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THE EXCISE TAX AS A REGULATORY DEVICE

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In the interesting study entitled "Facing the Tax Problem" published by the Twentieth Century Fund the authors clearly show that taxation, apart from its primary and ostensible purpose of securing revenue for governmental purposes, inevitably effects a greater or less degree of governmental regulation of a social or economic character.[1] Taxes in themselves are economic charges which must be paid in some way by the person affected. They must either come from the surplus of the taxpayer, or the burden must be passed on to those with whom the taxpayer has economic relations. Except in pure theory it seems impossible to have a single uniform system of taxation affecting all alike. The state in seeking objects for taxation must act selectively, placing the burden here, and exempting from it there. The necessary result is that the property, persons, or activities taxed are handicapped in their competition with others who do not carry that weight upon their shoulders. A tax placed on tangible property, and not on intangibles, makes such tangible property less desirable and decreases its economic value to the individual. An excise tax on tobacco increases its cost to the consumer, with an inevitable effect on the amount consumed. Particular objects of taxation meeting the popular disfavor can be handicapped through the imposition of a tax; others who enjoy legislative approval may be helped through exemptions from that burden.

Legislative bodies, national, state, and local have not been slow to recoguize this almost axiomatic truth. The statutes of all the states, providing systems of general property taxation, contain liberal and extensive exemptions for various types of property, and for varying classes of owners.[2] In the absence of express restrictions in the state constitutions, but little restraint exists on this power. It may be and often is used avowedly to favor certain types of business activities, believed to be in need of such an economic crutch.[3] A much more satisfactory device for controlling economic enter-

[1]Shoup and Associates, Facing the Tax Problem, Ch. IX (1937). Chapters X-XIV discuss this thesis in greater detail.

[2]For a discussion of the statutory provisions in the various states see, Baker, *Tax Exemption Statutes* (1928) 7 Texas L. Rev. 50.

[3]Citizens Telephone Co. v. Fuller, 229 U. S. 332 (1913); Union Bank & Trust Co. v. Phelps, 283 U. S. 181 (1933); Wilson v. Monticello Cotton Mills Co., 180 Ark. 1090, 20 S. W. (2d) 859 (1930); Williams v. Baldridge, 48 Idaho 618, 284 Pac. 203 (1930); Mars Realty Corp. v. Sexton, 141 Misc. 622, 253 N. Y. Supp. 15 (1931); Duke Power Co. v. Bell, 156 S. C. 299, 152 S. E. 865 (1930). There are, however, holdings that an exemption granted to a single individual out of a general class, of which he is a part, is invalid. Eyers Woolen Co. v. Gilsum, 84 N. H. 1, 146 Atl. 511 (1929); Lawrence University v. Outagamie County, 150 Wis. 244, 136 N. W. 619 (1912). *Cf.* however, Williams v. The Mayor, 289 U. S. 36 (1933). For a description of this type of statute see Baker, *Tax Exemption Statutes* (1928) 7 Tex. Law Rev. 50, 60. As to the effect of particular state constitutional prohibitions, see 2 Cooley, Law of Taxation (4th ed. 1924) 1387.

prise through the tax power is, however, the excise tax. This has a great advantage over the exemption in that it adds to, rather than subtracts from, the public revenue. By its very nature and definition it rests upon particular goods, activities, and callings. An excise has been authoritatively defined as "an inland impost operating as an indirect tax on the consumer, levied upon *certain specified* articles, as tobaccos, ales, spirits, etc., grown or manufactured in the country. It is also levied on licenses to pursue *certain* trades and deal in *certain* commodities."[4] Such a tax may also be employed by the federal government, which possesses no power of direct general property taxation, except on condition that it be apportioned among the several states according to their population. It is with the constitutional limitations upon the use of this type of tax for the ulterior purpose of social and economic control that this article mainly deals.

Certain types of these limitations need not detain us long. They arise out of the peculiar nature of our federal system, and are not particularly directed to the use of the taxing power for regulatory purposes. The superiority of the Constitution of the United States and of federal laws passed within the constitutional grant of power have given rise to the doctrine that the states are incompetent to levy a tax resting directly upon a federal instrumentality.[5] Neither may a state burden directly a right granted to the individual by the Constitution or by a valid law of Congress.[6] As a corollary to the immunity of federal agencies from state tax burdens, a similar but less extensive limitation has been held to rest upon the power of the Federal Government to tax the instrumentalities of the state.[7] The grant of power to the Federal Government to regulate interstate commerce places important, and often puzzling, limitations upon the state power to tax those engaged in interstate commerce. The number and complexity of the cases on this subject are so great that the

[4]Brewer, J., in Patton v. Brady, 184 U. S. 608 (1902). The italics are the present author's.

[5]The leading case is, of course, M'Culloch v. Maryland, 4 Wheat. (U. S.) 316 (1819) involving a state tax on the issue of federal bank notes. Other cases are: First National Bank v. Hartford, 273 U. S. 548 (1927); Van Brocklin v. Tennessee, 117 U. S. 151 (1886); Choctaw, Oklahoma & Gulf R. R. v. Harrison, 235 U. S. 292 (1914); Pan Handle Oil Company v. Mississippi, 277 U. S. 218 (1928); People ex rel Rogers v. Groves, 57 Sup. Ct. 269 (1937).

[6]Crandall v. Nevada, 6 Wall. (U. S.) 35 (1868); Lawrence v. Shaw, 57 Sup. Ct. 443 (1937). In regard to patents and copyrights, the Supreme Court, reversing older decisions now holds that the state may tax the owners thereof. Fox Film Corporation v. Doyal, 286 U. S. 123 (1932). In general see, Powell, *Indirect Encroachment on Federal Authority by Taxing Powers of the States* (1918) 31 HARV. L. REV. 321; Cohen and Dayton, *Federal Taxation of State Activities and State Taxation of Federal Activities* (1925) 34 YALE L. J. 807.

[7]Collector v. Day, 11 Wall. (U. S.) 113 (1870). *Cf.* South Carolina v. United States, 199 U. S. 437 (1905); Flint v. Stone Tracy Co., 220 U. S. 107 (1911). See also Indian Motorcycle Co. v. United States, 283 U. S. 570 (1931); Burnet v. Coronado Oil & Gas Co.,285 U. S. 393 (1932); Brush v. Commissioner, 57 Sup. Ct. 45 (1937). In general see Cohen and Dayton, *supra* note 6; Lewinson, *Tax Exempt Salaries and Securities* (1937) A. B. A. J. 685.

matter cannot be gone into here.[8] One thing is reasonably clear. The commerce clause prohibits the states from shaping their tax policies to favor their internal commerce and industry at the expense of those moving goods into the state from beyond its borders.[9] The Fourth Article of the Constitution granting to the citizens of each state the privileges and immunities of the citizens of the several states also prevents the states from adopting a policy of placing heavier burdens on nonresident than on resident tax payers.[10]

I

The above mentioned limitations upon the power to tax for regulatory motives must be mentioned in order to keep the record clear. Of more pertinent effect are three other constitutional limitations. First is the limitation placed on the federal government's exercise of power, made express by the Tenth Amendment to the Constitution, that that government possesses only the powers granted to it by the Constitution. Among the powers granted is the power to tax. Absent is a general police power—the power directly to regulate the affairs of men for the purpose of advancing the general safety, health, morals and welfare. The question then is directly raised; to what extent if at all may the national government employ its taxing power for the ulterior purposes of regulating matters not within its special competence?[11] It is necessary to turn to the cases. *Veazie Bank v. Fenno*[12] involved a federal tax of ten per cent on the amount of state bank notes paid out by any bank. The purpose of the law to drive such notes out of circulation by the levy of an excessive tax upon them cannot be doubted.[13] The Court, however, rather curtly refused to consider this point. "The judicial cannot prescribe to the legislative department of government limitations upon the exercise of its acknowledged powers. The power to tax may be exercised oppressively upon persons but the responsibility of the legislature is not to the courts, but to the

[8]By all odds the most complete discussion of this matter is contained in a series of articles by Professor Thomas Reed Powell, *Indirect Encroachment on Federal Authority by the Taxing Power of the States* (1918-1919) 31 HARV. L. REV. 572, 721, 932, 32 *Id.* 234, 374, 634, 902.

[9]Welton v. Missouri, 91 U. S. 275 (1876); Darnell v. Memphis, 208 U. S. 113 (1908). *Cf.* however, State Board v. Young's Market, 57 Sup. Ct. 77 (1936) concerning intoxicating liquor and resting on the 21st amendment.

[10]Travis v. Yale & Towne Mfg. Co., 252 U. S. 60 (1920); Smith v. Loughman, 245 N. Y. 486, 157 N. E. 753 (1927). In a recent opinion, a divided Court held that the seldom employed privileges and immunities clause of the Fourteenth Amendment also prevented a state from favoring local loans as contrasted to loans made outside the state, through the device of exempting from its income tax, loans made within the state at not to exceed 5% per annum. Colgate v. Harvey, 296 U. S. 404 (1935).

[11]For other discussions of this problem see Waite, *May Congress Levy Money Exactions designated Taxes solely for the Purpose of Destruction* (1908) 6 MICH. L. REV. 277; Cushman, *Social and Economic Control through Federal Taxation* (1934) 18 MINN. L. REV. 759; R. C. Brown, *When is a Tax not a Tax* (1936) 11 IND. L. J. 399.

[12]8 Wall. (U. S.) 533 (1869).

