this was an attempt to punish them for a crime of which they had been acquitted previously. Justice Holmes stated, in deciding for the Government:

> "But altho the contention is plausible, it seems to us unsound. It is true, especially if the premises are closed for a year, that a pecuniary detriment is inflicted, but that is true of a tax and sometimes it is hard to say how a given detriment imposed by the law shall be regarded. *Hodge v. Muscatine County,* 196 U. S. 346, 348. *The Creole,* 2 Wall, Jr. 485. The mere fact that it is imposed in consequence of a crime is not conclusive. A government may endeavor to prevent certain facts and yet provide that if they happen they shall yield as much revenue as they might have yielded, if lawful. *United States v. One Ford Coupe Automobile,* ante, p. 321. In like manner it may provide for the abatement of a nuisance whether or not the owners of it have been guilty of a crime. The only question is what the twenty-second section is intended to accomplish. It appears to us that the purpose is prevention, not a second punishment that could not be inflicted after acquittal from the first."

In *Lipke v. Lederer,*[34] petitioner was allowed to restrain the revenue officers from seizing his property for non-payment of a tax. Petitioner was indicted on a charge of unlawful sale of liquor and while that proceeding was pending, the revenue authorities levied a tax equal to double the basic single rate, pursuant to Section 35 of the National Prohibition Act. A majority of the Court held that the exaction was a penalty and, therefore, Revised Statute 3224 did not deprive the equity courts of jurisdiction and, further, that an injunction would issue to restrain the summary taking of his property by the revenue officers.

[31]272 U. S. 321 (1926).
[32]272 U. S. 630 (1926).
[33]41 STAT. 305 (1919).
[34]259 U. S. 557 (1922).

Mr. Justice McReynolds stated:

"The mere use of the word 'tax' in an act primarily designed to define and suppress crime is not enough to show that within the true intendment of the term a tax was laid. *Child Labor Tax Case,* ante, 20. When by its very nature the imposition is a penalty, it must be so regarded. *Helwig v. United States,* 188 U. S. 605, 613. Evidence of crime (§ 29) is essential to assessment under § 35. It lacks all the ordinary characteristics of a tax, whose primary function 'is to provide for the support of the government' and clearly involves the idea of punishment for infraction of the law—the definite function of a penalty. *O'Sullivan v. Felix,* 233 U. S. 318, 324."

In *Regal Drug Company v. Wardell,*[35] *Lipke v. Lederer* was followed to the effect that the so-called penalties and compound taxes for alleged violation of the National Prohibition Act could not be imposed and summarily enforced by distraint of property without notice and an opportunity to be heard; and Revised Statute 3224 did not preclude injunctive relief against such unlawful action.

In *United States v. La Franca,*[36] *Lipke v. Lederer* and *Regal Drug Company v. Wardell* were followed, the Court holding that the tax imposed by Section 35 of the National Prohibition Act, providing for the assessment and collection of a tax in double the amount now provided by law upon evidence of an illegal sale under the Act was not a true tax, but rather a penalty. Thus, the attempt to impose the penalty amounted to double jeopardy since there had been a former conviction.

Mr. Justice Sutherland summarized and distinguished the cases as follows:

"By § 35, *supra,* it is provided that upon evidence of an illegal sale under the National Prohibition Act, a tax shall be assessed and collected in double the amount now provided by law. This, in reality, is but to say that a person who makes an illegal sale shall be liable to pay a 'tax' in double the amount of the tax imposed by preexisting law for making legal sale, which existing law renders it impossible to make. A tax is an enforced contribution to provide for the support of government; a penalty as the word is here used, is an exaction imposed by statute as punishment for an unlawful act. The two words are not interchangeable, one for the other. No mere exercise of the art of lexicography can alter the essential nature of an act or a thing; and if an exaction be clearly a penalty it cannot be converted into a tax by the simple expedient of calling it such. That the exaction here in question is not a true tax, but a penalty involving the idea of punisbment for infraction of the law is settled by *Lipke v. Lederer,* 259 U. S. 557, 561-562. See also *Regal Drug Co. v. Wardell,* 260 U. S. 386. There is nothing in *United States v. One Ford Coupe,* 272 U. S. 321, or *Murphy v. United States,* 272 U. S. 630, to the contrary. The first of these cases was a proceeding to

[35] 260 U. S. 386 (1922).
[36] 282 U. S. 568 (1930).

forfeit an automobile because used in violation of law; the other was a suit in equity to enjoin the occupation and use of premises for a year because used in the commission of offenses under the National Prohibition Act, and to abate the maintenance as a nuisance. The distinction made by these four cases is that in the first two, the purpose of the proceedings was punishment; while, as to the other two, the purpose in the first case was to enforce a simple tax, not one which had been, as here, converted by a change of its nature, into a penalty, and in the second case the purpose was prevention."[37]

After the burial of the Eighteenth Amendment to the Constitution, the cases discussed above came to life in *United States v. Constantine*,[38] when the Supreme Court held that an attempt by the Congress to lay a special tax of $1,000 on all persons carrying on the liquor business in violation of state law was not a true tax but rather an additional Congressional penalty on those persons violating a state police regulation.

Mr. Justice Roberts, in striking down the tax as a device to usurp the police powers of the states reserved under the Tenth Amendment, stated:

"In the acts which have carried the provision, the item is variously denominated an occupation tax, an excise tax, and a special tax. If in reality a penalty it cannot be converted into a tax by so naming it [citing *United States v. La Franca*, 282 U. S. 568, 572] and we must ascribe to it the character disclosed by its purpose and operation, regardless of name [citing *Macallen Co. v. Massachusetts*, 279 U. S. 620, 625; *United States v. One Ford Coupe, supra*, 328; *Educational Films Corp. v. Ward*, 282 U. S. 379, 387]. Disregarding the designation of the exaction, and viewing its substance and application, we hold that it is a penalty for the violation of state law, and as such beyond the limits of federal power.

"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 [citing *Lipke v. Lederer*, 259 U. S. 557, 562]. Where, in addition to the normal and ordinary tax fixed by law, an additional sum is to be collected by reason of conduct of the taxpayer violative of the law, and this additional sum is grossly disproportionate to the amount of the normal tax, the conclusion must be that the purpose is to impose a penalty as a deterrent and punishment of unlawful conduct [citing *Helwig v. United States*, 188 U. S. 605, 613].

"Reference was made in the argument to decisions of this Court holding that where the power to tax is conceded the motive for the exaction may not be questioned. These are without relevance to the present case. The point here is that the exaction is in no proper sense a tax but a penalty imposed in addition to any the State may decree for the violation of a state law. The cases cited dealt with taxes concededly within the realm of the Federal power of taxation. They are not authority where, as in the present instance, under the guise of a taxing act the purpose is to usurp

[37] *Ibid.* 572.
[38] 296 U. S. 287 (1935).

the police powers of the State [citing *Bailey v. Drexel Furniture Co.*, 259 U. S. 20; *Hill v. Wallace*, 259 U. S. 44; *Linder v. United States*, 268 U. S. 5, 17]."[39]

Mr. Justice Cardozo, dissenting, thought that it was valid to tax illegal businesses at a higher rate than lawful ones, and further was of the opinion that the process of collective psychoanalysis of Congressional motive was being spread to unaccustomed fields.[40]

A. *Regulation Incidental To Taxation*

A perusal of the body of internal revenue legislation reveals many instances where a provision whose ostensible purpose is facilitation of tax collection also makes for socially desirable conduct. Thus, where the Congress levied a tax upon sales of produce or merchandise on exchanges and required all contracts of sale to be written and the stamp tax affixed to such written memorandum[41] the result was the same as that achieved by a statute of frauds. The written memorandum relieves against deception. Of course, the ostensible purpose for requiring the written memorandum is to have a place where the evidence of payment of the tax may be affixed. In *Nicol v. Ames*,[42] the Supreme Court sustained this tax. It held that the tax was an excise tax, not a direct tax, and further that the provision for making a memorandum of every sale was reasonably necessary to the collection of the tax. Mr. Justice Peckham pointed out that the memorandum required by the statute did not meet all of the requisites of the typical statute of frauds and did not seek to hold invalid sales where no memorandum was made. Notwithstanding this, however, the written memorandum makes for honesty. The effect of the regulatory provision is the same as that of a state statute of frauds even though the federal statute does not go quite so far in its sanction for failure to comply[43] in that the sale is not rendered unenforceable.

The various statutes levying taxes upon substitutes for bona fide agricultural commodities provides that these substitutes be adequately labeled as to their contents. Thus, oleomargarine must be labeled oleomargarine and cannot be sold other than from an original stamped package.[44] The statute levying a tax upon adulterated butter and processed or renovated butter provides that these must be labeled as such.[45] The Act of 1896, levying the

[39] *Ibid.* 294.
[40] *Ibid.* 297.
[41] 30 STAT. 448 (1898); 26 U. S. C .A. 903 (1934).
[42] 173 U. S. 509 (1899); see also Thomas v. United States, 192 U. S. 363 (1904), construing 26 U. S. C. A. 902 (1934); 30 STAT. 448 (1898).
[43] Another provision of this statute will be considered, *infra*, under the section entitled *Regulation As an Alternative to Taxation.*
[44] 24 STAT. 210 (1886); 26 U. S. C. A. 972 (b) (3) (1934); Daugherty v. United States, 108 Fed. 56 (C. C. A. 3d 1901), *cert. denied*, 181 U. S. 622 (1901); *In re* Kollock, 165 U. S. 526 (1897.
[45] 32 STAT. 196 (1902); 26 U. S. C. A. 992 (b) (1934).

tax on filled cheese, provides that packages containing the commodity be labeled as such in black-faced letter in four different places on the package.[46] The Act of 1898, levying a tax on mixed flour, provides that the container be labeled plainly "mixed flour."[47] It is fairly obvious that the elaborate statutory precautions respecting labels on these four commodities make for the prevention of fraud in that it is more difficult to "pass off" a spurious commodity for a genuine one.

