Cornell Law Review

Volume 23
Issue 1 *December 1937*

Article 5

Taxation Under the Federal Social Security Act Constitutional and Regulatory Aspects

Lester B. Orfield

TAXATION UNDER THE FEDERAL SOCIAL SECURITY ACT: CONSTITUTIONAL AND REGULATORY ASPECTS

LESTER B. ORFIELD

On May 24, 1937, just a week before adjournment for the summer, the Supreme Court of the United States in *Chas. C. Steward v. Davis,*[1] and *Helvering v. Davis,*[2] upheld the constitutionality of the Federal Social Security Act.[3] To speak more precisely, it upheld those phases of the Act which seemed most dubious from a constitutional standpoint and which, according to previous precedents, admitted of judicial review. The validity of those Titles of the Act not passed upon may be conclusively presumed. The Court upheld those phases of the Act which were most significant as well as novel from a sociological standpoint, namely, the provisions dealing with unemployment compensation[4] and federal old-age benefits.[5]

The decisions came almost two years after the enactment, the Act having been signed by President Roosevelt on August 14, 1935.[6] They climaxed a series of important decisions on constitutionality, most of which had gone against the New Deal. They came after the November, 1936 election after which, it has sometimes been pointed out, all important decisions have gone in favor of the New Deal, notably in the *National Labor Relations* case,[7] a decision which doubtless came as a welcome surprise to most advocates of the New Deal. Possibly of equal significance, they came at a time when the Supreme Court was undergoing the most violent criticism which had been indulged against it since the administration of Theodore Roosevelt. Some there are who will assert that the decisions were therefore not strictly on the merits but based upon avoiding further conflict with Congress and the President and bolstering up the position of the Court; that such recent

[1]57 Sup. Ct. 883, 81 L. ed. 779 (1937).

[2]57 Sup. Ct. 904, 81 L. ed. 804 (1937). The respondent in the former case was Harwell G. Davis, Collector of Internal Revenue for Alabama; while in the present case he was George P. Davis, a stockholder in the Edison Electric Illuminating Company of Boston.

[3]49 STAT. L. 620, c. 531, 42 U. S. C. A. § 7 (Supp.).

[4]Title IX. The court did not pass on Title III, but since the court found it was separable its validity was assumed.

[5]Titles II and VIII. The holding as to Title VIII was confined to the tax on employers.

[6]However, the Title IX taxes on employers if eight or more did not come into effect until 1936 and were payable as late as January 31, 1937, U. S. Treasury Dept. Regulations 90, Art. 303, while the Title VIII taxes on employers and employees did not come into effect until 1937, the first not becoming due until on or before Feb. 28, 1937. U. S. TREASURY DEPT. REG. 91, Art. 410 (1936). Because of the lateness of the due date of such taxes the government might perhaps have objected to earlier consideration on the ground of prematurity.

[7]National Labor Relations Bd. v. Jones & Laughlin Steel Corp., 57 Sup. Ct. 615 (1937).

decisions as *Railroad Retirement Board v. Alton R. Co.*[8] and *United States v. Butler*[9] indicated that the Court would reject the philosophy of the Social Security Act. The proponents of the Court will reply that the prior cases admitted of reasonable distinction, that the Social Security Act was drawn after the New Deal had profited by its mistakes in its earlier legislation, and that Mr. Chief Justice Hughes had voted with the liberal judges in a considerable number of cases, with Mr. Justice Roberts also supporting them occasionally.

The Court divided five to four on the validity of the Title IX tax, popularly referred to as the Federal Unemployment Insurance Tax.[10] The majority opinion was rendered by Mr. Justice Cardozo[11] and fully concurred in by Chief Justice Hughes and Justices Brandeis, Stone, and Roberts. Justices Sutherland and Van Devanter objected to the unemployment reserve fund feature, but did not find the provisions dealing with the fund separable and so found the whole Title invalid. Seven Justices thus thought the basic features of the tax valid since the trust fund might easily be dropped out by amendment to the Act. Justices McReynolds and Butler thought the whole Title unconstitutional as an invasion of states' rights. The two latter wrote separate opinions while Mr. Justice Sutherland wrote one concurred in by Mr. Justice Van Devanter.