[13]See the opinion of the Court at p. 536-539; Cushman, *supra* note 11, at p. 766.

people by whom its members are elected." The authority of the case to sustain the general use of the taxing power for non-federal objectives is, however, considerably weakened by the fact that the law in question was sustained not only by virtue of the tax power, but also by the power of Congress over the currency. The same thing must be said of *Hampton v. United States,*[14] a unanimous decision sustaining a tariff law against the charge that its purpose was not only revenue but protection of domestic industries. The validation of the law in question on the ground of well settled practice, could also have been placed on the exclusive control exercised by Congress over foreign commerce.[15] This weakness does not however exist in the cases of *In re Kollack*[16] and *McCray v. United States,*[17] for there the ulterior purpose of the tax law concerned a matter not within the direct domain of the federal government. The first decision involved a federal excise tax of two cents a pound on oleomargarine and other butter substitutes. The exaction was unanimously sustained. "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." Encouraged by this decision, Congress increased the tax to ten cents a pound on the odious substitute when colored to look like butter. The law was attacked not only as an infringement on the police power reserved to the several states but also because the high rate of the tax destroyed the appellant's business and so allegedly deprived him of his property without due process of law. Again the Court sustained the law. The Court may not overthrow a law, which on its face imposes a tax, by an inquiry into possible ulterior motives of Congress. Neither may a tax be declared beyond the scope of federal action because its burden may effect a regulation of matter not within the realm of Congressional action. The amount of the tax even though it might be so high as to work a destruction of the thing taxed, is yet a matter within legislative and not judicial cognizance. Even if it be admitted for sake of argument that the taxing power could not be used arbitrarily to discriminate between like activities or to destroy innocent and legitimate business, the tendency of oleomargarine colored to look like butter to work a fraud is sufficient reason to justify the harsh treatment dealt it in the legislation at hand.[18]

Sonzinsky v. United States,[19] decided at the last term of the Supreme Court,

[14]276 U. S. 394 (1928).

[15]The Court, however, uses sweeping language: "So long as the motive of Congress and the effect of its legislative action are to secure revenue for the benefit of the general government the existence of other motives in the selection of subjects of taxes cannot invalidate congressional action."

[16]165 U. S. 536 (1897).

[17]195 U. S. 27 (1904).

[18]The question of the power of either the national government or the state to destroy innocent and legitimate business by excessive taxation will be dealt with *infra.*

[19]57 Sup. Ct. 554 (1937).

sustained a federal tax of $200 on each sale of machine guns and sawed-off shot guns against the charge that the enactment was a regulatory and not a revenue measure. Mr. Justice Stone, speaking for a unanimous Court, said: "Every tax is in some measure regulatory. To some extent it interposes an economic impediment to the activity taxed as compared with others not taxed. But a tax is not any the less a tax because it has a regulatory effect . . . and it has long been established that an act of Congress which on its face purports to be an exercise of the taxing power is not any the less so because the tax is burdensome or tends to restrict or suppress the thing taxed."[20] This decision seems clearly to establish the competence of Congress to levy excise taxes, even though the imposition may result in regulation or even prohibition of matters outside the direct domain of federal power. Not only may the regulation be achieved through the weight of the tax itself. Ancillary regulations attached to a tax measure will be upheld as within the fiscal power of Congress, in spite of the social or economic control they may achieve. It is only necessary that the legislation accompanying the tax levy may be said to have a reasonable relation to the process of levying and collecting the tax.[21]

The use of an ostensible taxing power to achieve control of matters not within direct Congressional competence has not, however, been entirely unchecked. In *Bailey v. Drexel Furniture Company,*[22] an all but unanimous Court held unconstitutional a purported federal tax of ten per cent of the net profits of certain described industries employing child labor. It is interesting to note that the liberal justices Holmes and Brandeis concurred in the opinion. It is believed that this case is not necessarily contradictory to those just previously discussed. The Court rather "whips the devil around the stump" in distinguishing its earlier declarations, by the simple expedient of declaring that the exaction in this case is not a tax. The Court must still answer the question why the imposition in the child labor case was not a tax as much as it was in the oleomargarine and other cases. This it has attempted to do. The second child labor statute provided that the proprietors of all mines, quarries, canneries, work shops, and manufacturing plants who employed any children under the age of fourteen, or children between fourteen and sixteen, beyond

[20]To similar effect see, United States v. Doremus, 249 U. S. 86 (1919) (federal tax on narcotics); Alexander Theater Ticket Office v. United States, 23 F. (2d) 44 (1927) (tax on sales of theater tickets at "scalping" prices).

[21]Nicol v. Ames, 173 U. S. 509 (1899) (tax on sales on boards of trade—regulation required written memo of sale with names of parties, etc.); In re Kollack, 165 U. S. 536 (1897) (tax on oleomargarine—regulation required sale of product in containers clearly describing the product); United States v. Doremus, 249 U. S. 86 (1919) (tax on narcotics—dealers in drugs required to register; sales, except by physician's subscription in course of practice, to be on prescribed forms issued by Treasury Department); Alston v. United States, 274 U. S. 289 (1927) (same). If the ancillary regulations cannot be said to bear a reasonable relation to the revenue features of the act, they are not, of course, within the power of Congress. Linder v. United States, 268 U. S. 5 (1925). See (1926) 3 WIS. L. REV. 357.

[22]259 U. S. 20 (1922).

certain hours or at certain times should pay a federal tax of ten per cent on their net profits. In the mind of the Court this was primarily a regulation of child labor and the ten per cent exaction, not a tax, but a penalty upon those who trangressed the regulation, all beyond the scope of the powers granted Congress by the Constitution.

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

The conclusion of the Court was strengthened by the circumstances that the so-called tax imposed had no relation to the profit derived from the thing taxed, the same tax being levied whether one child was employed for a day, or five hundred for a year. It was only imposed when the employer knowingly employed children under the prescribed ages, and scienter was not customarily a feature of revenue acts. On the same day the Court also held unconstitutional a federal tax of twenty cents a bushel on all sales of grain of a future delivery but exempted from the tax, sales on exchanges, which received a license from the Secretary of Agriculture and complied with the detailed regulations prescribed by the law for the conduct of trading on the exchange.[23]

United States v. Constantine[24] involved a federal law "taxing" those dealing in intoxicating liquor contrary to the provisions of the state law, $1000 for the privilege of carrying on such illegal business. This "tax" was in addition to the regnlar federal excise of $25 on all liquor dealers. Again the Court found an intent to regulate matters beyond the scope of federal power. The ear-mark of its ulterior purpose seems to be the fact that the act branded certain conduct as illegal, and then "taxed" the performance of such illegal acts. This, in connection with the wide discrepancy between taxes on legal and illegal liquor dealing, according to the majority, branded the exaction as an ultra vires penalty rather than as a legal tax.[25] *Carter v. Carter Coal Co.*[25a]

[23]Hill v. Wallace, 259 U. S. 44 (1922). See also Trusler v. Crooks, 269 U. S. 475 (1926).

[24]296 U. S. 287 (1935).

[25]Justices Cardozo, Brandeis, and Stone dissented. This decision had a precedent in three unanimous opinions of the court all holding that imposition of disproportional "taxes" upon those violating laws of Congress were penalties and not taxes. As such they were subject to the constitutional limitations placed upon prosecutions of crimes and were not collectible by the free and easy processes of the revenue acts. Helwig v. United States, 188 U. S. 605 (1903); Lipke v. Lederer, 259 U. S. 557 (1922); United States v. La Franca, 282 U. S. 568 (1931).

[25a]298 U. S. 238 (1936).

involved a 15% sales tax on bituminous coal, but exempted operators who accepted codes of fair competition prescribed by the act. It was not seriously contended that the act was sustainable under the taxing power. In these decisions the previous cases such as *Veazie Bank v. Fenno*,[26] and *McCray v. United States*[27] were distinguished on the ground that in those cases the contention that the imposition was a penalty rather than a tax rested solely on the amount of the tax. Here the "face of the act" disclosed its regulatory character. Distinguished critics of the Court have found the distinction drawn by it between the earlier and the later cases untenable.[28] If the Court refuses to hold an imposition, commonly accepted to be for prohibitive purposes, ultra vires because of its excessive amount, why should it not likewise refuse judicially to condemn a law, avowed to be for tax purposes, through the process of examining the regulatory features in the context of the act? Both criteria are used for the purpose of discovering the legislative intent. It is believed, however, there is a distinction though it may be one of degree rather than of kind. In the case of the amount of the tax, there is a natural judicial reluctance to interfere with a matter so peculiarly of political rather than of judicial coguizance. Just how high must a tax be in order to be declared prohibitive? A more patent consideration is probably the realization by the Court that in the *Second Child Labor Case*[29] and in *Hill v. Wallace*[30] a device was projected which if sustained would easily lead to the extension of federal power into all realms of human activity. It is the writer's belief that the Court appreciates its quasi-political responsibility of keeping alive in our governmental system the traditional separation of powers between the states and the federal government. This traditional separation is the implicit major premise in many of its decisions. The Court will not allow the line of demarcation to be obliterated through devices resting on possible logical deductions from the bare verbiage of the Constitution, or by the circumstance that it is often difficult satisfactorily to explain why this particular exercise of power falls within the federal boundaries and the other exercise within the domain of the states. After all, is there not cogency in the words of Chief Justice Taft previously quoted from *Bailey v. Drexel Furniture Company?*[31]

II

True, taxes, whether levied by the Federal Government or by the states,

[26] *Supra* note 12.
[27] *Supra* note 17.
[28] Corwin, *Constitutional Law in 1921-1922* (1922) 16 Am. Pol. Sc. Rev. 613; Cushman, *Social and Economic Control through Taxation* (1934) 18 Minn. L. Rev. 757. See, however, Powell, *Child, Labor, Congress, and the Constitution* (1922) 1 N. C. L. Rev. 61.
[29] *Supra* note 22.
[30] *Supra* note 23.
[31] See *supra* p. 50. *Cf.* Corwin, The Commerce Power versus States Rights (1936).

may then be employed for the purpose of social or economic regulation.[32] What, if any, are the limitations upon this power? First to be considered is the equal protection clause of the Fourteenth Amendment. No state shall "deny to any person within its jurisdiction the equal protection of the laws." The concept of equality before the law is so close to an irreducible, albeit exceedingly elastic, axiom, that it almost defies exposition. Concerning the phrase, the Court has declared, "equality has not been and probably never can be precisely defined. Generally, it has been said that it only requires the same means and methods to be applied impartially to all the constituents of a class so that the law shall operate equally and uniformly upon all persons in similar circumstances." But the difficulty arises in determining what are similar circumstances. The state has a wide discretion in making classifications, but it may not be arbitrary. There must be "some difference which bears a just and proper relation to the attempted classification, and is not a mere arbitrary selection." Special legislation to meet special problems is certainly not prohibited.[33] Attempting to be more explicit, Mr. Justice Brandeis has said "the equality clause requires merely that the classification shall be reasonable. We call that action reasonable which an informed, intelligent, just minded, and civilized man could rationally favor."[34]

It will be noticed that there is no equal protection of the law clause specifically applicable to the Federal Government. Does it follow that the Federal Government may within the scope of the powers granted be as arbitrary as it chooses? May it levy income taxes at one rate against those adhering to a particular political party and at another rate against all their opponents? It is believed that the due process clause of the Fifth Amendment would be applied to prevent arbitrary classification by federal law. It is true that the Court has at times taken pains to announce that the federal taxing power is not bound by the limitation of equal protection.[35] In these cases, however, the

[32]The question just discussed as to federal taxes has no importance as to the states, which possess both the power to tax and the general police power.