The oleomargarine and filled cheese statutes further provided for confiscation by the Commissioner of Internal Revenue if he found that the commodities contain any ingredient deleterious to the public health.[48] Appeal from his decision in either case lay to a special board composed of the Surgeon General of the Army, the Surgeon General of the Navy, and the Secretary of Agriculture. The statute concerning processed or renovated butter is less comprehensive in its police power aspects; it limits forfeiture of deleterious products only where the product is intended for interstate or foreign commerce.[49] Of course, when so limited, a provision of this nature is valid as a regnlation of commerce. It would seem, however, that the oleomargarine and filled cheese forfeiture sections which do not limit their operation to interstate or foreign commerce and have nothing to do with facilitation of revenue collection are of questionable validity as an attempt by the Federal Government to exercise a general police power for the protection of health.

The tobacco sections of the internal revenue laws afford us an example of regulation looking toward the protection of morals. One of the provisions relative to the packaging of tobacco and snuff reads as follows:

> "No packages of manufactured tobacco or snuff, prescribed by law, shall be permitted to have packed in, or attached to, or connected with them, nor affixed to, printed, branded, marked, written, or printed upon them, any share, certificate, or instrument purporting to be, or to represent a ticket, chance, share, or interest in, or dependent upon, the event of a lottery, nor any indecent or immoral picture, representation, print or words . . ."[50]

A similar provision in the tobacco laws of 1897 read as follows:[51]

> "None of the packages of smoking tobacco or fine-cut chewing tobacco and cigarettes prescribed by law shall be permitted to have packed in, or attached to, or connected with them, any article or thing whatsoever,

[46] 29 STAT. 254 (1896); 26 U. S. C. A. 1002 (b) (1934).
[47] 30 STAT. 468 (1898); 26 U. S. C. A. 1022 (a) (5) (1934).
[48] 24 STAT. 212 (1886); 26 U. S. C. A. 981 (1934); 29 STAT. 256 (1896); 26 U. S. C. A. 1010 (1934).
[49] 32 STAT. 196 (1902); 26 U. S. C. A. 995 (1934).
[50] 36 STAT. 110 (1909); 26 U. S. C. A. 800 (d) (1934). The same provision relating to cigars and cigarettes is to be found at 26 U. S. C. A. 811 (d) (1934); these provisions are derived from REV. STAT. 3394 (1875).
[51] 30 STAT. 151 (1897).

other than the manufacturer's wrappers and labels, the internal revenue stamp and the tobacco or cigarettes, respectively, put up thereon, on which tax is required to be paid under the internal revenue laws; nor shall there be affixed to, or branded, stamped, marked, written, or printed upon, said packages, or their contents, any promise or offer of, or any order or certificate for, any gift, prize, premium, payment or reward."

In *Felsenheld v. United States,*[52] this provision was held valid. The internal revenue officers were sustained in their seizure of a quantity of Merry World smoking and chewing tobacco. Each package of tobacco contained a slip called a coupon which offered certain prizes for a specified number of coupons. The stipulated facts agreed to by the parties were that the thin coupon was of inappreciable weight and did not affect in any way the ascertaining of the proper tax payable upon the tobacco or interfere in any way with the collection of the tax. Nevertheless, Mr. Justice Brewer thought this provision valid on the ground of administrative expediency. He pointed out that it would be difficult to ascertain in each particular case whether the foreign substances in the package were trifling in size or weight, or otherwise.[53]

It is to be noted that in this particular case the objectionable substance was inserted in the package. The case might well be different where the coupon or pictures are attached to the outside of the package. In such case there is no conceivable connection with the net weight of the tobacco in the package.

The most important statute to be considered in discussing control by the imposition of a tax with incidental regulation is the Harrison Anti-Narcotic Act of 1914, as amended.[54]

In the first instance, the occupational and stamp taxes levied under the Act will be considered in the conventional manner as finding their constitutional basis in the Taxing Clause. Then an attempt will be made to ascertain whether this is a situation where the taxing power is being used to carry out another constitutional power of the Federal Government—the Treaty Power.

Section 1 of the Act of 1914 levied a special occupational tax of one dollar per annum on every person "who imports, manufactures, produces, compounds, sells, deals in, dispenses, or gives away opium or cocoa leaves or any compound, manufacture, salt derivative, or preparation thereof . . ."

Section 2 of the Act made it unlawful for any person to sell, barter, exchange or give away any of the drugs mentioned in Section 1, except in pursuance of a written order of the transferee. The Commissioner of Internal

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[52] 186 U. S. 126 (1901).
[53] *Ibid.* p. 132.
[54] 38 STAT. 785 (1914); 26 U. S. C. A. 1040, 1383 (1934).

Revenue was directed to have a suitable supply of blank order forms available. The sale of any order forms to a person not registered under the special tax provision in Section 1 was prohibited. Section 2 further provided that "it shall be unlawful for any person to obtain by means of said order forms any of the aforesaid drugs for any purpose other than the use, sale, or distribution thereof by him in the conduct of a lawful business in said drugs or in the legitimate practice of his profession." An exception to the use of order forms was made where the drug was prescribed in the course of professional practice by a physician, dentist, or veterinary surgeon registered under Section 1.

Section 8 of the Act declared it to be unlawful for any person not registered under Section 1 and not consuming the drugs pursuant to a professional prescription to have in his possession or control any of the said drugs, and such possession or control was made presumptive evidence of a violation of Section 8 and also of Section 1. Section 9 provided that violations of the Act should be punishable by either, or both, a fine of not more than $2,000 and imprisonment for not more than five years.

In *United States v. Jin Fuey Moy,*[55] the Supreme Court construed the Act for the first time. The defendant physician was indicted for conspiring to violate Section 8 by making it possible for a drug addict to have possession of some morphine sulphate. The defendant doctor had not issued the prescription in good faith in the course of professional practice. Mr. Justice Holmes wrote the opinion for the majority of the Court.[56] He held that Section 8 must be narrowly construed so as to apply only to those persons required to register under Section 1. Therefore, a drug addict having possession of the drugs, and, of course not being of a class to register, could not be guilty of a violation of this section. The defendant doctor then was not guilty of a conspiracy in giving drugs to an addict. Mr. Justice Holmes said:[57]

> "It may be assumed that the statute has a moral end as well as revenue in view, but we are of the opinion that the district court, in treating those ends as to be reached only through a revenue measure and within the limits of a revenue measure, was right."

Mr. Justice Holmes feared that to interpret Section 8 to apply to all persons would present a grave constitutional question of federal power.

Before the Supreme Court had a chance to speak decisively on the validity of the Narcotic Act, a lower court seized upon Mr. Justice Holmes' fears to invalidate part of Section 2. In *Blunt v. United States,*[58] that part of Section 2 was invalidated which reads as follows:

[55]241 U. S. 394 (1916).
[56]Mr. Justice Pitney dissenting.
[57]*Ibid.* p. 402.
[58]255 Fed. 332; (C. C. A. 7, 1918); *cf.* Saunders v. United States, 260 Fed. 386, 388 (C. C. A. 6th, 1919); Miller v. United States, 287 Fed. 864 (C. C. A. 5th, 1923).

"It shall be unlawful for any person to obtain by means of said order forms any of the aforesaid drugs for any purpose other than the use, sale, or distribution thereof by him in the conduct of a lawful business in said drugs or in the legitimate practice of his profession."

In that case the doctor was registered with the Commissioner of Internal Revenue and by means of order forms had procured large quantities of narcotics which he was selling to persons who were not being treated by him in good faith as patients. Another count charged him with selling 2,000 grains of morphine without having registered as a dealer and without having paid the special tax as a dealer. Defendant had been convicted in the trial court on all charges. The Circuit Court affirmed his conviction for violation of Section 1, requiring dealers to register, but reversed so much of the judgment below as was based on the sale of morphine to persons who were not patients treated by him in good faith. Judge Mack declared that Congress may tax a commodity but had not the power to specify what use should be made of a tax-paid article. He stated:

"It does not, however, follow . . . that because Congress may tax any article regardless of whether or not it be a legitimate article of interstate commerce, it may enact an intrastate prohibition law as to any such article. Its power under article 8, clause 1, (presumably meant to be Article 1, Clause 8, Section 1) of the Constitution is only 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; not to regulate taxation throughout the land. And while a power to regulate interstate commerce may include the right to prohibit such interstate commerce as may be deemed harmful (*Lottery Case,* 188 U. S. 321, 23 Sup. Ct. 321, 47 L. Ed. 492; *Hoke Case, supra* [but see *Hammer v. Dagenhart* (June 3, 1918), 247 U. S. 251, 38 Sup. Ct. 529, 62 L. Ed. 1101]), the power to lay taxes on an article includes no right to make any specific use of such tax-paid artiele unlawful.

"This, however, is the sole purpose and intent of the last clause in Section 2. No question of tax or revenue or the protection or security thereof is involved; under this clause, it is declared unlawful for a physician who has paid the required license fee and has bought the order form essential to obtaining the drug, to consume it himself as a drug addict or to give it away or to sell it except in the legitimate exercise of his profession. In our judgment, this prohibition has no relation whatsoever to the taxing power of Congress; it is exclusively an attempt, in the guise of an incidental tax regulation, to exercise the police powers reserved to the States."

The defendant petitioned the Supreme Court for *certiorari,* desiring to appeal from the affirmance of his conviction on the charge of violating the registration provisions of Section 1. The Government did not appeal and filed no brief. The Supreme Court denied *certiorari* on March 24, 1919.

In the meantime, on March 3, 1919, the Supreme Court had decided the case of *United States v. Doremus.*[59] The defendant physician was charged with violating Section 2. The first count charged him with a sale of 500 one-sixth grains of heroin, a derivative of opium, to a drug addict, not in pursuance of a written order form. The second count charged the same offense in a different fashion, namely, that defendant had not distributed the drug in the course of his regular professional practice. The lower court had dismissed the indictment, holding that Section 2 was unconstitutional as an invasion of the police power reserved to the states.

Mr. Justice Day writing the opinion for the majority[60] reversed the lower court and held that Section 2 in its entirety was valid, even as to the prohibition of the drugs other than in the course of a lawful business or legitimate professional practice. He was of the opinion that these incidental regulations in Section 2 tendered "to keep the traffic above board and subject to inspection by those authorized to collect the revenue."