The validity of the Title VIII Tax on employers,[12] popularly referred to as the Federal Old Age Pension Tax, and of the Title II benefits was upheld by a vote of seven to two, the only dissenting votes being those of Justices McReynolds and Butler. As in the case of the Federal Unemployment Insurance Tax, the majority opinion was rendered by Mr. Justice Cardozo. No opinions were written by the dissenting Justices, the report stating merely that they were "of opinion that the provisions of the Act here challenged are

---

[8]295 U. S. 330, 55 Sup. Ct. 758, 79 L. ed. 1468 (1934). This case is cited by Mr. Justice Sutherland, in his opinion in the Alabama State Unemployment Compensation Law case, as forbidding pooled fund state unemployment compensation laws. Carmichael v. So. Coal & Coke Co., 81 L. ed. 811, 826, 827 (Sup. Ct. 1936).

[9]297 U. S. 1, 80 L. ed. 477, 102 A. L. R. 914 (1935). However, none of the dissenting opinions in the Social Security cases rely on United States v. Butler. In the Federal Unemployment Insurance Tax case the majority opinion expressly pointed out that the Agricultural Adjustment Act differed in several respects from the Title IX provisions. Carmichael v. So. Coal & Coke Co., 81 L. ed. 779, 790 (1936). In July, 1937, after the President's Court proposal had been killed through recommitment, however, President Roosevelt asserted that his efforts had not been in vain since the decisions in the Social Security cases amounted to a reversal of United States v. Butler.

[10]Such usage is purely popular since the government insisted and the Supreme Court held that the funds raised flow into the general treasury funds and may be used for any purpose proper for government.

[11]To Mr. Justice McReynolds, the beautifully worded opinion of the majority by Mr. Justice Cardozo, seems to have been a mere "cloud of words." Carmichael v. So. Coal & Coke Co., *supra* note 8 (1936).

[12]The Court did not pass on the Title VIII tax on employees.

repugnant to the Tenth Amendment, and that the decree of the Circuit Court of Appeals should be affirmed."[13]

On the same day on which the Court handed down its decisions upholding the Federal Social Security Act, it also decided *Carmichael v. Southern Coal & Coke Co.* sustaining the Alabama State Unemployment Compensation Law.[14] As in the case of the decision on the federal unemployment insurance tax, the vote was five to four with the same Justices favoring and the same opposing. The majority opinion was rendered by Mr. Justice Stone, who had taken no part in the decision on November 23, 1936 upholding by a four to four vote[15] the decision of the New York Court of Appeals in favor of the validity of the New York Unemployment Compensation Law.[16] The case was on appeal from a decision by a three judge court from the Federal District Court of Alabama, holding the Alabama Law unconstitutional.[17] Mr. Justice Sutherland rendered a dissenting opinion concurred in by Justices Van Devanter and Butler.[18] This dissenting opinion did, however, approve of such laws as the Wisconsin employers' reserve account plan, since adopted only in Nebraska. Eight of the nine Justices thus approved of the latter type of unemployment compensation law. Mr. Justice McReynolds dissented without opinion.

Some study of this last decision is essential for several reasons. The unemployment compensation provisions of the Federal Act would obviously be futile if the states could not constitutionally pass state unemployment compensation laws. They would also be largely futile if pooled fund systems were not allowed as almost all states had adopted such laws. They would also be futile if the state laws were regarded as unconstitutional because their enactment was induced by the federal provisions. They would also be futile if a state could not deposit its unemployment compensation fund in the Treasury of the United States. Moreover, the reasoning of the Court as to the validity of the exceptions in the Alabama State Law was applied by the Court to the exceptions in the federal unemployment insurance tax and the federal old age pension tax. The holding that the beneficiaries need not show indigence is probably applicable to the *Federal Old Age Pension* case as is the holding that an employer could not attack the tax on employees.