[33]Mr. Justice McKenna in Magoun v. Illinois, 170 U. S. 283 (1898). For a declaration that a classification must bear a relation to the purpose of the law see McKenna, J., in Billings v. Illinois, 188 U. S. 97 (1903). To preserve the public health and safety physicians can be required to take a prescribed course of collegiate education, while those pursuing other occupations might not be. It does not follow that in a revenue measure physicians could be taxed at a higher rate than other citizens. In Aero Mayflower Transit Corp. v. Georgia, 295 U. S. 285 (1935) it was held that farmers carrying their own produce to market could be relieved from certain excise taxes on automobile trucks. In Smith v. Cahoon, 283 U. S. 533 (1931) it was held that a safety law was invalid which exempted such carriers from its provisions.

[34]Dissent in Quaker City Cab Co. v. Commonwealth, 277 U. S. 389 (1928). Mr. Justice Cardozo, conversely, has described the unconstitutional classification as one that has "its origin in nothing better than whim and fantasy, a tyrannical exercise of arbitrary power." Dissent in Concordia Fire Insurance Co. v. Illinois, 292 U. S. 535 (1934).

[35]La Belle Iron Works v. United States, 256 U. S. 377 (1921). "The Fifth Amendment has no equal protection clause; and the only rule of uniformity prescribed with

tax would undoubtedly have been valid, even if the clause in question had been applied to it. On the other hand, in one of the most thorough discussions of the taxing power, Chief Justice White conceded that an arbitrary classification producing "a gross and patent inequality" would not be sustainable.[36] Further tending to support the proposition just hazarded is the fact that the Court has often considered attacks on federal laws based on claims of arbitrary and unequal treatment, when, if the principle of equality were inapplicable, a vastly easier disposal of the contention could and should have been made.[37] Lastly, in *Heiner v. Donnan*[38] a divided Court held that a federal estate tax levied on inter vivos gifts made within two years of death could not be sustained as a tax on a certain class of inter vivos gifts. The Court followed the previous case of *Schlesinger v. Wisconsin,*[39] involving the validity of a state statute to similar effect under the Fourteenth Amendment. The Court stated that since the classification in the earlier case was invalid under the Fourteenth Amendment the similar classification in the federal act was invalid under the Fifth Amendment.[40] "Due process of law" can perhaps best be resolved into a prohibition upon arbitrary and outrageous actions by the government. It has been held to prevent taxation of previously vested interests;[41] taxation by a state of subjects not within its jurisdiction;[42]

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respect to duties, imposts and excises laid by Congress is the territorial uniformity required by Article I, Section 8." See also National Paper Co. v. Bowers, 266 U. S. 273 (1925).

[36]In speaking of due process of law limitations upon the federal taxing power, that learned, though often abstruse, justice said: "And no change in the situation here would arise even if it be conceded, 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 not the exertion of taxation, but a confiscation of property; that is, a taking of the same in violation of the 5th Amendment; or, what is equivalent thereto, was so wanting in basis for classification as to produce such a gross or patent inequality as to inevitably lead to the same conclusion." Brushaber v. Union Pacific R. R., 240 U. S. 1 (1916). See also White, Chief Justice, in Knowlton v. Moore, 178 U. S. 41 (1900).

[37]Nicol v. Ames, 173 U. S. 509 (1899); McCray v. United States, 195 U. S. 27 (1904); Flint v. Stone Tracy Co., 220 U. S. 107 (1911); Billings v. United States, 232 U. S. 261 (1914); Alaska Fish Salting Co. v. Smith, 255 U. S. 44 (1921); Pacific American Fisheries v. Alaska, 269 U. S. 269 (1925); Bromley v. McCaughn, 280 U. S. 124 (1929); Chas. E. Steward Machine Co. v. Davis, 57 Sup. Ct. 883 (1937). In the last cited case, Mr. Justice Cardozo, in upholding certain exemptions from the tax levied under the national Social Security Law took occasion to remark that the Fifth Amendment had no equal protection clause. He added, however, that the exemptions were valid "though we assume that discrimination, if gross enough, is equivalent to confiscation and subject under the Fifth Amendment to challenge and annulment." [For a full discussion of the Social Security Cases see article by Prof. L. B. Orfield, *infra* p. 85.—Ed.]

[38]285 U. S. 312 (1932).

[39]270 U. S. 230 (1926).

[40]Mr. Justice Stone dissented, taking, in part, the ground that the Fifth Amendment had no equal protection clause and that "no tax has been held invalid under the Fifth Amendment because based on an improper classification."

[41]Nichols v. Coolidge, 274 U. S. 531 (1927).

[42]Frick v. Pennsylvania, 268 U. S. 473 (1925).

and to be a bar to double taxation.[43] The writer does not doubt but that the Court would apply its limitation as contained in the Fifth Amendment to prevent arbitrary and unreasonable classifications.[44]

It is clear, however, that the concept of equal protection of the law does not require the states or the Federal Government to adopt a tax system of rigid and unvarying uniformity. The general operation of this clause as applied to tax legislation was stated by Mr. Justice Bradley in *Bell's Gap Railroad Co. v. Commonwealth*[45] as follows:

> "The provision in the fourteenth amendment, that no state shall deny to any person within its jurisdiction the equal protection of the laws, was not intended to prevent a state from adjusting its system of taxation in all proper and reasonable ways. It may, if it chooses, exempt certain classes of property from any taxation at all, such as churches, libraries, and the property of charitable institutions. It may impose different specific taxes upon different trades and professions, and may vary the rates of excise upon various products; it may tax real estate and personal property in a different manner; it may tax visible property only, and not tax securities for payment of money; it may allow deductions for indebtedness, or not allow them. All such regulations, and those of like character, so long as they proceed within reasonable limits and general usage, are within the discretion of the state legislature, or the people of the state in framing their constitution. But clear and hostile discriminations, against particular persons and classes, especially such as are of an unusual character, unknown to the practice of our governments, might be obnoxious to the constitutional prohibition."

With the general principles thus enunciated by the Court no quarrel can be found. The difficulty comes, of course, in their application. After reading many of the cases one is almost brought to believe that the validity or invalidity of a given tax discrimination depends not so much upon the inherent characteristics of the act in question as upon the diverse sympathies and prejudices of the judges who review the legislation. Are they or are they not inclined to be ingenious and astute in discovering a possible valid purpose in the classification at hand.[46] The task of finding a rational basis for many of

[43]First National Bank v. Maine, 284 U. S. 312 (1932).

[44]See also BURDICK, LAW OF AMERICAN CONSTITUTION (1922) p. 416; WILLIS, CONSTITUTIONAL LAW (1936) p. 572.

[45]134 U. S. 232 (1889).

[46]There have been five chain store tax laws considered by the Court. Three have been upheld as constitutional; two have been declared unconstitutional. In all of these five cases Justices McReynolds, Sutherland, and Butler have thought the law a denial of equal protection. In all five cases, Justices Brandeis, Stone, and Cardozo have considered the law constitutional. The diverse results are due to the switch from one side to the other of Justices Hughes, Van Devanter, and Roberts. State Board of Tax Commissioners v. Jackson, 283 U. S. 527 (1931), law constitutional, Justices Van Devanter, McReynolds, Sutherland, Butler dissenting; Louis K. Liggett Co. v. Lee, 288 U. S. 517 (1933), law unconstitutional, Justices Brandeis, Stone, Cardozo dissenting; Fox v. Standard Oil Co., 294 U. S. 87 (1935), law constitutional, Justices McReynolds,

the decisions is not made easier by the circumstance that often the Court simply declares the classification contained therein reasonable, without giving any basis for its conclusion in that respect.

Since this paper is devoted to a consideration of the taxing power for the incidental purpose of regulation, we need not consider all attacks on taxation based on the denial of equal protection.[47] Some general observations may, however, be made. As is seen a rigid uniformity is not required. An excise tax by its very nature is levied on a special article, calling, or transaction. In selecting matters for such taxation the legislature has a wide discretion. Providing the object or transaction taxed has in popular acceptance an actual separate identity of its own, the tax is not invalid because the tax-payer thinks that other similar objects or transactions might also be taxed. Thus an excise tax may be laid on sales of produce on exchanges or boards of trade without at the same time levying a tax on such sales of stocks and bonds.[48] Where, however, no such de facto, generally accepted distinction exists between the subject taxed and that not taxed, and the distinction drawn seems to the Court fanciful, it has overthrown the tax in question.[49] That the distinction between the first group of cases and the second is not always easy to draw is indicated by the fact that in all the cases in the second group the so-called liberal judges dissented from the majority view that the classification was arbitrary.[50] The practical

Sutherland, Butler dissenting; Stewart Dry Goods Co. v. Lewis, 294 U. S. 550 (1935), law unconstitutional, Justices Brandeis, Stone, Cardozo dissenting; Great Atlantic and Pacific Tea Co. v. Grosjean, 57 Sup. Ct. 772 (1937), law constitutional, Justices McReynolds, Sutherland, Butler dissenting. These cases will be discussed *infra*.