In the case of *Webb & Goldbaum v. United States,* decided on the same day as the *Doremus Case,* Mr. Justice Day, also writing for the same majority[61] as in the former case, upheld the conviction of a doctor and a druggist, registered under Section 1 of the Act, who used official order forms to obtain large quantities of the drug and then made distribution by means of prescriptions to drug addicts. It was established that the druggist filled over 4,000 such prescriptions within an eleven month period. Mr. Justice Day held that "to call such an order for the use of morphine a physician's prescription would be so plain a perversion of meaning that no discussion of the subject is required."[62]

In *United States v. Balint,*[63] Chief Justice Taft, writing for an unanimous Court, held that *scienter* was no part of the statutory crime created by the Anti-Narcotic Act and that to constitute the offense of selling drugs contrary to Section 2 of the Anti-Narcotic Act, it was not necessary to prove that the seller was aware that he was dispensing drugs unlawfully. He explained the purpose of Section 2 in the following language:

> "It is very evident from a reading of it that the emphasis of the section is in securing a close supervision of the business of dealing in these dangerous drugs by the taxing officers of the Government, and that it merely uses a criminal penalty to secure record evidence of the disposition of such drugs as a means of taxing and restraining the traffic."[64]

[59]249 U. S. 86 (1919).
[60]Chief Justice White and Justices McKenna, Van Devanter, and McReynolds agreed with the lower court that the statute invaded the local police power.
[61]Chief Justice White and Justices McReynolds, Van Devanter, and McKenna again dissenting on the same ground—invasions of the reserved police powers of the states.
[62]Accord: Jin Fuey Moy v. United States, 254 U. S. 189 (1920).
[63]258 U. S. 250 (1922).
[64]*Ibid.* p. 253.

In *United States v. Behrmann,*[65] decided on the same day as the *Balint* case, it was also held that intent to violate the statute was not an essential part of the statutory crime. The defendant physician gave an addict prescriptions for sufficient drugs to constitute 3,000 ordinary doses. The majority, speaking through Mr. Justice Day, decided that the prescription of a single dose or even a number of doses, would not make a physician subject to the penalties of the Act, but the situation was different with the large quantity given to the drug addict in this case.[66]

The next case involving the dispensing of narcotics by a physician was *Linder v. United States.*[67] The indictment charged the defendant physician with dispensing four tablets of morphine and cocaine to a known addict. An unanimous Court, per Mr. Justice McReynolds, reversed the conviction below and construed the Narcotic Act not to prohibit the dispensing of small quantities of drugs by a physician during the course of a bona fide medical practice. He pointed out:[68]

> "The facts disclosed indicate no conscious design to violate the law, no cause to suspect that the recipient intended to sell or otherwise dispose of the drugs, and no real probability that she would not consume them."

Mr. Justice McReynolds distinguished the second *Jin Fuey Moy,* the *Balint* and the *Behrman* cases on the ground that the defendant physician in each case was dispensing large quantities of the drugs to addicts under the guise of prescriptions issued in the course of professional practice.

That the *Linder* case did not in any way overrule the prior narcotic decisions appears from the case of *Boyd v. United States.*[69] The defendant physician was convicted below of dispensing drugs to various addicts by means of prescriptions not given in the course of bona fide professional practice. The Supreme Court, per Mr. Justice Van Devanter, approved the charge of the trial Justice to the effect that the only question to be decided by the jury was whether the defendant honestly believed his prescriptions were for the purpose of cure. The jury was charged that this was what the standard of good faith in the course of professional practice meant.

In 1919, the Congress amended the Harrison Anti-Narcotic Act by increasing the amount of the various occupational taxes and further adding a stamp tax of one cent per ounce on any opium, cocoa leaves, or any compound, salt, derivative or preparation thereof, produced in or imported into the

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[65]258 U. S. 280 (1922).
[66]Mr. Justice Holmes dissented on the ground that no bad faith was alleged and further thought that a prescription did not cease to be a prescription simply because a large quantity of drugs was involved. Mr. Justice McReynolds and Mr. Justice Brandeis concurred.
[67]268 U. S. 5 (1925).
[68]*Ibid.* p. 17.
[69]271 U. S. 104 (1926).

United States and sold or removed for consumption or sale. The importer, manufacturer, producer, or compounder was liable for the stamp tax.

In *United States v. Wong Sing*,[70] the Supreme Court was called upon to interpret this addition to the narcotic laws. The defendant was indicted on two counts for the unauthorized possession of unstamped narcotics. The first count charged failure to pay the occupational tax; the second charged failure to pay the stamp tax. The lower court sustained a demurrer to the first count on the authority of the first *Jin Fuey Moy* case, and reasoning from that case, (which had interpreted Section 8 of the original act) to this new section, the District Court held that persons liable to the stamp tax were only those liable to the occupational taxes. The Supreme Court, in an unanimous decision per Mr. Justice McKenna, reversed the dismissal by the lower court. The Government's counsel was willing to acquiesce in the dismissal of the first count on the authority of the first *Jin Fuey Moy* case, but urged a wider interpretation of the section relating to violations of the stamp tax provision. The court sustained the Government's view. It said that the section providing that:

> "It shall be unlawful for any person to purchase, sell, dispense, or distribute any of the aforesaid drugs, except in the original stamped packages or from the original stamped packages . . ."

applied to all persons even though they were not importers, producers, manufacturers or compounders, licensed under the occupational tax provisions of the Act.

Mr. Justice McKenna leaned heavily upon the *Doremus* and *Webb* decisions. He stated that these cases meant that the Congress, as a complement to a revenue measure, could make criminally unlawful the sale, barter, or exchange of narcotic drugs, except under certain prescribed conditions designed to make it effective as a revenue measure. He further stated that the 1914 Act, levying an occupational tax on the various dealers in narcotics, placed certain conditions on sellers, and it was equally valid for the 1919 Stamp Tax Act to place similar restrictions upon purchasers.

In *Alston v. United States*,[71] defendant was indicted for purchasing morphine and cocain from unstamped packages. Counsel for the defendant urged that the entire Act be invalidated because the Congress had undertaken to regulate matters beyond its powers and within exclusive control of the states. Mr. Justice McReynolds, writing for an unanimous Court, revealed that he had no qualms about the constitutionality of the stamp tax, distinguishing other provisions of the narcotic laws concerning whose validity he had urged a

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[70] 260 U. S. 18 (1922).
[71] 274 U. S. 289 (1927).

reexamination in *United States v. Daugherty.*[72] In the *Alston* case, he stated:

> "The present cause arises under those provisions of Section 1 which impose a stamp tax on certain drugs and declare it unlawful to purchase or sell them except in or from original stamped packages. These provisions are clearly within the power of Congress to lay taxes and have no necessary connection with any requirement of the Act which may be subject to reasonable disputation. They do not absolutely prohibit buying or selling; have produced substantial revenue; contain nothing to indicate that by colorable use of taxation Congress is attempting to invade the reserved powers of the states. The impositions are not penalties."

In *Nigro v. United States,*[73] the order form provision of Section 2 of the Act came before the Court again pursuant to the invitation for review in the *Daugherty* case. The defendant, not of the class supposed to be registered under Section 1, was convicted below for selling an ounce of morphine. The sale was not made in pursuance of an appropriate written order form as provided for in Section 2. The case was certified to the Supreme Court in order that it might decide whether the prohibition in Section 2 of any sales except pursuant to an official order form was meant to apply to all persons, registered under the Act or not, and further that if the Act was to be so construed whether it was constitutional. The majority of the Court, speaking through Chief Justice Taft, held that the order form provisions apply to all persons, whether registered under the Act or not, and as thus applied were valid. Chief Justice Taft was of the opinion that the application of Section 2 to all persons was reasonably necessary to prevent tax evasion and said:[74]

> "It would seem to be admissible and wise, in a law seeking to impose taxes for the sale of an elusive subject, to require conformity to a prescribed method of sale and delivery calculated to disclose or make more difficult any escape from the tax."

Chief Justice Taft also adverted to the fact that the amendments of 1919 had increased the various occupational taxes and had added the stamp tax; and that this made for a substantial income to the Government. He stated that:[75]

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[72]269 U. S. 360 (1925). This case involved the definiteness of the sentence imposed by the trial court for conviction on three counts for violation of the Harrison Anti-Narcotics Act. In the course of his opinion in this case, Mr. Justice McReynolds gratuitously observed:

"The constitutionality of the Anti Narcotic Act, touching which this court so sharply divided in United States v. Doremus, 249 U. S. 86, was not raised below and has not been again considered. The doctrine approved in Hammer v. Dagenhart, 247 U. S. 251; Child Labor Tax Case, 259 U. S. 20; Hill v. Wallace, 259 U. S. 44, 67; and Linder v. United States, 268 U. S. 5, may necessitate a review of that question if hereafter properly presented."

[73]276 U. S. 332 (1927).

[74]*Ibid.* p. 341.

[75]*Ibid.* p. 345.

"Under the Narcotic Act, as now amended, the tax amounts to about one million dollars a year, and since the amendment in 1919 it has benefited the Treasury to the extent of nearly nine million dollars. If there was doubt as to the character of this Act, . . . it has been removed by the change whereby what was a nominal tax before was made a substantial one. It is certainly a taxing Act now as we held in the *Alston* case."[76]

The last important case concerning the Narcotic Act is *Casey v. United States.*[77] Section 1 of the Narcotic Act, as amended in 1919, declared that the absence of required stamps from any of the drugs specified in the statute should constitute prima facie evidence of a violation of the Act by the person in whose possession they were found. The defendant, a lawyer for narcotic addicts, was charged with the purchase of three and four tenths grains of morphine not in or from an original stamped package. He was convicted below. A majority of the Court, per Mr. Justice Holmes, upheld the rebuttable presumption created by the statute, declaring that it meant only that the burden of going forward with the proof rested on the defendant; it was up to him to go ahead and explain possession of unstamped drugs.

Referring to the repeated assaults upon the constitutionality of the various provisions of the narcotic laws, Mr. Justice Holmes said:[78]

"The statute is much more obviously a revenue measure now than when *United States v. Doremus,* 249 U. S. 86, was decided, and is said to produce a considerable return. *Alston v. United States,* 274 U. S. 289, 294. It is too late to attempt to overthrow the whole Act on *Child-Labor Tax Case,* 259 U. S. 20. It is said also that no opium is produced in the United States, and at all events that statute has been so modified that now at least *United States v. Jin Fuey Moy,* 241 U. S. 394, does not apply to this case. *United States v. Wong Sing,* 260 U. S. 18, 21."