[13]57 Sup. Ct. 88, 81 L. ed. 804, 811 (1936).
[14]57 Sup. Ct. 868, 81 L. ed. 811 (1936).
[15]W. H. H. Chamberlin v. Andrews, 299 U. S. 515, 57 Sup. Ct., 122 (1936). Such a decision is not strictly binding as a precedent. Etting v. Bank of United States, 11 Wheat. 59, 6 L. ed. 419 (U. S. 1836); Hertz v. Woodman, 218 U. S. 205, 30 Sup. Ct. 621, 54 L. ed. 1001 (1910). The holding was ignored in Gulf States Paper Corporation v. Carmichael, 17 Fed. Supp. 225, 229 (1936). The House of Lords has adopted a different rule. Beamish v. Beamish, 9 H. L. Cas., 274, 338 (1861).
[16]W. H. H. Chamberlin, Inc. v. Andrews, 276 N. Y. 1, 2 N. E. (2d) 22 (1936).
[17]17 Fed. Supp. 225 (1937).
[18]*Supra* note 8.

The frequent attempts by the United States Government to secure delay in the hearing of cases involving the constitutionality of Acts of Congress[19] and the less common situations where the government wished to expedite the hearing make the form of the procedure under which the Social Security cases arose of interest. *The Federal Unemployment Insurance Tax* case[20] came up on writ of *certiorari* from a decision of the Fifth Circuit Court of Appeals[21] affirming a judgment of the Federal District Court for the District of Alabama dismissing a complaint in a suit to recover back a tax paid under Title IX.[22] The *Federal Old Age Pension* case also came up on writ of *certiorari*,[23] but from a decision of the First Circuit Court of Appeals[24] reversing a decree of the Federal District Court for Massachusetts,[25] which dismissed a bill by a stockholder to restrain a corporation from paying taxes levied under Title VIII. It was by the very narrowest margin that the Supreme Court was willing to pass upon the constitutionality of Title VIII. Four of the Justices, Brandeis, Stone, Roberts, and Cardozo, the last of whom wrote the opinion, took the view that the case was not properly one for an injunction since the legal remedy was adequate. That is to say, the stockholder should have waited until the corporation made the tax payment, then if the corporation showed no disposition to seek a refund, the shareholder might sue in equity to compel the corporation to seek a refund.[26]

[19]The earlier policy of the government was to object to any decision determining the constitutionality of the Social Security Act on the ground of prematurity. See the brief for the government in Pulaski Trucking Corporation v. Newark Milk Company, a case arising in the Federal District Court for New Jersey on June, 1936.

[20]57 Sup. Ct. 673 (1936). Certiorari was granted in March 29, nine days after the decision in the Circuit Court.

[21]Chas. C. Steward Match Co. v. Davis, 89 F. (2d) 207 (March 20, 1937). The case was argued in the Supreme Court on April 8th and 9th, or only eighteen days after the decision in the Circuit Court.

[22]The District Court did not write an opinion. Title IX was upheld by the Federal District Court for Massachusetts, Davis v. Boston & Maine R. R., 17 F. Supp. 97 (Dec. 7, 1936). This decision was reversed by the Circuit Court of Appeals for the First Circuit on April 14, 1937 by a two to one vote, 89 F. (2d) 368. Title IX was also upheld by the Federal District Court for the Northern District of Alabama in Beeland Wholesale Co. v. Davis, 17 Fed. Supp. 529 (Jan. 14, 1937), affirmed by the Circuit Court of Appeals for the Fifth Circuit in 88 F. (2d) 447 (Feb. 16, 1937), which latter case, however, went off mainly on the ground that the remedy was not in equity. An injunction and a declaratory judgment were refused without decision on constitutionality in Aponau Mfg. Co. v. Fly (S. D. Miss., Jan. 4, 1937) 17 Fed. Supp. 944, affirmed by the Circuit Court of Appeals for the Fifth Circuit in 87 F. (2d) 997 in a per curiam decision. Title IX was upheld incidental to decisions upholding state unemployment compensation acts in Gillum v. Johnson, 62 Pac. (2d) 1037, 108 A. L. R. 595 (Cal. Nov. 25, 1936); Howes Bros. Co. v. Massachusetts Unemployment Corp. Comm., 5 N. E. (2d) 720 (Mass. 1936); and Beeland Wholesale Co. v. Kaufman, 174 So. 516 (Ala. March, 1937).

[23]The petition was filed on April 20 and granted on April 26, 1937.