[47]When the tax statute is entirely innocent and regular but the inequality is due to its faulty administration, the problem raised is not involved here. See Sioux City Bridge Co. v. Dakota County, 200 U. S. 441 (1923); Cumberland Coal Co. v. Board of Revision, 284 U. S. 23 (1931).

[48]Nicol v. Ames, 173 U. S. 509 (1899). See also, Pacific Express Co. v. Seibert, 142 U. S. 339 (1891) (tax on express companies); Adams Express Co. v. Ohio, 165 U. S. 194 (1897) (same); Cook v. Marshall County, 196 U. S. 261 (1905) (tax on retailers and not on wholesalers of cigarettes); Armour Packing Co. v. Lacy, 200 U. S. 226 (1906) (tax on meat packing establishments); Ohio Tax Cases, 232 U. S. 576 (1914) (classified public utility tax); Rogers v. Hennepin County, 240 U. S. 184 (1916) (tax on grain exchanges); Hart Refineries v. Harmon, 278 U. S. 499 (1929) (tax on sale and not on consumption of oil); Broad River Power Co. v. Query, 288 U. S. 179 (1933) (tax on production of electric power by water or steam, and not by internal combustion engines).

[49]Schlesinger v. Wisconsin, 270 U. S. 230 (1926) (inter vivos gifts made within six years of death of donor); Heiner v. Donnan, 285 U. S. 312 (1932) (similar); Louisville Gas & Elec. Co. v. Coleman, 277 U. S. 32 (1927) (mortgage tax on mortgages not maturing within five years); Quaker City Cab Co. v. Pennsylvania, 271 U. S. 389 (1928) (tax on gross receipts of taxi-cabs when operated by corporations); Liggett Co. v. Lee, 288 U. S. 517 (1933) (higher tax on chain stores operating in more than one county, than on those within a single county); Concordia Fire Insurance Co. v. People, 292 U. S. 535 (1934) (tax on general insurance companies also doing a casualty insurance business—none on companies doing a casualty business alone).

[50]It has been held that the burden of showing the classification is arbitrary rests upon the contestant of the tax. Citizens Bank v. Durr, 257 U. S. 99 (1921); Concordia Fire Insurance Co. v. People, 292 U. S. 535 (1934).

exigencies of assessing and collecting imposts to supply the public revenue may also be a valid ground for tax classification. Public utilities, because of the wide spread, but unified nature of this business, and the undesirability of collecting taxes from them through levy and sale of the property assessed, may be treated differently from other tax-payers.[51] Where one type of tax-payer is subject to a particular type of tax, the fact that similar tax-payers are bearing other tax burdens which the first are not, will often save the law in question from the charge of unfair discrimination.[52] Exemptions from taxation are often sustained on the ground that the possible revenue to be derived would not justify the trouble and expense of collection.[53] It has also been held that when the tax delinquency problem is particularly serious as to a certain type of tax-payers and adequate methods can be devised to collect the tax from them, statutes may provide special means to collect such taxes, without including all delinquents within their scope.[54] It is sufficiently obvious that, where a certain type of activity places unusually heavy burdens on the public revenues, higher taxes may be exacted to meet the situation presented.[55] Lastly, the courts have accepted the common viewpoint of tax economists, and have sustained progressive taxes on the ground that the tax may be graduated according to ability to pay.[56] The graduated special taxes on chain stores have been sustained on the ground that that method of doing business gave the tax-payer special advantages over single store owners, and, therefore, the former should pay heavier taxes.[57]

It must not be supposed that the principles just stated furnish a master

[51]Western Union Telegraph Co. v. Indiana, 165 U. S. 304 (1896); Puget Sound P. & L. Co. v. King County, 264 U. S. 22 (1924). See also Adams Express Co. v. Ohio, 165 U. S. 194 (1897); Savannah T. & I. Ry. v. Savannah, 198 U. S. 392 (1905).

[52]Baltic Mining Co. v. Massachusetts, 231 U. S. 68 (1913); Northwestern Mutual Life Ins. Co. v. Wisconsin, 247 U. S. 132 (1918); General American Tank Car Co. v. Day, 270 U. S. 367 (1925); Lawrence v. State Tax Commission, 286 U. S. 276 (1932).

[53]Citizens Telephone Co. v. Fuller, 229 U. S. 322 (1913); Broad River Power Co. v. Query, 288 U. S. 179 (1933); Carmichael v. Southern Coal Co., 57 Sup. Ct. 868 (1937).

[54]Winona & St. Peter Land Co. v. Minnesota, 159 U. S. 526 (1895); King v. Mullins, 171 U. S. 404 (1898); Florida, etc., R. R. v. Reynolds, 183 U. S. 471 (1902); White River Lumber Co. v. Arkansas, 279 U. S. 692 (1929), Justices Butler, Taft, Van Devanter dissenting.

[55]Carley & Hamilton v. Snook, 281 U. S. 66 (1930); Alward v. Johnson, 282 U. S. 509 (1931); Continental Baking Co. v. Woodring, 286 U. S. 352 (1932). These are all cases of special taxes on commercial vehicles using the public highways.

[56]Magoun v. Illinois, 170 U. S. 283 (1898); Knowlton v. Moore, 178 U. S. 41 (1900); Brushaber v. Union Pacific R. R. Co., 240 U. S. 1 (1916); Bromley v. McCaughn, 280 U. S. 124 (1924).

[57]State Board of Tax Commissioners v. Jackson, 283 U. S. 527 (1931); Fox v. Standard Oil Co., 294 U. S. 87 (1935); Great A. & P. Tea Co. v. Grosjean, 57 Sup. Ct. 772 (1937). In Pacific American Fisheries v. Alaska, 269 U. S. 269 (1925) an excise tax on salmon packed, was progressively increased in accordance with the number of cases packed. This was sustained on the ground that a large pack furnished proportionally greater profits than a smaller pack. Other cases supporting classification based on special advantages are: Nicol v. Ames, 173 U. S. 509 (1899); Citizens National Bank v. Durr, 257 U. S. 99 (1921).

key for unlocking tax problems. The retail merchant operating a single store undoubtedly believes that the chain organization has so many advantages over him that it is fair that it should pay heavier taxes. It is hardly to be expected that an owner of 225 chain stores doing an annual business of $1,000,000 would look with equanimity on paying $5,433 in taxes, while a department store competing with him, and doing an annual business of $8,000,000 would pay but a three dollar tax.[58] It is often a difficult question to determine whether the basis provided for a tax does indeed rest on ability to pay. The majority of the Court thought that a retail store tax graduated according to gross receipts did not reflect any greater ability to pay. The dissenting Justices argued that it did.[59] Let it be granted that the state may shape its tax policies to meet the practical exigencies of levy and collection, still the extent of this power is uncertain. It is often difficult to determine whether a gift made within a limited period of death is an ordinary untaxable inter-vivos gift, or one made in contemplation of death and so taxable under the inheritance tax statutes. To meet the situation inheritance taxes were assessed in all gifts made within a fixed period of death. The majority of the Court twice held that the public's problem did not justify thus singling out a limited class of inter-vivos gifts and subjecting them to a special tax.[60] The actual economic facts on which a tax classification rests are often difficult of ascertainment. Even when they are discoverable the troublesome task still remains of determining whether the exigencies of the public revenue are sufficiently severe to justify taxing one person higher than another on substantially similar intrinsic things.[61]

In the cases just discussed, the exemptions, burdens, and distinctions of the tax laws were germane to the tax as a measure of revenue. What are the restrictions placed by the equal protection clause when these discriminations are used as instruments for social or economic regulation Some matters are reasonably clear. Unless the Supreme Court completely abandons its independence and tradition, it may confidently be asserted that equal protection of the law denies to the government the power to enforce discriminatory and oppressive taxes for the purpose of racial, religious, or political persecution.[62] Again, it does not need argument to prove that an

[58]In State Board of Tax Commissioners v. Jackson, *supra* note 57, Mr. Justice Sutherland, dissenting, thought that there was not sufficient reason to distinguish between chain stores and large department stores doing a greater gross business.

[59]Stewart Dry Goods Co. v. Lewis, 294 U. S. 550 (1935). *Cf.* Metropolitan Theaters v. Chicago, 228 U. S. 61 (1913), sustaining a license tax on theaters graduated according to admission charged.

[60]Schlesinger v. Wisconsin, 270 U. S. 230 (1926); Heiner v. Donnan, 285 U. S. 312 (1932). In the former case Mr. Justice McReynolds assumes the very point in issue by declaring that an unconstitutional levy cannot be justified by the possibility that tax evasion may otherwise result.

[61]See State *ex rel.* Matteson v. Luecke, 194 Minn. 246, 260 N. W. 206 (1935), holding unconstitutional a statute permitting delinquent taxes to be compromised.

[62]Fortunately the Court has never been presented with such a statute. It has, how-

activity which the state has power to suppress absolutely because of its inherent anti-social characteristics it may also discourage or restrain by heavy taxation.[63] Neither is citation of authority required to sustain preferential tax treatment of activities carried on for philanthropic and not for selfish motives. Such activities carry a burden which otherwise the public would have to sustain.[64] The lower tax rate imposed on bequests, inheritances, and gifts to the wife, lineal descendant, or close relative of a decedent or donor can also be easily justified. Such preferential treatment undoubtedly rests on the common acceptance of the moral obligation and proper inclination of the transferor to be mindful of his immediate family and relatives.[65]

Manifestly, the legal status and relation of the corporation are so unique as to justify special tax treatment. Incorporation is a privilege which a state may either grant or deny. It follows that when the privilege is granted it may be made subject to such taxes, levied specifically on that privilege, as the state may wish to impose. The corporation so taxed is in no position to claim that it is denied its constitutional rights.[66] Moreover, there is no doubt but that the franchise to be a corporation is a valuable one, conferring special privileges not possessed by natural persons. Corporations cannot, therefore, object when these special privileges are subject to taxation, even though no corresponding taxes are laid on natural persons conducting a like form of business.[67] Do these considerations justify the state in singling

ever, declared the principle in dictum. Quong Wing v. Kirkendall, 233 U. S. 59 (1912). A special tax on hand laundries operated by men was alleged to be aimed at Chinese. Mr. Justice Holmes said, if true, that "would be a discrimination which the Constitution does not allow." See also Mr. Justice Bradley in Bells Gap R. R. Co. v. Commonwealth, *supra* note 45; Mr. Justice Brown in American Sugar Refining Co. v. Louisiana, 179 U. S. 89 (1900).