The cumulative effect of the stamp and occupational tax is that any person in possession of drugs can be prosecuted and punished unless he can show that he is consuming the drug pursuant to a doctor's prescription, or, that

[76]*Ibid.* p. 353. In 1920, not to exceed $750,000 was appropriated for the enforcement of the Narcotic Act. 41 STAT. 654. Same in 1921. 41 STAT. 1275.

In 1924, not to exceed $1,250,000 was appropriated for narcotic control. 43 STAT. 71. In 1925 the amount was not to exceed $1,329,440. 43 STAT. 771.

This year the Treasury supply bill carries an appropriation of $1,267,600 for the Bureau of Narcotics. Pub. L. No. 77, 75th Cong. 1st Sess. (May 14, 1937).

In 1935 the income from narcotic taxes amounted to $580,613; in 1936, $554,028.39. Com. Int. Rev. Rep. 1936, p. 107. The preliminary statement of Internal Revenue Collections, Fiscal year 1937, reveals that the total income from the narcotic, process butter, mixed flour, filled cheese, National Firearms Act, and other miscellaneous taxes amounted to $626,332.96. *Res Ipsa Loquitur!*

[77]276 U. S. 413 (1928).

[78]*Ibid.* p. 420. Mr. Justice McReynolds dissenting on the ground that the presumption created by the statute was arbitrary and violative of due process; Mr. Justice Butler dissented on the ground that the case had nothing to do with the collection of revenue but rather was an attempt to use federal power to combat the opium traffic; Mr. Justice Brandeis dissented on the ground of entrapment by a federal officer; and Mr. Justice Sanford dissented on the ground that the facts did not establish a prima facie presumption.

he is a dealer or doctor who has registered and paid the special tax. The Act prohibits anyone from possessing *unstamped* drugs unless the person is consuming them in the course of medical treatment. And no one can legally have possession of *stamped* drugs unless he is a dealer or doctor registered under the Act. Again, no one can purchase stamped drugs unless either an order form or a doctor's prescription is obtained. The Act specifically prohibits the sale of order forms to anyone who is not a registered dealer or doctor under the occupational tax provisions. In the last analysis, therefore, no one can procure or possess drugs unless he be a registered dealer or doctor, or a patient of the latter. The only chance for a drug addict to obtain a supply legally is through a doctor's prescription of a relatively small amount—the *Linder* case loophole. If the doctor attempts to mete out large amounts via the prescription method, the *Behrman, Webb,* and *Boyd* cases are precedents for conviction.

Thus, the various provisions of the stamp and special taxes make for control of purchase and sale of the drugs from initial production to final consumption. The effective regimentation of all traffic is achieved. Sales other than for medicinal purposes are prohibited. Any breach of the various provisions regulating purchase and sale is prosecuted as an attempt at tax evasion. And in order to imprison a violator of the Act for not more than five years and fine him not more than $2,000, the Government need not prove loss of revenue; violation of the "incidental" regulation is sufficient.[79]

It is apparent from the foregoing review of the Harrison Anti-Narcotic Act and the cases that have arisen under it that the result is not merely the giving of publicity to criminal transactions but rather the Act affords an effective method for complete control of the drug traffic.[80] The Federal Government has been the prosecutor, not the several states. Statistics reveal that from 1931 to 1936 there were reported 24,320 federal violations by unregistered persons and 8,491 federal violations by registered persons. 16,497 unregistered and 918 registered violators were convicted.[81]

In our discussion of the Narcotic Act and cases, it has been assumed that the taxing peg in the constitutional closet was the proper one upon which to hang federal regulation of the drug traffic. However, in the first narcotic case shortly after the enactment of the statute, the earlier *Jin Fuey Moy* case,[82]

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[79]See United States v. Bush, 16 F. (2d) 709; (C. C. A. 5th 1927).

[80]*Cf.* Powell, *Child Labor, Congress and the Constitution* (1922) 1 N. C. LAW REV. 61, 80. United States v. Sullivan, 274 U. S. 259 (1927), holding that criminals must file income tax reports is an instance where the Federal Government gives publicity to criminal conduct in order that state prosecution may follow; see also 26 U.S.C.A. 1120 (1934) (10% tax on sales of pistols and revolvers. Sales are thus brought aboveboard and anyone bootlegging the guns can be prosecuted for evasion of the tax). *Cf.* United States v. Constantine, 296 U. S. 287 (1935).

[81]MILLSPAUGH, CRIME CONTROL BY THE NATIONAL GOVERNMENT (1937) 222.

[82]*Supra* note 55.

Government counsel argued that the Harrison Anti-Narcotic Act was passed for the purpose of fulfilling this country's international obligation as a signatory to the International Opium Convention.[83] His argument, in part, was as follows:

> "The bill originated from the State, and not in the Treasury Department.
> "The two Acts of January 27, 1914, and this Act were enacted to comply with the treaty; see President's Message of August 9, 1913 . . .
> "The assertion that the Acts were not passed pursuant to any treaty is erroneous as reports of Committees show that purpose . . . "[84]

Mr. Justice Holmes adverted to his contention in the following language:[85]

> "The Government . . . contends that this Act was passed with two others in order to carry out the International Opium Convention; 38 Stat., Part 2, 1929; that Congress gave it the appearance of a taxing measure in order to give it a coating of constitutionality . . ."

He then brushed aside the argument:

> "If we could know judicially that no opium is produced in the United States the difficulties in this case would be less, but we hardly are warranted in that assumption when the act itself purports to deal with those who produce it. Section 1. Congress, at all events, contemplated production in the United States, and therefore the act must be construed on the hypothesis that it takes place. If opium is produced in any of the States obviously the gravest question of power would be raised by an attempt of Congress to make possession of such opium a crime. *United States v. Dewitt,* 9 Wall, 41. . . . The Statute does not purport to be in execution of a treaty but calls itself a registration and taxing act. The provision before us was not required by the Opium Convention, and whether this section is entitled to the supremacy claimed by the Government for treaties is, to say the least, another grave question, and, if it is reasonably possible, the act should be read so as to avoid both."

The only other case in which Government counsel attempted to validate the Narcotic Act as in execution of a treaty was *Alston v. United States.*[86] Solicitor General Mitchell argued that the Anti-Narcotic Act had the double purpose of enforcing the Opium Convention and raising revenue. He alleged that the public records indicated this.[87]

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[83]38 STAT. (Pt. 2) 1929 (1912).
[84]241 U. S. 394, 395 (1916).
[85]*Ibid.* p. 401 .
[86]274 U. S. 289, 391 (1927).
[87]The debates in the Congress in 1913 and 1914 during the passage of the various opium bills clearly indicate that their purpose was to carry out the Hague Convention of 1912. The Harrison Anti Narcotic bill was one of the three prepared by the House Committee on Ways and Means to suppress the drug traffic. These bills were guided through the House by Mr. Harrison of New York. The first bill reported amended the Act of 1890,

In the *Nigro* case, counsel for defendant cited the first *Jin Fuey Moy* case and argued that if the statute were construed to execute the treaty, another grave question would arise.[88] In *Casey v. United States,* defendant argued that since Government counsel in the first *Jin Fuey Moy* case had conceded that the purpose of the Narcotic Act was the carrying out of the

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which taxed the manufacture of smoking opium, by increasing the tax from $10 per pound to $300 per pound and increasing the manufacturer's bond from $5,000 to at least $100,000. This bill was approved on January 17, 1914, 38 STAT. 277, 26 U.S.C.A. 1057 (1934).

In Lee Mow Lin v. United States, 250 Fed. 694 (C. C. A. 8th, 1918), *cert. denied,* 247 U. S. 518 (1918), the Act was attacked as invalid on the ground that the tax of $300 per pound was prohibitive. The Court upheld its validity in the following language:

"The law on its face is a law imposing a tax for revenue purposes. The tax imposed of $300 per pound on all opium manufactured for smoking purposes may be so high as to defeat the purpose of raising revenue, but the power to tax, as has been said, includes the power to destroy."

This statement constituted dictum inasmuch as the assailant of the statute was an alien, and as such, was banned from the business.

Mr. Harrison of New York in reporting the opium smoking bill to the House from the Committee on Ways and Means stated:

"Mr. Chairman, This is the first one of a series of three bills which have been recently agreed upon by the Committee on Ways and Means and reported unanimously by that Committee with a favorable recommendation to the House. This bill is designed to impose so severe a tax upon the manufacturers of smoking opium as to discourage that manufacture."

He further stated:

"The International Opium Congress meets on the 1st of July at the Hague. The United States was the instigator of these series of commissions and congresses trying to settle this matter in its international aspects, and our own good faith as a nation is strengthened by the adoption of these bills, showing our own purpose to stamp out this matter." 50 CONG. REC. 2168 (1913).

In the same session of the Congress the Opium Importation Act of 1909, 35 STAT. 614, 21 U. S. C. A. 171 (1927), was drastically revised so as to prevent any importation of narcotics except of such amount as the Federal Narcotics Control Board found necessary for domestic, medicinal and legitimate purposes, 38 STAT. 275 (1914); 21 U.S.C.A. 171 (1927). This Act derived from the second of the series of three bills mentioned by Mr. Harrison, *supra,* see 50 CONG. REC. 2191 (1913); [the customs duties levied upon opium permitted to be imported for medicinal purposes are listed at 19 U. S. C. A. 1001, ¶ 59 (1936 Supp.)].

Mr. Harrison in reporting to the House the bill which later became known as the Harrison Anti-Narcotic Act, stated:

"This is the third and last one of this series of bills attempting to control and regulate the traffic in narcotics . . ." 50 CONG. REC. 2201 (1913).

Senator Thomas in reporting the bill from the Finance Committee the next year after passage by the House stated:

"The bill has been considered very fully in Committee. It came over from the House very early in the special session. It is very necessary that the bill shall be enacted into law as early as possible, owing to the fact that it is necessary to carry out and make effective the provisions of a treaty relating to the same subject, concerning which three bills have been reported in the House, two of which have been enacted into law." 51 CONG. REC. 5670 (1914).

The Senator at a later point in the debate also made the following statement:

"It is a bill the passage of which is necessary for the proper enforcement of the provisions of the opium treaties between the different countries which have been signed. The State Department has been especially urging its early consideration, stating that it has been largely handicapped in the execution of other laws on account of the failure of this bill to become a law." 51 CONG. REC. 13754 (1914).

[88] 276 U. S. 332, 333 (1928).

International Opium Convention, this Act, therefore, was not a revenue measure but rather a police measure, and hence unlawful as an invasion of the reserved police powers of the states.[89] Mr. Justice Holmes disposed of this contention by stating:

> "It is said also, that no opium is produced in the United States, and at all events the statute has been so modified that now at least *United States v. Jin Fuey Moy,* 241 U. S. 394, does not apply to this case. *United States v. Wong Sing,* 260 U. S. 18, 21."[90]

No Justice of the Supreme Court other than Mr. Justice Holmes in the two cases mentioned above has adverted to the Government's contention that the Narcotic Act was in execution of a treaty. The only basis for discussion, therefore, is to be found in these brief statements by Mr. Justice Holmes.

It is to be observed that Mr. Justice Holmes did not feel warranted in assuming that opium was not being produced in this country on the ground that the Act purported to deal with persons who engaged in its production. It would seem that he failed to distinguish between the production of raw opium, which is not carried on domestically, and the production of prepared opium, which is. It is also to be noted that Mr. Justice Holmes in *Casey v. United States* intimated that he might have been too hasty in his earlier conclusion when he adverted again to the contention that opium was not being produced in the United States and distinguished his prior decision in *Jin Fuey Moy* on the ground that the statute had since been modified.

It is, indeed, significant that in the interim between the *Jin Fuey Moy* and *Casey* decisions Mr. Justice Holmes decided the case of *Missouri v. Holland.*[91] He there held that the Tenth Amendment was not a limitation upon the treaty power and upheld the Federal Government in its preemption of a field normally reserved to the states under the Tenth Amendment. It is to be noted that even Government counsel in the *Jin Fuey Moy* case thought that the statute needed a "coating of constitutionality" even though it did execute a treaty. And the contentions of defense counsel in the *Casey* and *Nigro* cases also rested upon the same misconception of the scope of the treaty power.

In spite of these considerations, we have yet to examine Mr. Justice Holmes' further statement that construing the statute broadly so as to cover all traffic in the drugs was not required by the Opium Convention. The language of the Convention seems rather clear on this score. Article 9 of the Treaty provided that:

> "The Contracting Powers shall enact pharmacy laws and regulations in such a way as to limit the manufacture, the sale, and the use of mor-

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[89]276 U. S. 413, 414 (1928).
[90]*Ibid.* 420.
[91]252 U. S. 416 (1920).

phine, cocain and their respective salts to medical and legitimate uses, only, unless existing laws or regulations have already regulated the matter. They shall cooperate amongst themselves in order to prevent the use of these drugs for any other purpose."[92]

Article II further provided that:

"The Contracting Powers shall take measures to prohibit in their internal commerce all transfers of morphine, cocain and their respective salts to all nonauthorized persons, unless existing measures have already regulated the matter."[93]

Any doubt as to the international obligations of this country to control domestic consumption of drugs must be banished in view of the more drastic provisions contained in the Treaty of 1931 entitled, *Convention for Limiting the Manufacture and Regulating the Disposition of Narcotic Drugs,* to which this country is a signatory.[94] Article 15 of the Treaty imposes a duty upon each High Contracting Party of creating a special administration, if it had not done so already, for the purpose of "regulating, supervising, and controlling the trade in the drugs."[95]

It is to be also noted that Mr. Justice Holmes, in answering the treaty argument in the first *Jin Fuey Moy* case said, "The statute does not purport to be an execution of a treaty but calls itself a regulation and tax act." In connection with this makeweight statement, the doctrine of judicial notice of treaties is to be noted. Article VI of the Constitution places them on a par with the Constitution itself.[96]

Needless to say, the suppression of the opium traffic is a valid subject for a treaty in view of widespread smuggling, and further in that no raw opium is produced in this country.[97]

Although the Supreme Court has decided the various opium cases on the basis of a liberal interpretation of the taxing power, it has been the Government's contention that the Act was valid as an exercise of the treaty power. It may be that the Supreme Court will confine its decisions in these cases by rationalizing them on the basis of the treaty power, if the Federal Government seeks to utilize the narcotic precedents to sustain similar statutory devices for dealing with other problems. Cases which will undoubtedly arise under two recently enacted statutes may present this opportunity.

This year witnessed the enactment of a statute designed to control traffic

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[92]38 STAT. (pt. 2) 1929, 1932 (1912).
[93]*Ibid.*
[94]48 STAT. (pt. 2) 1543 (1931).
[95]*Ibid.* 1571. The Federal Government had already created such special administration in 1930 when the present Bureau of Narcotics was organized in the Treasury Department; Millspaugh, *supra* note 81, at 213.
[96]*Cf.* Mr. Justice Holmes in Missouri v. Holland, 252 U. S. 416 (1920); also see 5 WIGMORE, EVIDENCE (5th ed. 1923) § 2573c; JONES, COMMENTARIES EVIDENCE § 391.
[97]16 ENCYC. BRITANNICA (14th ed. 1929) p. 810.

in the domestically produced drug known as marihuana. The statute is known as the "Marihuana Tax Act of 1937."[98] It levies a special occupational tax upon all producers, importers, manufacturers and compounders of the drug. Physicians and other practitioners are also required to register and pay a nominal special tax. The Act further provides that it shall be unlawful for any person, whether or not required to pay a special tax and register, to transfer marihuana, except in pursuance of a written order form, blanks for this purpose to be furnished by the Secretary of the Treasury. It is further provided that every transfer of the drug pursuant to the written order form should be subject to a special transfer tax. In the case of registered persons, the tax is one dollar per ounce, or fraction thereof; unregistered persons must pay a tax of $100 per ounce. These taxes must be paid by the transferee at the time the order form is procured. The net effect seems to be that transfers of the drug may not take place unless pursuant to an official order form. Any person may procure an order form, but a prohibitive tax of $100 per ounce is laid upon attempted transfers by unregistered persons. These provisions are to be compared to the Harrison Anti-Narcotic Act wherein the sale of order forms to non-registered persons was prohibited. In view of the prohibitive tax, the result would seem to be the same in either case.

The second recent statute levying a tax upon a "criminal" commodity is the National Firearms Act of 1934.[99] Section 2 of the act levies occupational taxes of $500 a year on importers and manufacturers, $200 on dealers and $300 a year on pawnbrokers. Section 3 of the act levies a special stamp tax of $200 on every transfer of a firearm. Section 4 of the Act makes it unlawful to transfer a firearm except in pursuance of a written order form. The finger prints and a photograph of the transferee are to accompany the order. The serial number of the firearm is also to be recorded.

In *Sonzinsky v. United States,*[100] an unanimous court speaking through Mr. Justice Stone upheld the occupational tax of $200 on dealers. The defendant argued that the levy was not a true tax but rather a penalty imposed for the purpose of suppressing traffic in certain noxious types of firearms, the local regulation of which was reserved to the states. Defendant claimed that the various taxes were prohibitive. Mr. Justice Stone answered these contentions in the following language:

> "Here the annual tax of $200 is productive of some revenue. We are not free to speculate as to the motives which moved Congress to impose it, or as to the extent to which it may operate to restrict the activities taxed. As it is not attended by an offensive regulation, and

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[98]Pub. L. No. 238, 75th Cong. 1st Sess. (Aug. 2, 1937).
[99]48 STAT. 1240, 26 U. S. C. A. 1132 (1934).
[100]57 Sup. Ct. 554 (1937).

since it operates as a tax, it is within the national taxing power." [Citing *Alston, Nigro* and *Hampton* cases.][101a]

The Court pointed out that the opinion in the case involves only the special tax under Section 2. Decision was expressly reserved on Sections 3 and 4 relating to the transfer tax with its incidental regulations. One can only speculate as to the next phase. Will these regulations under Sections 3 and 4 be sustained on the authority of the narcotic cases?[101]

B. *Regulation as an Alternative to Taxation*

On May 15, 1922, the Supreme Court decided *Bailey v. Drexel Furniture Company* (The *Child Labor Tax Case*)[102] and *Hill v. Wallace.*[103] The statute involved in the *Child Labor Tax Case* was that part of the Revenue Act of 1919[104] which levied a tax on the employment of child labor. The Act set up standards for the employment of children and provided that any person employing a child in violation of these standards should pay an excise tax equivalent to 10% of the entire net profits received or accrued each year from the sale or disposition of his products. A person violating the statute in good faith was exempted from payment of the tax. The Secretary of Labor and the Commissioner of Internal Revenue were authorized to provide for the inspection of establishments subject to the Act.

A majority of eight,[105] speaking through Chief Justice Taft, invalidated the law on the ground that the so-called tax was a method for the regulation of the employment of child labor in the States—an exclusive state function and within the reservation of the Tenth Amendment. The Chief Justice posed the question whether the exaction was a tax or a penalty. He pointed out that there was no clear cut distinction between a tax and a penalty but that there does come a time "in the extension of the penalizing features of the so-called tax when it loses its character as such and becomes a mere penalty with the characteristics of regulation and punishment."[106] The Chief Justice concluded that the so-called tax was a penalty "to coerce people of a state to act as Congress wishes them to act in respect of a matter completely the business of the state government under the Federal Constitution."[107]

[100a][For a complete analysis, see *The Excise Tax as a Regulatory Device,* by Prof. Ray A. Brown, *infra* p. 45—*Ed.*].

[101]57 Sup. Ct. at 556. Mr. Justice Stone pointed out that the $200 tax was paid by 27 dealers in 1934 and by 22 dealers in 1935. It can hardly be expected, however, that this income from the tax made up for the funds expended in the course of administration.

[102]259 U. S. 20 (1922).

[103]259 U. S. 44 (1922).

[104]40 STAT. 1138 (1919).

[105]Mr. Justice Clarke dissented without opinion.