[63]McCray v. United States, 195 U. S. 27 (1904); Hammond Packing Co. v. Montana, 233 U. S. 331 (1914); A. Magnano Co. v. Hamilton, 292 U. S. 40 (1934). These were all taxes on oleomargarine. See Powell v. Pennsylvania, 127 U. S. 678 (1887), upholding state statute forbidding sale of oleomargarine. In Rast v. Van Deman & Lewis Co., 240 U. S. 342 (1915), a special excise on use of trading stamps was sustained by direct resort to the powers of state to prohibit their use. In Alaska Fish Salting Co. v. Smith, 255 U. S. 44 (1921), sustaining an excise tax on use of fish for fertilizer, the tax could be sustained on basis of states control over *ferae naturae*.

[64]In Board of Education v. Illinois, 203 U. S. 553 (1906), the Court sustained an exemption in its inheritance tax laws of gifts to charities operating in Illinois and not to those operating in other states.

[65]Magoun v. Illinois, 170 U. S. 283 (1898); Billings v. Montana, 188 U. S. 97 (1903); Campbell v. California, 200 U. S. 87 (1906); Bromley v. McCaughn, 280 U. S. 124 (1929).

[66]Kansas City, etc., Ry. v. Kansas, 240 U. S. 227 (1916); Kansas City, etc., R. R. v. Stiles, 242 U. S. 111 (1916). In the first of these cases the attack on the tax was based on the commerce clause, but failed because of the principle above enunciated.

[67]Flint v. Stone Tracy Co., 220 U. S. 107 (1911) involved a federal excise tax on corporate franchises measured by the net income of the corporation. In sustaining the power of Congress thus to discriminate between corporations and natural persons the Court said: "It could not be said, even if the principles of the 14th Amendment were applicable to the present case, that there is no substantial difference between the carrying on of business by the corporations taxed, and the same business when conducted by a private firm or individual. The thing taxed is not the mere dealing in mer-

out corporations for discriminatory treatment when the tax is not upon the corporate franchise as such, but is general in its inherent character, resting on property or privileges possessed both by corporations and natural persons? The answer of the Court is not clear. In *Fort Smith Lumber Co. v. Arkansas,*[68] a five to four decision sustained the right of a state to tax corporate stock held by corporate owners, without placing a similar tax on corporate stock owned by natural persons. Mr. Justice Holmes said in support of the decision:

> "If the state of Arkansas wished to discourage but not to forbid the holding of stock in one corporation by another and sought to attain the result by this tax, or if it simply saw fit to make corporations pay for the privilege, there would be nothing in the Constitution to hinder. A discrimination between corporations and individuals with regard to a tax like this cannot be pronounced arbitrary, although we may not know the precise ground of policy that led the State to insert the distinction in the law."[69]

In *Quaker City Cab Co. v. Pennsylvania,*[70] however, a six to three decision held unconstitutional a state tax on the gross receipts of corporations engaged in the taxi-cab business, while no such tax was levied upon partnerships or individuals engaged in a like business. Corporations are, of course, persons, within the meaning of the due process and equal protection clauses of the Constitution.[71] The majority of the Court could see no valid reason to distinguish between the operation of taxicabs by corporations, and by natural persons, and so held the law arbitrary in its classification and a denial of equal protection. The dissenting Justices took, in part, a logical approach to the problem. Since the state may levy special taxes on the unusual privi-

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chandise, in which the actual transactions may be the same, whether conducted by individuals or corporations, but the tax is laid upon the privileges which exist in conducting business with the advantages which inhere in the corporate capacity of those taxed, and which are not enjoyed by private firms or individuals. These advantages are obvious, and have led to the formation of such companies in nearly all branches of trade. The continuity of the business without interruption by death or dissolution, the transfer of property interests by the disposition of shares of stock, the advantages of business controlled and managed by corporate directors, the general absence of individual liability, these and other things inhere in the advantages of business thus conducted, which do not exist when the same business is conducted by private individuals or partnerships. It is this distinctive privilege which is the subject of taxation, not the mere buying or selling or handling of goods, which may be the same, whether done by corporations or individuals." See also Home Insurance Co. v. New York, 134 U. S. 594 (1890).

[68]251 U. S. 532 (1920).

[69]This case and the following case of White River Lumber Co. v. Arkansas, 279 U. S. 692 (1929) also sustained statutes providing for the recovery of unpaid, or under-assessed, taxes from corporations, and not providing like actions against natural persons. The decisions were, however, based upon the ground that special necessity for recovery of such taxes might exist in the former and not in the latter case. See *supra* note 54.

[70]271 U. S. 389 (1928).

[71]County of San Mateo v. Southern Pac. R. Co., 13 Fed. 722, 743 (1882); Louis K. Liggett Co. v. Lee, 288 U. S. 517 (1933).

lege enjoyed by corporations,[72] it may also achieve the desired result through the medium of any of the generally recognized forms of taxation. As the state may undoubtedly levy special excise taxes on the operation of vehicles of public conveyance, and also special taxes on the corporate privilege, it may combine these two types of taxes and levy special taxes on the operation of such vehicles by corporations. Of greater significance in explaining the diverse views of the majority and dissenting Justices are the remarks made by Mr. Justice Brandeis in his dissenting opinion. A considerable body of public opinion regards the corporate device as insidious, leading to unfortunate concentration of wealth and power in a few individuals.[73] The learned Justice does not regard it as arbitrary for a state to direct its tax policy so as to hamper this tendency.[74] If the particular judge views the corporate method of doing business as merely the normal and well accepted way of doing business, he will doubtless regard with some abhorrence discrimination between corporations and natural persons engaged in the like type of business. A sympathetic attitude towards the view that corporations are undesirable instruments causing undue concentration of wealth, will lead to an opposite conclusion.

Two opinions, both rendered by divided Courts, have held that discrimination between corporations within the state, doing similar types of business, were arbitrary and unconstitutional. *F.S. Royster Company v. Virginia*[75] held that to tax domestic corporations doing business in and out of the state, on their entire income wherever earned, but to exempt entirely from taxation such corporations who did no business whatever within the state was a denial of equal protection of law. While the majority conceded that it was entirely proper to exempt from taxation income and property out of the state, there was no justification in giving such an exemption to domestic corporations who did no business in the state and in refusing it to those who did. The dissenting Justices would sustain the discrimination as a justifiable incentive to non-residents doing business out of the state to incorporate in Virginia. *Concordia Fire Insurance Company v. People*[76] held a denial of equal protection to exist when a state taxed fire insurance companies, doing a casualty insurance business as a side line, on all their receipts including those from casualty insurance, and placed no tax on the receipts of companies doing a casualty insurance business alone. The dissenting Justices considered that there was a sufficient difference between the two types of corporations to justify different tax treatment. The only conclusions to be

[72]See *supra* note 67.
[73]See Berle and Means, The Modern Corporation and Private Property (1932).
[74]In this connection see particularly the exhaustive discussion by Mr. Justice Brandeis in his dissent to Louis K. Liggett Co. v. Lee, *supra* note 71.
[75]253 U. S. 412 (1920).
[76]292 U. S. 535 (1934).

drawn seem to be first, that the mere fact that a tax-payer is a corporation does not expose it to arbitrary classification, and secondly, that the more liberal judges can find a just basis for classification whereas the more conservative ones cannot.

Foreign corporations not admitted to do, and not doing, business in a state are not "persons within the jurisdiction" within the meaning of the equal protection clause of the Fourteenth Amendment. As a condition of their right to enter, a state may, therefore, impose higher taxes upon them than on domestic corporations doing a like business.[77] After a severe struggle, however, in which Mr. Justice Holmes argued valiantly that the absolute power possessed by a state to grant or refuse foreign corporations the privilege to do intra-state business necessarily comprehended the right to impose any conditions it chose upon that privilege, it was finally established that a foreign corporation, once within a state and owning property and doing business therein, could not be subjected to greater tax burdens than domestic corporations doing the same type of business.[78] Neither may the state make it a condition on a foreign corporation entering a state that it submit to unconstitutional enactments.[79] A discrimination between corporate tax-payers solely on the basis of their domestic or foreign incorporation is not, therefore, permitted.[80] It does not follow, however, that they must be taxed in all respects alike. All that is required is that there be no outrageous or arbitrary discriminations in the burdens placed upon them, and the protesting tax-payer has the burden of showing such discriminations to exist.[81]

In the above cases, legally founded or commonly accepted non-technical norms justify the distinctions drawn. The Court has, however, broadly declared that "a state does not deny the equal protection of the laws merely by adjusting its revenue laws and taxing system in such a way as to favor certain industries or forms of industry."[82] At times the Court does not attempt discovery of the possible reasons for the favoritism shown. Thus, it is held that a state may levy an excise tax on hand laundries and leave so-called "steam laundries" exempt.[83] So a tax may be laid on meat-packing

[77]Pembina Mining Co. v. Pennsylvania, 125 U. S. 181 (1888); Fire Association v. Philadelphia, 119 U. S. 110 (1886).

[78]Southern Railway v. Greene, 216 U. S. 400 (1910); Bethlehem Motors v. Flynt, 256 U. S. 421 (1921). See also Western Union Telegraph Co. v. Kansas, 216 U. S. 1 (1910). In all these cases there were dissents expressed or registered.