[106]259 U. S. 20, 38 (1922).

[107]*Ibid.* p. 39. In the previous case of Hammer v. Dagenhart, 247 U. S. 251 (1918), the Court by a majority of one had invalidated the Act of September 1, 1916, 39 STAT. 675, which prohibited transportation in interstate commerce of goods made at a factory in

The Chief Justice stressed the fact that intention to violate the statute was a prerequisite to the imposition of a tax. He stated that "*scienter* is associated with penalties not with taxes."[108] He also mentioned the grant of power to the Secretary of Labor to make inspections as another feature of the Act which indicated that it was not a real revenue measure.

In *Hill v. Wallace,* an unanimous Court, again speaking through the Chief Justice, held certain provisions of the Future Trading Act[109] of 1921 invalid. Section 4 of the Act imposed a tax of 20 cents on every bushel involved in contracts of sale of grain for future delivery. Where the seller held and owned the grain at the time of sale he was relieved from payment of the tax, thus confining the Act to "short sales." Also relieved from the tax were sales made by or through a member of a board of trade designated by the Secretary of Agriculture as a contract market. Section 5 authorized the Secretary of Agriculture to designate boards of trade as contract markets when such boards complied with certain standards set forth in the statute. The most important of these standards was that the governing board of a board of trade seeking designation as a contract market should make regulations for the prevention of price manipulation and "market cornering" by member dealers and operators. Section 3 imposed a tax of twenty cents on every bushel involved in certain options known to the trade as "privileges", "bids", "offers", "puts and calls", "indemnities", and "ups and downs." Section 9 authorized investigations by the Secretary of Agriculture and publication of findings.

The twenty cent tax on "futures" with its exemptions conditioned on compliance with Congressional standards was invalidated as a palpable attempt to regulate commodity gambling. The Chief Justice pointed out that the regulations had no relevancy to the collection of tax in that they were imposed by the Secretary of Agriculture, and not the Secretary of the Treasury. He concluded:

> "The Act is in essence and on its face a complete regulation of Boards of Trade, with a penalty of 20 cents a bushel on all 'futures' to coerce Boards of Trade and their members into compliance."[110]

Five months later the Congress enacted another Grain Futures Act.[111] The validity of this statute was adjudicated the next year in *Chicago Board of Trade v. Olsen.*[112] The new statute declared that the regulation of trans-

which within 30 days prior to removal therefrom, child labor had been employed. It was held that this was not a regulation of interstate commerce but an attempt to control production in the several states. *Cf.* National Labor Relations Board v. Jones and Laughlin Steel Corporation, 57 Sup. Ct. 615 (1937).

[108] 259 U. S. 20, 27 (1922).

[109] 42 STAT. 187 (1921).

[110] 259 U. S. 44, 46 (1922).

[111] 42 STAT. 998 (1922). See also Pub. L. No. 675, 74th Cong. 1st Sess. (June 15, 1936).

[112] 262 U. S. 1 (1923).

actions on grain exchanges was necessary for the removal of obstructions and burdens upon interstate commerce in grain. The Secretary of Agriculture was given broad supervisory power over boards of trade. The Secretary was authorized to designate boards of trade as contract markets if they compiled with the same conditions which the Congress had sought to impose in the first act. The Court sustained the statute on the theory that boards of trade constituted "bottle-necks" in the flow of interstate commerce.[113]

In *Trusler v. Crooks*,[114] a unanimous Court, in an opinion written by Mr. Justice McReynolds delivered the final *coup de grace* to the first Grain Futures Act when it invalidated Section 3 levying a twenty cent tax on every bushel involved in certain options. In *Hill v. Wallace*, the Chief Justice, in reserving decision on Section 3, had declared by way of dictum that the tax appeared to be a valid excise on certain transactions which approximated gambling. In the *Trusler* case, however, Mr. Justice McReynolds invalidated the exaction, declaring it to be a penalty because of its prohibitory nature. He was also of the opinion that this section was intimately related to the unlawful scheme of regulation outlawed in *Hill v. Wallace*.[115]

Before the Supreme Court decided the three tax cases discussed above, a District Court upheld the Cotton Futures Act of 1916[116] which levied an excise of two cents on each pound of cotton involved in contracts of sale for future delivery on excbanges and boards of trade. The Act exempted from the imposition of the tax contracts which conformed to certain statutory standards relating to grades of cotton, prices, dates of sale, and methods of settlement. The Secretary of Agriculture was authorized to establish and promulgate rules and regulations to carry out the standards set up in the Act. In *Hutton v. Terrill*,[117] the Act was upheld as a revenue measure although it was admitted that it had for its purpose objects other than the raising of revenue. The Act of 1916, upheld in the *Hutton* case, superseded the prior Cotton Futures Act of 1914 which had been invalidated in *Hubbard v. Loewe*[118] on the ground that it had originated in the Senate, whereas the Constitution provides that revenue measures must originate in the House.[119]

There is an instance in the internal revenue laws where the imposition of

[113]Stafford v. Wallace, 258 U. S. 495 (1922).

[114]269 U. S. 459 (1925).

[115]The Trusler case affords an example of strange conduct by a law officer of the Federal Government. Solicitor General Mitchell, after presenting the Government's argument, stated that he was under no obligation to conceal his opinion that the statute was unconstitutional and could not raise a dollar of revenue because completely prohibitory.

[116]39 Stat. 476 (1916); 26 U. S. C. A. 1090 (1934).

[117]255 Fed. 860 (D. C. N. Y. 1918).

[118]226 Fed. 135 (D. C. N. Y. 1915).

[119]U. S. Const. Art. 1, § 7, Clause 1.

a tax as an alternative to compliance with Congressional standards has never been litigated. The Act of February 26, 1936,[120] levied a tax of three cents on each dollar of the premium charged by a foreign insurance company issuing a policy in the name of a resident of the United States upon property within the United States where such company did not maintain an officer or agent in the state, territory, or district within which the company was authorized to do business. It is apparent that the purpose of the statute was to force foreign insurance companies to maintain local agents.[121] The tax collection statistics issued by the Bureau of Internal Revenue do not reveal how much revenue, if any, is raised by this statute.

The child labor, grain futures, cotton futures, and foreign insurance company statutes, considered above, gave the taxpayer the choice of complete tax exemption if he complied with the applicable Congressional standards. We now turn to a consideration of statutes which gave the taxpayer the choice of complying or having his taxes increased.

The Oleomargarine Act of 1886[122] levied a tax of two cents per pound on yellow oleomargarine. The Act was amended in 1902[123] to provide for a tax of one-quarter of one cent per pound on oleomargarine not artificially colored any shade of yellow so as to resemble butter, and ten cents per pound, if so colored. In *McCray v. United States*,[124] Mr. Justice White, writing for a majority of the Court, held the tax to be a valid excise and not invalid as an interference with the powers reserved to the states. He held that the classification between colored and uncolored oleomargarine satisfied the due process clause of the Fifth Amendment, and that the classification between butter and oleomargarine was also valid, relying on the fact that the states could prohibit the manufacture of oleomargarine because of its deceptive characteristics.[125] Mr. Justice White disposed of

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[120] 44 STAT. 103 (1926); 26 U. S. C. A. 1904 (1934).

[121] *Cf.* Allgeyer v. Louisiana, 165 U. S. 578 (1897); St. Louis Compress Co. v. Arkansas, 260 U. S. 346 (1922).

[122] 24 STAT. 209 (1886); see *In re* Kollock, 165 U. S. 526 (1897); upholding the delegation of power to the Commissioner of Internal Revenue to prescribe regulations for branding oleomargarine pursuant to this Act. Accord: Prather v. United States, 9 App. D. C., 82 (1896); writ of error in the Supreme Court dismissed on procedural technicalities, 164 U. S. 452 (1896). In the Kollock case Mr. Justice Fuller stated:

"The Act before us is on its face an Act for levying taxes, and although it may operate in so doing to prevent deception in the sale of oleomargarine as and for butter, its primary object must be assumed to be the raising of revenue." *Ibid.* p. 536.

[123] 32 STAT. 93 (1902).

[124] 195 U. S. 27 (1904). Chief Justice Fuller and Justices Brown and Peckham dissented without opinion.

[125] Counsel for the Government pointed out that at that time 29 states prohibited the manufacture of oleomargarine colored in imitation of butter and that the Congress in grading the tax merely recognized that classification. Counsel had also argued that the heavy tax laid upon colored oleomargarine was a means to prevent fraud in the collection of the tax laid upon the legitimate or uncolored oleomargarine in that coloration made it

the contention that the tax destroyed the oleomargarine business in favor of the dairy interests by stating that the Court could not inquire into the incidental effect of the exercise of a Congressional power. In other words, as far as he was concerned, the question of excessive taxation was a political one, not judicial. The effect of the case was that the Federal Government was allowed to do by taxation what the states were doing directly under their police power. The manufacturer of oleomargarine was given the choice of leaving coloring matter out of his product or having the tax increased from a quarter of one cent per pound to the prohibitive rate of ten cents per pound.[126]

In connection with the prohibitory tax on oleomargarine, two other federal statutes which have never been litigated should be noted. In 1902 Congress levied a ten cent per pound tax on adulterated butter and only one-quarter of one cent per pound on processed or renovated butter.[127] In

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possible for oleomargarine to simulate butter and thus escape the tax on uncolored oleomargarine; 195 U. S. 27, 41.

In the case of Powell v. Pennsylvania, 127 U. S. 678 (1888), the Supreme Court upheld the state statute prohibiting the manufacture of oleomargarine colored in imitation of butter as a valid exercise of the state police power to prevent deception.