[79]Terrel v. Burke Construction Co., 257 U. S. 529 (1922), over-ruling Security Mutual Life Insurance Co. v. Prewitt, 202 U. S. 246 (1906); Williams v. Standard Oil Co., 278 U. S. 235 (1929).

[80]See *supra* note 78.

[81]General American Tank Car Corp. v. Day, 270 U. S. 367 (1926); Concordia Fire Insurance Co. v. People, 292 U. S. 535 (1934). See also Baltic Mining Co. v. Massachusetts, 231 U. S. 68 (1913); Northwestern Mutual Life Insurance Co. v. Wisconsin, 247 U. S. 132 (1918). See *supra* note 52.

[82]Mr. Justice Holmes in Quong Wing v. Kirkendall, 223 U. S. 59 (1912).

[83]Quong Wing v. Kirkendall, *supra* note 82.

establishments and not on those packing other food products.[84] It seems fairly clear that a state may encourage an industry which it believes to be important and of great benefit to the state by exempting it from taxes laid on related types of business. The fact that bituminous coal was the source of important by-products, offering opportunities for increasing the manufactures of the state, seems to be the reason why an excise tax might be laid on the mining of anthracite coal, and not on the mining of bituminous.[85] The state may also validly favor the development of co-operative enterprises, by exempting them from the taxes levied on identical businesses conducted for the profit of the entrepreneurs.[86] Exemptions to that constant favorite of the legislature, the American farmer, have uniformly met with approval. To hold otherwise would indeed fly in the face of the nationally declared and accepted policy to foster and protect a basic industry widely believed to be in need of all the support it is humanly possible to give it.[87] The levy of an excise tax on hand laundries conducted by men, and not by women, was sustained on the ground that discriminations in regard to sex were proper and that the state "might put a lighter burden upon women than upon men with regard to an employment that our people commonly regard as more appropriate for the former."[88] It may be narrow and selfish, but it is quite understandable that a state should desire to favor local activities conducted by its residents. Tax laws directed to this purpose, where the commerce clause and the privileges and immunities clause of the Fourth Article of the Federal Constitution do not apply,[89] have been held based on reasonable and not on arbitrary classifications.[90]

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[84]Armour Packing Co. v. Lacy, 200 U. S. 226 (1906).

[85]Heisler v. Thomas Colliery, 260 U. S. 245 (1922). In Aero Mayflower Corporation v. Georgia Public Service Commission, 295 U. S. 285 (1935), an excise tax levied on carriers for hire on the public highways exempted carriers in localities not served by railroad. This was held proper. It is also held that carriers by water may be favored by exemption from taxes placed on other types of carriers. Carmichael v. Southern Coal Co., 57 Sup. Ct. 868 (1937).

[86]Citizens Telephone Co. v. Fuller, 229 U. S. 322 (1913). See also Louisville Gas and Electric Co. v. Coleman, 277 U. S. 32 (1928); Union Bank & Trust Co. v. Phelps, 288 U. S. 181 (1933), sustaining exemptions of building and loan associations.

[87]American Sugar Refining Co. v. Louisiana, 179 U. S. 89 (1900); Continental Baking Co. v. Woodring, 286 U. S. 352 (1932); Aero Mayflower Transit Corporation v. Georgia Public Service Comm., 295 U. S. 285 (1935); Carmichael v. Southern Coal Co., 57 Sup. Ct. 868 (1937); Chas. C. Steward Machine Co. v. Davis, 57 Sup. Ct. 883 (1937). The power to exempt in tax laws is wider than the power of exemption in regulatory laws. *Cf.* with above cases: Connoly v. Union Sewer Pipe Co., 184 U. S. 540 (1902); Smith v. Cahoon, 283 U. S. 553 (1931). See also Cox v. Texas, 202 U. S. 446 (1906).

[88]Quong Wing v. Kirkendall, 223 U. S. 59 (1912).

[89]See *supra* notes 9-10.

[90]Williams v. Fears, 179 U. S. 270 (1900), excise tax on occupation of securing laborers, applicable only when such laborers were hired to work outside the state; Cox v. Texas, 202 U. S. 446 (1906), tax on sales of wines, not applicable to sales of wines produced from grapes grown in state, while same were in hands of producer or manufacturer. In this case counsel failed to raise the question of the commerce

Since every tax exemption places an added burden on the classes not exempt, no sharp line can be drawn between those tax laws which are designed to favor certain classes of taxpayers and those which are intended as restrictions upon certain other taxpayers. A tax of wide-spread general application with special narrow exemptions is usually intended to favor those exempted. A special tax of narrow application only, on the other hand, is usually designed as a restriction on the special class taxed. Here again, the Supreme Court has placed no precise limitations on the legislative power to act for the latter purpose. Although in many cases the restrictions imposed by the revenue law may be sustained on the ground that the state by its police power might regulate or prohibit the thing taxed,[91] the Court often does not rely on this point, but sustains the statute in question on the general power of the state to employ tax laws for restrictive purposes.[92] The special taxes on chain stores are undoubtedly partly promulgated at the behest of the independent merchant as devices to hamper and discourage the former method of doing business. The Court has, however, usually ignored this phase of the problem, and has preferred to rely on the thesis that the chain store's particular organization and method of doing business has given it a greater ability to pay, so that the laws in question are merely designed to bring about a more equal distribution of the tax burden.[93] The so-called liberal members of the Court have, however, recognized the former, more important aspect of the chain store tax and as such have supported it. In *Great Atlantic and Pacific Tea Co. v. Grosjean*,[94] Mr. Justice Roberts, writing the opinion of the majority, joins this group:

> "Our decision need not, however, rest on conceptions of subject, measure and rate of tax. Much broader considerations touching the state's internal policy of police sustain the exaction. In the exercise of its police power the state may forbid, as inimical to the public welfare, the prosecution of a particular type of business, or regulate a business in such manner as to abate evils deemed to arise from its pursuit. Whatever a state may forbid or regulate it may permit upon condition

clause. Board of Education v. Illinois, 203 U. S. 553 (1906), exemption from tax of charities operating in state only. See also State Board of Equalization v. Young's Market, 299 U. S. 59 (1936). In Billings v. United States, 232 U. S. 261 (1914), it was held proper for the United States to impose an excise tax on foreign built pleasure yachts, and not on those domestically built. But *cf.* Bethlehem Motors v. Flynt, 256 U. S. 42 (1921).

[91] See *supra* note 63.

[92] See Singer Sewing Machine Co. v. Brickell, 233 U. S. 304 (1914); Alaska Fish Co. v. Smith, 255 U. S. 44 (1921); A. Magnano Co. v. Hamilton, 292 U. S. 40 (1934). In Alaska Fish Co. v. Smith, *supra*, Mr. Justice Holmes said: "If Alaska deems it for its welfare to discourage the destruction of herring for manure and to preserve them as food for man or for salmon, and to that end imposes a greater tax upon that part of the plaintiff's industry than upon the similar use of other fish or of the offal of salmon, it can hardly be said to be contravening a Constitution that has known protective tariffs for a hundred years."

[93] See *supra* note 57.

[94] 57 Sup. Ct. 772 (1937).

> that a fee be paid in return for the privilege, and such a fee may be exacted to discourage the prosecution of a business or to adjust competitive or economic inequalities. Taxation may be made the implement of the exercise of the state's police power; and proper and reasonable discrimination between classes to promote fair competitive conditions and to equalize economic advantages is therefore lawful.
>
> "If, in the interest of the people of the state, the legislature deemed it necessary either to mitigate evils of competition as between single stores and chains or to neutralize disadvantages of small chains in their competition with larger ones, or to discourage merchandising within the state by chains grown so large as to become a menace to the general welfare, it was at liberty to regulate the matter directly or to resort to the type of taxation evidenced by the Act of 1934 as a means of regulation."[95]

Recent and inevitable future changes in the personnel of the Court will probably enhance an attitude of tolerance towards legislation regulating trade, business, and manufacture. If such, indeed, be the course of events, tax laws may be used to achieve that purpose. Those meeting the legislative favor may be helped by exemptions; those not meeting that favor may be shackled by heavy tax burdens. The Court will be loath to interfere.

III

One further possible restriction on the use of power to tax for regulatory purposes remains for discussion. May a legislative body, national or state, for the purpose of suppressing or destroying a particular activity place upon it confiscatory or prohibitive taxes? Are such exactions entitled to consideration as revenue laws, or must they stand or fall as regulatory acts, depending for their validity on the police power of the state? Does due process of law prevent prohibitory taxes on property or activities, which are not within the power of the government by direct means to suppress?[96]

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[95]In his dissent to Lewis K. Liggett Co. v. Lee, 288 U. S. 517 (1933) Mr. Justice Brandeis declares: "The purpose of the Florida statute is not, like ordinary taxation, merely to raise revenue. Its main purpose is social and economic. The chain store is treated as a thing menacing the public welfare. The aim of the statute, at the lowest, is to preserve the competition of the independent stores with the chain stores; at the highest its aim is to eliminate altogether the corporate chain stores from retail distribution." He looks with sympathy on the view that "the chain store, by furthering the concentration of wealth and of power and by promoting absentee ownership, is thwarting American ideals; that it is making impossible equality of opportunity; that it is converting independent tradesmen into clerks; and that it is sapping the resources, the vigor, and the hope of the smaller cities and towns." The precise basis of his dissent seems, however, to be the corporate character of the plaintiff's in the particular case. In Fox v. Standard Oil Co., 294 U. S. 87 (1935), Mr. Justice Cardozo, writing the opinion of the majority, echoes somewhat the same idea: "A motive to build up through legislation the quality of men may be as creditable in the thought of some as a motive to magnify the quantity of trade."