[126] Strictly speaking, the statute levied a tax of 10 cents per ponnd and granted an exemption of 9¾ cents for the non-use of coloring matter. In Magnano v. Hamilton, 292 U. S. 40 (1934), Mr. Justice Sutherland, writing for an unanimous Court, upheld a statute of the State of Washington which levied an excise tax of 15 cents per pound on all butter substitutes sold within the state. The Justice relied upon the McCray case as an apt precedent to sustain the proposition that the Court would not inquire into the motives of the legislature simply because an excessive tax was being levied on a business. Mr. Justice Sutherland, perhaps, overlooked the fact, as did Mr. Justice White, in the McCray case, that under the division of powers in the Federal Constitution different considerations govern the exercise of the Federal taxing power than do the exercise of the taxing power by the several states. It would seem that there should be little difficulty in sustaining prohibitory taxation on a commodity when a direct prohibition by a state had previously been upheld in Powell v. Pennsylvania, *supra*. In the Powell case as well as in the Magnano case, it was admitted that the commodity in question was nutritious. But it seems that at any rate the police power can be exercised to prevent deception even though the commodity that may be "passed off" is not deleterious to health. *Cf.* Weaver v. Palmer Bros. Co., 270 U. S. 402 (1925).

In connection with the execution of the public policy of a state by the taxing power the case of Alaska Fish Company v. Smith, 255 U. S. 44 (1920) should be noted. The Alaska legislature had passed a statute levying certain license taxes upon persons manufacturing fertilizer in whole or in part from herring. The tax was attacked because of its prohibitive nature. Mr. Justice Holmes, writing for an unanimous Court, upheld the statute even though it discriminated against complainant's business. Mr. Justice Holmes stated:

"We know of no objection to exacting a discouraging rate as the alternative of giving up a business when the legislature has the full power of taxation." *Cf.* Fox v. Standard Oil Company, 294 U. S. 87 (1935).

Where a municipal corporation upon which has been conferred a limited taxing power or a limited police power, or both, attempts to levy a prohibitive tax, a situation is presented which is analogous to the exercise of the taxing power by the Federal Government. *Cf.* Morton v. Macon, 111 Ga. 162, 36 S. E. 627 (1900); Dasch v. Jackson, 183 Atl. 534 (Md. 1936); O'Keefe v. City of Somerville, 190 Mass. 110, 76 N. E. 457 (1906); Puget Sound Power & Light Company v. Seattle, 291 U. S. 619 (1934).

[127] 32 STAT. 196, 26 U. S. C. A. 99 (1934).

1912 a tax of two cents per 100 matches was levied upon white phosphorus matches.[128]

We have now to consider the levying of graduated excise taxes on the sale of theatre tickets in excess of the price printed thereon. Section 500 (a) (2) of the Revenue Act of 1926[129] levied a 5% tax on the sale of theatre tickets away from the box office in excess of the price printed thereon where such excess did not exceed 50 cents, and further levied a tax of 50% where the amount of the excess was more than 50 cents above the printed price. These taxes were sustained in *Alexander Theatre Ticket Office, Inc. v. United States*.[130] The taxpayer in this suit had urged that the Congress was seeking to regulate profits in a local business over which it had no direct control. Judge Manton answered this contention by stating that the Congress could graduate the amount of the tax upon considerations of public policy, and that such action by the legislature was not subject to judicial review or inquiry. He stated:

> "The economic consequences and matters of public policy always involved in a tax were within the political domain of the legislative branch of the Government . . . By the terms of this taxing statute, the tax is not prohibitive or confiscatory. It may reduce or control profits in some instances, but that is not fatal to the tax."[131]

In 1928 the statute was amended to provide that any sale not in excess of 75 cents above the printed price was taxable at 5%; sales involving an excess of more than 75 cents above the printed price to be taxed 50%. In *Couthoui v. United States*,[132] suit was brought in the Court of Claims to recover certain taxes paid pursuant to this section. The Court of Claims in an unanimous decision, per Judge Green, came to the same conclusion as the Second Circuit did in the *Alexander Theatre Ticket* case. Judge Green relied on the *McCray* case but did not mention the *Alexander* decision. He, too, thought that the question of excessive taxation was a political one, not judicial and pointed out:

> "It is a common but, as we think, erroneous opinion in some quarters that the legislative body enacting a taxing statute cannot with propriety take into consideration any other matters but the revenue sought to be obtained, and that if it has other purposes besides raising revenue in imposing the tax, or in prescribing a particular manner in which it shall be levied, the tax is invalid. When enacting a statute, it is not only

[128]37 Stat. 81 (1912), 26 U. S. C. A. 1071 (1934).
[129]26 U. S. C. A. 871 (1927).
[130]23 F. (2d) 44; (C. C. A. 2d 1927).
[131]*Ibid.* 47. In McKenna v. Anderson, 31 F. (2d) 1016; (C. C. A. 2d 1929), the Government was again sustained in its imposition of these taxes. The decision below was affirmed in open court on the authority of the Alexander case. 31 F. (2d) 1016, (C. C. A. 2d 1929), *cert. denied*, 279 U. S. 869 (1929).
[132]54 F. (2d) 158 (Ct. Cl. 1931), *cert. denied*, 285 U. S. 548 (1932).

the right but the duty of a legislative body in such cases to take into consideration the effect of the tax in an economic way on the people as a whole, and the beneficial or injurious effects as the case may be which will result from the manner in which the tax is levied. If this were not done, the result might be highly injurious to the public generally, and result in a condition of affairs which would arouse so much protest and objection that our institutions would be endangered."[133]

Section 500 (2) (3) of the Revenue Act of 1926 also levied a tax of 50% on the excess over the printed price where the sale took place at the box office. The validity of this statute was presented to the Second Circuit in *Apollo Operating Corporation v. Anderson.*[134] This excess profits tax was held valid on the authority of the *Alexander Theatre Ticket* case. The Court, per Judge Manton, stated:

"The claim that it is violative of the Tenth Amendment of the Constitution was answered in the *Alexander* case, where we held that the act imposing a tax on the selling of tickets away from the box office was not an unauthorized exercise by Congress of state powers. It is not any more a violation of the powers reserved to the state to impose a tax upon the excess price of tickets sold at the box office than to impose a tax on the excess price of tickets sold away from the box office."[135]

It is apparent that in the last analysis these cases sustained Congressional price fixing tbrough the taxing power. The 50% excess tax in the 1926 statute on box office and "scalpers'" sales effectively regulated prices in that sales were discouraged where the excess was between 50 cents and a dollar. So with the 1928 tax of 50% where the excess was more than 75 cents above the printed price. Under this provision sales were discouraged where the excess was between 75 cents and $1.50.

In *Tyson v. Banton,*[136] the Supreme Court had held invalid a New York State statute which prohibited the sale of theatre tickets at a greater advance than 50 cents over the price stamped on the ticket. Thus, in the case of amusement tickets, a state was not permitted to effect under its police power what the Federal Government has been able to accomplish by graduations in the tax rate.

C. *The Spending Power*

Now we proceed from a consideration of regulation by the imposition of taxes to a discussion of regulation by the appending of unilateral or bilateral contracts to expenditures for the general welfare. Here again, the problem is to ascertain whether the Federal Government is attempting to deal with matters whose concern have not been delegated to it. In this

[133] *Ibid.* p. 163.
[134] 55 F. (2d) 66, (C. C. A. 2d 1932).
[135] *Ibid.* p. 67.
[136] 273 U. S. 418 (1927); *cf.* Nebbia v. New York, 291 U. S. 502 (1934).

field, the two important decisions of the Supreme Court are of recent history. After nearly one hundred and fifty years of federal expenditure, the Supreme Court was finally called upon to authoritatively decide between conflicting theories of the federal spending power, and to further determine how far the Congress could go in making its expenditures effective.

In *United States v. Butler,*[137] the Supreme Court for the first time declared that the Hamiltonian view of the General Welfare Clause, rather than the Madisonian, is the correct one. The adoption of this view means that the power of the Federal Government to spend for the general welfare is not merely a power incidental to the others delegated in Article I of the Constitution, but rather is a great substantive power of itself on a par with the others. In spite of the Court's espousal of the Hamiltonian view of the general welfare clause, a majority in the *Butler* case held the AAA invalid as an attempt to regulate agricultural production. The invalid regulation was found to consist in the contracts which the farmers sigued in order to receive benefit payments. Mr. Justice Roberts, writing for the majority, drew a distinction between:

> ". . . a statute stating the conditions upon which money shall be expended and one effective only upon an assumption of contractual obligation to submit to regulation which otherwise could not be enforced."[138]

Mr. Justice Stone, writing for the minority, did not find any validity in the distinction drawn by Mr. Justice Roberts. He stated:

> "It makes no difference that there is a promise to do an act which the condition is calculated to induce. Condition and promise are alike valid since both are in furtherance of the national purpose for which the money is appropriated."[139]

It should be noted, therefore, that no fault was found with the processing tax as such, nor with the fact that the proceeds were appropriated in advance.[140] The invalidity of the whole program consisted in the fact that

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[137]297 U. S. 1 (1936). [For a full discussion of the control of agricultural production and consumption through taxation, see article by Elbert P. Tuttle, *infra* p. 117.—*Ed.*]

[138]*Ibid.* p. 73.

[139]*Ibid.*

[140]In Cincinnati Soap Co. v. United States, 57 Sup. Ct. 764 (1936), Mr. Justice Sutherland, writing for an unanimous Court, had occasion to point out that earmarking the proceeds of a tax for a definite appropriation does not invalidate that tax provided the tax is good *qua* tax and the appropriation is valid as an expenditure for a "Federal Constitutional purpose." The statute involved in the case imposed a tax upon the first domestic processing of coconut oil, wholly of Philippine production, and then provided that the proceeds of the tax should be deposited into a special account for the benefit of the Philippine Islands. Mr. Justice Sutherland said, "If Congress, for reasons deemed by it to be satisfactory, chose to adopt the *quantum* of receipts from this particular tax as the measure of the appropriation, we perceive no valid basis for challenging its power to do so." It is to be noted that the practice of combining the tax and the appropriation in one statute makes it possible for the taxpayer involved to have a standing in court to challenge the validity of the appropriation. This was so held in the *Butler* case, distinguishing Frothingham v. Mellon and Massachusetts v. Mellon, 262 U. S. 447 (1923). In

the farmers made binding promises to limit their production. The majority found in this submission to regulation a coercive scheme by the Federal Government to control matters reserved to the states, and, therefore, the whole scheme from tax to expenditure was held invalid as violative of the Tenth Amendment.