[96]For other discussions of this problem see, Waite, *May Congress Levy Money Exactions Designated Taxes Solely for the Purpose of Destruction?* (1908) 6 MICH. L. REV. 277; Levin, *Does the Power to Tax Involve the Right to Destroy a Lawful Business?*

The answers to these questions by the United States Supreme Court and by the courts of the individual states seem to differ. The Supreme Court has definitely declared that "a tax within the lawful power of state" may not "judicially be stricken down under the due process clause simply because its enforcement may or will result in restricting or even destroying particular occupations or businesses."[97]

This attitude seems partly due to the early declaration by Marshall in *M'Culloch v. Maryland*[97a] that "the power to tax involves the power to destroy." That declaration has heen echoed by the Court many times since.[98] It is true that the aphorism was used in the *M'Culloch* decision and in many other cases to overthrow rather than sustain the tax in question. This circumstance does not, however, serve to destroy the cogency of the general declaration. The Court declares that once it be admitted that a given subject matter may be lawfully taxed, no constitutional limit exists to the amount of the tax, and the taxing authority can therefore destroy that subject. This is the major premise for the holding that even a moderate or slight tax upon a forbidden subject matter may not be levied.[99] It would be strangely inconsistent for the Court after declaring this principle for the purpose of overthrowing a moderate tax on constitutionally exempt subjects, to declare it inapplicable to an excessive tax levied on a non-exempt subject.[100] The Court has also been extremely reluctant to search a law which on its face merely levies a tax to discover therein hidden objectives, not within the domains of the legislative power. As has been seen it has refused to hold federal tax laws unconstitutional, on the sole ground that the amount of the tax levied accomplishes regulation or suppression of matters not within

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(1933) 67 U. S. L. Rev. 448, 512; Cushman, *Social and Economic Control through Federal Taxation* (1934) 18 Minn. L. Rev. 759; R. C. Brown, *When is a Tax not a Tax?* (1936) 11 Ind. L. J. 399.

[97]Mr. Justice Sutherland, speaking for a unanimous Court in A. Magnano Co. v. Hamilton, 292 U. S. 40 (1934).

[97a]4 Wheat. (U. S.) 316 (1809).

[98]Crandall v. Nevada, 6 Wall. (U. S.) 35 (1867); Austin v. The Aldermen, 7 Wall. (U. S.) 694 (1868); Flint v. Stone Tracy Co., 220 U. S. 107, 168 (1911); Indian Territory Illuminating Oil Co. v. Oklahoma, 240 U. S. 522 (1916); Evans v. Gore, 253 U. S. 245 (1920); Alaska Fish Salting Co. v. Smith, 255 U. S. 44 (1921); A Magnano Co. v. Hamilton, *supra* note 97; Fox v. Standard Oil Co., 294 U. S. 87 (1935).

[99]See statement of Mr. Justice Sutherland in Macallen v. Commonwealth, 279 U. S. 620, 628 (1929).

[100]It is true that the great name of Mr. Justice Holmes is coupled with a statement as curt and precise as that of the Chief Justice previously quoted, "The power to tax is not the power to destroy while this court sits," dissent in Panhandle Oil Co. v. Mississippi, 277 U. S. 218, 223 (1928). This aphorism was used, however, to support a moderate non-discriminatory state tax on a federal instrumentality. Other decisions in which Mr. Justice Holmes participated show that when the subject matter of the tax was within the scope of the taxing body's sovereignty, he would not overthrow a tax beeause of its possible destructive effect. See McCray v. United States, 195 U. S. 27 (1904); Alaska Fish Salting Co. v. Smith, 255 U. S. 44 (1921).

The dictum of Chief Justice White (see *supra* note 36) may leave a loophole for holding that confiscatory taxation is forbidden.

the domain of direct federal action.[101] Likewise, when tax measures are contested on the ground that the tax is so heavy as to work a destruction of individual interests contrary to the demands of due process of law, the Court has upheld the law in question by refusing to consider the amount of the tax as evidence of an unlawful motive in the taxing authorities. The writer believes, however, that it is futile to attempt to answer questions concerning the power of government to destroy particular businesses or occupations by excessive taxation simply by drawing logical deductions from general expressions of principle by the Court, entirely disassociated from the actual decisions made in the cases in which they were enunciated. The context in which the general statement is uttered must never be ignored. When we examine the actual cases in which the Court decided that tax levies alleged to be destructive of the particular subject taxed were constitutional, we find that in most, if not all instances, it was within the power of the government, insofar as due process of law was concerned, to accomplish the alleged result by ordinary police regulation for that expressly avowed purpose.[102] This was certainly true of *Veazie Bank v. Fenno,*[103] where the Federal Government under its power to regulate the currency could prevent competing media of exchange from driving officially declared money out of circulation. The power to place a ten cent a pound tax on oleomargarine colored to look like butter was, so far as due process was concerned, partially justified on the ground that the sale of such goods could lawfully be prohibited.[104] It seems that prohibitive taxes on uncolored oleomargarine may also be sustained by reliance on the police power,[105] as well as by regarding them as mere manifestations of the ordinary power to tax.[106]

It is, certainly, also true that due process does not deny to government the power to forbid the sale of such lethal weapons as machine guns and sawed-off shotguns.[107] Indeed, when the Court was presented with an excessive tax on trading stamps it admitted their confiscatory character, but sustained the law on the express ground that the state had the right to prohibit their use by direct legislation under the police power.[108] The pro-

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[101]See *supra* p. 65.
[102]Veazie Bank v. Fenno, 8 Wall. (U. S.) 533 (1869); McCray v. United States, 195 U. S. 27 (1904); A Magnano Co. v. Hamilton, 292 U. S. 40 (1934); Fox v. Standard Oil Co., 294 U. S. 87 (1935); Sonzinsky v. United States, 57 Sup. Ct. 554 (1937).
[103]*Supra* note 102.
[104]McCray v. United States, *supra* note 102.
[105]Powell v. Pennsylvania, 127 U. S. 678 (1897).
[106]A. Magnano Co. v. Hamilton, *supra* note 102. Cf. however, the *per curiam* decision in Glenn v. Field Packing Co., 290 U. S. 177 (1933), where the state constitution was applied to hold an oleomargarine tax unconstitutional.
[107]See Sonzinsky v. United States, *supra* note 102.
[108]Rast v. Van Deman & Lewis, 240 U. S. 342 (1916); Tanner v. Little, 240 U. S. 369 (1916).

hibitive tax placed on the use of certain fish for certain purposes can also be sustained through the power possessed by the state to control the wild game within its borders.[109] The last word of the Supreme Court sustaining chain store taxes alleged to be prohibitive seems to be that the state may prohibit under the police power "chains grown so large as to become a menace to the public welfare";[110] and *a fortiori* it can accomplish the same result by taxation. While the general statements made by the Court would seem to justify prohibitive taxes even on entirely innocent businesses or occupations, the actual decisions of the Court go no farther than sustaining such taxes when the state also has the power to destroy the thing taxed by direct legislation.

Unless one is completely swayed by the desirability of judicial non-interference with legislative acts, it is refreshing to turn from the deliberate obtuseness of some of the United States Supreme Court opinions to the forthright expressions of the state courts. State and municipal governments have at times employed their taxing powers as instruments for the crippling or destruction of certain types of business or commercial activity. Peddlers, other transient merchants, auctioneers, and loan agencies have frequently suffered from legislation of this character, but the state courts have not looked with favor at such stratagems.[111] *State v. Osborne*,[112] involved a state statute imposing a two-hundred dollar a year license tax on transient merchants in each county in which they did business. The prohibitive effect of the tax was apparently assumed. In holding such a levy unconstitutional, the Iowa court said:

[109]Alaska Fish Salting Co. v. Smith, 255 U. S. 44 (1921).

[110]Great Atlantic and Pacific Tea Co., 57 Sup. Ct. 772 (1937), quoted *supra* p. 63.

[111]Chaddock v. Day, 75 Mich. 527 (1880) involved a municipal ordinance regulating and taxing peddlers of fresh meat. Concerning this law the Michigan court said:

"We do not think this by-law can be sustained as a regulation of hawkers or peddlers, as it is evident that it was not so intended by its framers. Indeed, it appears to be open to the charge of the respondent that it was passed in the interest of the persons in said village selling fresh meat in shops, and in restraint of trade.

"It is quite common in these latter days for certain classes of citizens—those engaged in this or that business—to appeal to the government—national, state or municipal—to aid them by legislation against another class of citizens engaged in the same business, but in some other way. This class of legislation, when indulged in, seldom benefits the general public, but nearly always aids the few for whose benefit it is enacted, not only at the expense of the few against whom it is ostensibly directed, but also at the expense and to the detriment of the many, for whose benefit all legislation should be, in a republican form of government, framed and devised. This kind of legislation should receive no encouragement at the hands of the courts, and be only upheld when it is strictly within the legitimate power of Congress, or the state or municipal legislatures." The writer does not concur with the view of the court that this ordinance was necessarily unconstitutional. Candor, however, compels recoguition of the fact that much legislation is not passed to promote genuinely common interests, but the interest of one class as it clashes with the interests of another. The existence of active lobbies in our legislative halls proves this fact. See Brown, *Police Power—Legislation for* Health and Safety (1929) 42 Harv. L. Rev. 866, 879.

[112]171 Iowa 678, 154 N. W. 294 (1915).