In deciding that the processing tax levied by the statute was invalid because appropriated in advance for an unlawful purpose, Mr. Justice Roberts relied on some of the cases we have discussed in the preceding section concerning the imposition of a tax in order to regulate. He referred to the *Child Labor Tax* case, *Hill v. Wallace, Linder v. United States,* and *United States v. Constantine* in the following language:

> "In the *Child Labor Tax* case, 259 U. S. 20, and in *Hill v. Wallace,* 259 U. S. 44, this court had before it statutes which purported to be taxing measures. But their purpose was found to be to regulate the conduct of manufacturing and trading, not in interstate commerce, but in the states,—matters not within any power conferred upon Congress by the Constitution—and the levy of the tax a means to force compliance. The court held this was not a constitutional use, but an unconstitutional abuse of the power to tax. In *Linder v. United States, supra,* we held that the power to tax could not justify the regulation of the practice of a profession, under the pretext of raising revenue. In *United States v. Constantine* (decided December 11, 1935), we declared that Congress could not, in the guise of a tax, impose sanctions for violation of state law respecting the local sale of liquor. These decisions demonstrate that Congress could not, under the pretext of raising revenue, lay a tax on processors who refuse to pay a certain price for cotton and exempt those who agree so to do, with the purpose of benefitting producers."[141]

Mr. Justice Stone, dissenting, pointed out the distinction between regulation by taxation exemplified by the cases cited by Mr. Justice Roberts and regulation by expenditure:

> "The tax is unlike the penalties which were held invalid in the *Child Labor Tax* case, 259 U. S. 20, in *Hill v. Wallace,* 259 U. S. 44, in *Linder v. United States,* 268 U. S. 5, 17, and in *United States v. Constantine,* decided December 11, 1935, because they were themselves the instruments of regulation by virtue of their coercive effect on matters left to the control of the states. 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."[142]

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these cases, the Supreme Court had decided that neither an individual federal taxpayer nor a state, acting on behalf of its citizens as federal taxpayers had any standing to challenge a given appropriation made out of the general fund in the Treasury.

[141]297 U. S. 1 (1936).

[142]*Ibid.*

A little more than a year after the *Butler* case was decided, the Supreme Court passed upon the validity of the Social Security Act which involved a broad scheme of benefit payments for old age assistance, unemployment insurance, aid to dependent children, maternal and child welfare assistance, and aid for public health work.[143] Appropriations for these various grants-in-aid were authorized from the general fund in the Treasury. Title VIII imposed an excise tax upon employers and a special income tax upon employees to be deducted from their wages and paid by the employers. Title IX levied a special excise tax on employers of eight or more persons. The proceeds of these taxes were to go into the general fund in the Treasury. In *Steward Machine Co. v. Davis*,[144] Title IX was challenged on the ground that the states were being coerced into passing unemployment insurance laws because of credit allowed to the taxpayer if the state had an unemployment insurance fund to which he contributed. Mr. Justice Cardozo, writing for the majority, instead of state coercion and violation of the Tenth Amendment by the Federal Government found a constitutional plan of federal-state cooperation to deal with the national problem of unemployment. He put to one side the precedents used to invalidate the AAA with these words:

> "It is one thing to impose a tax dependent upon the conduct of the taxpayers, or of the state in which they live, where the conduct to be stimulated or discouraged is unrelated to the fiscal need subserved by the tax in its normal operation, or to any other end legitimately national. The *Child Labor Tax* case, 259 U. S. 20, and *Hill v. Wallace,* 259 U. S. 44, were decided in the belief that the statutes there condemned were exposed to that reproach. Cf. *United States v. Constantine,* 296 U. S. 287. It is quite another thing to say that a tax will be abated upon the doing of an act that will satisfy the fiscal need, the tax and the alternative being approximate equivalents. In such circumstances, if in no others, inducement or persuasion does not go beyond the bounds of power. We do not fix the outermost line. Enough for present purposes that wherever the line may be, this statute is within it. Definition more precise must abide the wisdom of the future."[145]

Mr. Justice Cardozo also disposed of the *Butler* case and pointed out the fact that the state was not coerced in any way because it was free to withdraw by repealing its statute. He stated, however, that the situation would not be different if the states entered into contracts with the Federal Government instead of accepting grants-in-aid upon fulfilling certain conditions. In further answer to the allegation that the states had abdicated their powers to the Federal Government, Mr. Justice Cardozo stated:

[143][For a complete discussion of the Social Security Act, see article by Prof. Lester B. Orfield, *infra* p. 85—*Ed.*]
[144]57 Sup. Ct. 883 (1937).
[145]*Ibid.*

"The inference of abdication thus dissolves in thinnest air when the deposit is conceived of as dependent upon a statutory consent, and not upon a contract effective to create a duty. By this we do not intimate that the conclusion would be different if a contract were discovered. Even sovereigns may contract without derogating from their sovereignty. *Perry v. United States,* 294 U. S. 330, 353; 1 Oppenheim, International Law, 4th ed. § 493, 494; Hall, International Law, 8th ed., § 107; 2 Hyde, International Law, § 489. The states are at liberty, upon obtaining the consent of Congress, to make agreements with one another. Constitution, Art. 1, section 10, par. 3. *Poole v. Fleeger,* 11 Pet. 185, 209; *Rhode Island v. Massachusetts,* 12 Pet. 657, 725. We find no room for doubt that they may do the like with Congress if the essence of their statehood is maintained without impairment.[146] Alabama is seeking and obtaining a credit of many millions in favor of her citizens out of the Treasury of the nation. Nowhere in our scheme of government—in the limitations express or implied of our federal constitution—do we find that she is prohibited from assenting to conditions that will assure a fair and just requital for benefits received. But we will not labor the point further. An unreal prohibition directed to an unreal agreement will not vitiate an act of Congress and cause it to collapse in ruin."[147]

In *Helvering v. Davis, supra,* Title VIII of the Social Security Act levying an income tax on employees and an excise tax on employers was challenged on the ground that Title II providing for the payment of old age benefits, was the occasion for the tax, and that the tax was invalid since Congress was violating the Tenth Amendment in dealing with old age security, a matter of local concern. Mr. Justice Cardozo, writing for the majority, held the expenditures authorized by Title II to be for the general welfare. He stated, "Congress did not improvise a judgment when it found that the award of old age benefits would be conducive to the general welfare."[148]

[146] Footnote 14 to the Justice's opinion omitted.

[147] 57 Sup. Ct. 583 (1937).

[148] 57 Sup. Ct. 904 (1937). After deciding the validity of Title II, Mr. Justice Cardozo went on to state:

"Third: Title II being valid, there is no occasion to inquire whether Title VIII would have to fall if Title II were set at naught.

"The argument for the respondent is that the provisions of the two titles dovetail in such a way as to justify the conclusion that Congress would have been unwilling to pass one without the other. The argument for petitioners is that the tax moneys are not earmarked, and that Congress is at liberty to spend them as it will. The usual separability clause is embodied in the act. Section 1103.

"We find it unnecessary to make a choice between the arguments, and so leave the question open."

The usual procedure was reversed in this case. Ordinarily, before the Court will question the validity of a federal expenditure the taxpayer must show the connection between the proceeds from his tax and the contemplated expenditure. Thus in the Butler case, *supra,* the taxpayer had a standing to challenge the appropriation and the method of expenditure because his tax was appropriated in advance for the challenged purpose. But here the tax to be paid by complainant's corporation is slated for the general fund in the treasury and the appropriation authorized to carry out the expenditure is to come out of that general fund. The shareholder's suit can give the litigant a standing to challenge the tax but where the vice alleged in the tax consists of unlawful expenditure, The AAA and Social Security cases make certain the Congressional power to spend for the purpose of inducing desirable conduct irrespective of the lack of power to command directly. The recipients of federal bounty may be either individual citizens or the several states. When Congress deals with the states, the Social Security cases, by way of dictum, authorize either unilateral or bilateral contracts for the purpose of making the federal expenditure effective. But where the individual citizens are concerned, the *Butler* case would seem to allow the use of unilateral contracts only.[149] A majority of the Court were of the opinion that binding promises by farmers to act in a manner thought socially desirable by the Congress amounted to invalid regimentation. It must be remembered, however, that a vigorous minority saw no distinction between condition and promise.

EXEUNT

The statutes and cases have been marshalled without regard to any preconceived thesis. Nor have they been patterned to fit some catch-phrase, maxim or bromidium. He who reads may judge for himself whether or not the courts have been guided by a "robust common sense" in drawing distinctions. Perhaps he will find that "robust common sense", or, he may find a strange admixture of *Wahrheit und Dichtung*. Others have given expression to specific viewpoints. They are noted in the margin.[150] Their dissertations run the gamut from the judge who looked upon the use of the taxing power for nonfiscal purposes as a "species of intellectual dishonesty" to the professor of political science who, contrarily, saw in every extension of the taxing power a stroke of judicial statesmanship.

another step would seem to be necessary: the shareholder must first prove the tie-up between the tax and the expenditure. Mr. Justice Cardozo in this case first decided the validity of the appropriation, and then stated that it was not necessary to decide whether the tax was intertwined with the appropriation. Seemingly, Frothingham v. Mellon, 262 U. S. 447 (1923), has been honored in the brcaeh.

[149]See the Soil Conservation and Domestic Allotment Act, Pub. L. No. 461, 74th Cong. 1st Sess. (Feb. 29, 1936).

[150]Hough, *Covert Legislation and the Constitution* (1917) 30 HARV. L. REV. 801; Bruce, *The Tyranny of the Taxing Power* (1920) 18 MICH. L. REV. 508; Brown, *When Is A Tax Not A Tax?* (1936) 11 IND. L. J. 399; Levin, *Does the Power to Tax Involve the Right to Destroy a Lawful Business?* (1933) 67 U. S L. REV. 448; Long, *Federal Police Regulation by Taxation* (1922) 9 VA. L. REV. 81; Grant, *Commerce, Production and the Fiscal Powers of Congress* (1936) 45 YALE L. J. 751, 991; Powell, *The Processing Tax and the Social Security Act* (1936) 5 BR'KLYN L. REV. 125, *Child Labor, Congress and the Constitution* (1922) 1 N. C. L. REV. 61; Cushman, *Social and Economic Control through Federal Taxation* (1934) 18 MINN. L. REV. 759, *National Police under the Taxing Clause of the Constitution* (1920) 4 MINN. L. REV. 247.