". . . The power of the state to tax and regulate different occupations and lines of business is not to be denied. It is also true that the courts have sometimes said "the power to tax is power to destroy"; but, as is usual with all general propositions, this concession may be overworked. The power to tax cannot lawfully be carried to an extent to destroy rights or privileges guaranteed by the Constitution. The first section of our Bill of Rights assures to every man protection in his natural right to acquire, possess and enjoy property. This necessarily includes the right to buy, sell and exchange; and, in so far as the traffic is of a harmless and useful character, the state may not impose an occupation tax which shall operate as a prohibition or as a burden of magnitude sufficient to render the right valueless. For example, if the legislature should impose an occupation tax of one thousand dollars per year upon every market gardener or farmer or carpenter or grocer or telegraph operator or washer-woman, no court would hesitate to say it was an unconstitutional abuse of power. The power and discretion of the legislature are broad, but they are not illimitable; and while we will be slow to invalidate a statute enacted in due form, we will not hesitate to do so if the unconstitutionality of the act is patent."[113]

There are many decisions and more dicta from the state courts to like effect. In spite of the reluctance of the United States Supreme Court to pierce through ostensible tax laws to discover in them unjustifiable suppressions of innocent businesses and occupations, the state courts have not hesitated to perform the task. Where, of course, the matter oppressively taxed is something that the state may under its police powers suppress, the levy of a prohibitive tax is sustained.[114] Where, however, the activity oppressively taxed is of an innocent character, the overwhelming weight of authority in the state courts is that such laws are void under the due process of law clause of the Fourteenth Amendment, or under the similar provisions of the state constitutions.[115] Many of these decisions involved city ordinances,

[113]To similar effect see Fiscal Court v. F. & A. Cox Co., 132 Ky. 738, 744, 117 S. W. 296 (1909).

[114]Hale v. State, 217 Ala. 403, 116 So. 369 (1928); Mitchell v. Williams, 27 Md. 62 (1866); Indianapolis v. Bieler, 138 Ind. 30, 36 N. E. 857 (1893); Commonwealth v. McCray, 250 Ky. 182, 61 S. W. (2d) 1043 (1933); State v. Wilson, 101 Kan. 789, 168 Pac. 679 (1917); Stalick v. Gallup, 23 N. M. 405, 168 Pac. 707 (1917).

[115]Republic Iron & Steel Co. v. State, 204 Ala. 469, 86 So. 52 (1920) (dictum); State v. Kartus, 230 Ala. 352, 162 So. 533 (1935) (dictum); In re Dees, 50 Cal. App. 11, 194 Pac. 717 (1920); State ex rel. Bonesteel v. Allen, 83 Fla. 214, 91 So. 104 (1922) (dictum); Miami Transit Co. v. McLin, 101 Fla. 1233, 133 So. 99 (1931) (dictum); Williams v. Mayor, 152 Ga. 696, 111 S. E. 47 (1921); Shellnut v. City Council, 163 Ga. 502, 136 S. E. 446 (1927); City of Carrollton v. Bazette, 159 Ill. 284, 42 N. E. 837 (1896) (city ordinance enacted under its police power); People v. Wilson, 249 Ill. 195, 94 N. E. 141 (1911); State v. Osborne, *supra* note 112; Fiscal Court v. F. & A. Cox Co., *supra* note 113; City of Louisville v. Pooley, 136 Ky. 286, 124 S. W. 315 (1910); Sallsbury v. Equitable Purchasing Co. 177 Ky. 348, 197 S. W. 813 (1917); Commonwealth v. McCray, *supra* note 114 (dictum); Iowa City v. Glassman, 155 Iowa 671, 136 N. W. 899 (1912); In re Opinions of Justices, 173 Me. 573, 121 Atl. 902 (1923), (dictum); Peterson Baking Co. v. Freemont, 119 Neb. 212, 228 N. W. 256 (1929); Grantham v. Chickaska, 156 Okla. 56, 9 P. (2d). 747 (1932); Matthews v. Jensen, 21 Utah (207) 61 Pac. 303 (1900). See, however, *contra*, Stull v. De Mattos,

but this is immaterial where the declaration of invalidity was on grounds of unconstitutionality applicable to municipal ordinances as well as to state legislation. Even the holdings that city ordinances levying prohibitive taxes are not proper exercises of the charter power to tax, but to be sustained, if at all, under charter grants of the police power are germane to the problem under consideration.[116] They show a willingness to consider the amount of a levied tax as evidence that a purported exercise of a revenue power is not so in fact, but the exercise of a power of another nature which is forbidden to the enacting authority.[117]

In the judicial consideration of levying prohibitive taxes on businesses or occupations, which are not within the power of the state to suppress by direct means, the writer prefers the holdings of the state courts to the evasive doctrines enunciated by the nation's highest court. Both legislative and judicial repute suffer when, with judicial support, a legislative body, forbidden by constitutional mandates to destroy a certain business or occupation by direct means, is permitted to accomplish the identical result by confiscatory taxation. It is true that the Supreme Court in adopting the doctrines that it has, is influenced undoubtedly by a laudable desire not to declare legislative acts ultra vires when any reasonable means of escape is possible.[118]

23 Wash. 71, 62 Pac. 451 (1900) in which the court upheld an alleged confiscatory tax by refusing to consider the amount of the tax as evidence of the use of an unlawful power.

[116]Moffitt v. City, 55 Colo. 112, 133 Pac. 754 (1913); Morton v. Mayor, 111 Ga. 162, 36 S. E. 627 (1900); Huguley-McCulloch Auto Co. v. La Grange, 159 Ga. 352, 125 S. E. 799 (1924); Iowa City v. Glassman, 155 Iowa 671, 136 N. W. 899 (1912); Caldwell v. Lincoln, 19 Neb. 569, 27 N. W. 646 (1886); Monroe v. Endelman, 150 Wis. 621, 138 N. W. 70 (1912).

[117]It is often a difficult matter to determine whether a tax is indeed prohibitive or confiscatory. The rule seems to be that the contestant of the tax has the burden of proving it to be so. The court will not conclude from the mere size of the tax that it is confiscatory. Minnesota v. Martin, 124 Minn. 498, 145 N. W. 383 (1914); Erwin v. Omaha, 118 Neb. 331, 224 N. W. 692 (1929); State v. Razook, 179 N. C. 708, 103 S. E. 67 (1920). All the circumstances of a case must be considered. In Ex Parte Sikes, 102 Ala. 173, 15 So. 522 (1893), a $2000 per year liquor tax was held not prohibitive. It was shown that dealers actually did a sufficient business to pay the tax. However, the mere fact that an individual tax payer does not make a sufficient net income to enable him to pay the tax, does not brand it as necessarily prohibitive. The state does not guarantee profits to individuals. In testing the confiscatory character of a tax it is also necessary to take a period of time sufficiently long to give a fair test. See Williams v. Talladega, 164 Ala. 633, 51 So. 330 (1909); Wocopep Co. v. Montgomery, 213 Ala. 450, 459, 105 So. 214 (1925); Interstate Co. v. Richardson, 177 Ga. 9, 169 S. E. 373 (1933). These were all cases where the tax was undoubtedly levied for revenue purposes. Where, however, the tax was shown to approach 100% of the profits earned by the average proprietor of the business taxed, City of Louisville v. Pooley, 136 Ky. 286, 124 S. W. 315 (1910); and where it consumed one-third of the earnings of the most successful of the concerns taxed, Sallsbury v. Equitable Purchasing Co., 177 Ky. 348, 197 S. W. 813 (1917), the tax was held prohibitive. See also Williams v. Mayor, 152 Ga. 696, 111 S. E. 47 (1921), where the tax was apparently part of a corrupt scheme to secure a monopoly of the local ice business by driving out small competitors.

[118]Concerning the unfortunate effect on the quality of justice of the pressure on the courts to sustain at all hazards legislation claimed to be contrary to constitutional pro-

When, as in the extension of federal regulatory powers through prohibitory taxes,[119] objectives generally admitted to be desirable are achieved, we may be inclined to believe that the end justifies the means. But it is not necessary, and it is improper, for the Court to assume the ostrich role in order to sustain oppressive and arbitrary measures against the innocent and worthy. The writer believes that the Supreme Court, in spite of its general declarations, will not do it. As has been pointed out, the cases actually before the Court concerned prohibitive taxes on subjects which were within the legislative power by direct means to suppress. In *Adams v. Tanner*,[120] the Supreme Court held that it was not within the police power of the state of Washington to abolish private employment agencies. Can it be supposed that if the Washington legislature had immediately levied a $50,000 annual license tax on such agencies, the Court would have sustained it? Does anyone believe that the present Court would sustain prohibitive taxes on private schools, which, it has been held, cannot be outlawed by direct means?[121] Would not the Court pierce the subterfuge and declare the law vicious and underhanded? If the state desires as a matter of public policy to destroy a particular business or method of doing business, should it not rely on its police power, and however it seeks to achieve its objective, be limited by the boundaries of that power? Indeed, the most recent opinion by the Court, in which an alleged prohibitive tax on chain stores was sustained, seems to rely directly on the power of the state to abolish such a method of business as inimical to the public welfare.[122] Where the object of the tax is something which the Court believes should in the public interest be preserved and not destroyed, a different result, it is believed, will be attained. Proof of this lies in *Grosjean v. American Press Co.*,[123] in which a unanimous Court held that a Louisiana license tax of two per cent on the gross receipts of those engaged in the business of publishing advertising in newspapers was an infringement on the liberty of the press, and contrary to due process of law under the Fourteenth Amendment. The Court did not hesitate to see other than revenue purposes in the law in question. "It is bad because, in the light of its history, and in its present setting, it is seen to be a deliberate and calculated device in the guise of a tax to limit the circulation of information to which the public is entitled in virtue of the constitutional guaranties."

All tax laws have an economic and social effect. Although the Federal

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visions see, Pound, *Spurious Interpretation* (1907) 7 Col. L. Rev. 379, 384. I am indebted to Professor Oliver Rundell for calling my attention in this connection to this excerpt.

[119]See Sonzinsky v. United States, 57 Sup. Ct. 554 (1937.

[120]244 U. S. 590 (1917).

[121]Pierce v. Society of the Sisters, 268 U. S. 510 (1925).

[122]Great Atlantic and Pacific Tea Co. v. Grosjean, 57 Sup. Ct. 772 (1937), quoted *supra* p. 63.

[123]297 U. S. 233 (1936).

Government has only fiscal powers in this connection, it may still use its tax power to achieve much incidental regulation. Within the limits of due process it may even use the tax power to destroy. By exemptions and special levies, tax laws of both the nation and the state may either aid or hinder activities in accordance with reasonable social and economic objectives. It is believed that the courts should not and will not permit the power to tax to be used to destroy those things which the state cannot destroy by direct legislation.