[24]Davis v. Edison Electric Illuminating Co. of Boston, 89 F. (2d) 393 decided on April 14, 1937.

[25]18 Fed. Supp. 1 (1937).

[26]Compare the similar readiness to take jurisdiction in Ashwander v. Tennessee Valley

But a majority of the Court, including Justices McReynolds and Butler who thought the Act unconstitutional, were of the view that the Court should take jurisdiction since both the government and the taxpayer waived the objection as to the adequacy of the legal remedy.[27]

The *Alabama State Unemployment Compensation Law* case was passed upon by the Supreme Court as of right, coming up on appeal instead of by petition for writ of *certiorari.* Though a state law was involved, the case arose in a federal court;[28] and since a statutory three judge court was involved, the case went up directly to the Supreme Court. The lower court granted an injunction at the suit of employers covered by the act.

The result of taking jurisdiction in the *Federal Old Age Pension* case was to obtain a ruling on all phases of the Social Security Act before the fall of 1937. The validity of the federal old age pension Titles was argued on[29] May 5th, the decision thus coming but nineteen days later, whereas the validity of the Alabama State Unemployment Compensation Law[30] was argued on April 7th and 8th and that of the Federal Unemployment Insurance Tax[31] on April 8th and 9th, intervals of a month and a half thus elapsing in the two latter cases.

Analyses of the Act

The Social Security Act of August, 1935 is made up of eleven loosely knit Titles administered by several agencies. The only relation these Titles bear to one another is that they all serve a common humanitarian purpose. Several of the Titles might have been omitted and other provisions added[32] or substituted without impairing the logical consistency of the Act. The chief

---

Authority, 56 Sup. Ct. 466 (1936). However, in that case, as Mr. Justice Cardozo pointed out upon oral argument, the directors had not discretion to make an unconstitutional payment or to yield to an unconstitutional demand since the loss would be irreparable; but in the present case the directors in their discretion could pay and afterwards sue to get it back. SEN. DOC. No. 71, p. 4, 75th Cong., 1st Sess.

[27]The majority of the court distinguished the case from a case decided by the Second Circuit Court of Appeals denying equitable relief, Norman v. Consolidated Gas Co., 89 F. (2d) 619, decided April 12, 1937, on the ground that there the remedy was challenged by the Company and the government at every stage of the proceeding, thus withdrawing any discretion from the court.

[28]17 Fed. Supp. 225 (Dec. 15, 1936). The petitions for appeal were filed and granted Jan. 20th and 30th, 1937.

[29]To summarize the dates and steps involved, the decision of the district court was on Jan. 27, that of the circuit court on April 14, petition for *certiorari* was filed on April 20 and granted on April 26, oral argument was on May 5 and decision on May 24, 1937.

[30]The three judge federal court gave its decision on Dec. 15, 1936, petitions for appeal were filed and granted on Jan. 20 and 30th, 1937, oral argument was on April 7 and 8th, and decision on May 24.

[31]The decision of the district court was on March 11, that of the circuit court on March 20th, petition for *certiorari* was filed on March 26th and granted on March 29th, oral argument on April 8th and 9th, and decision on May 24th.

[32]Health insurance is now the chief subject of discussion.

governmental agency set up by the Act is the Social Security Board. Title VII of the Act provides for an independent Board of three members, not more than two of whom shall be members of the same political party, appointed by the President with the advice and consent of the Senate for rotating terms of six years. This Board has charge of grants-in-aid for the administration of the state unemployment compensation laws, the grants to the states for assistance to the needy aged, blind, and children, and, most important of all, the federal old-age benefits program. The Board is also charged with the duty of engaging in research in order to make recommendations as to legislation concerning old-age pensions, unemployment compensation, accident compensation, and other social insurance subjects. The Board administers Titles I, II, III, IV, VII, IX (in part), and X of the Act.

Four other government agencies are involved. Those parts of Title V providing for maternal and child-health services, services for crippled children, and child-welfare services are administered by the Children's Bureau of the Department of Labor. Part four of Title V dealing with vocational rehabilitation is administered by the office of Education of the Department of the Interior. The provisions for public-health work under Title VI are administered by the Bureau of Public Health Service of the Department of the Treasury. Finally, all the taxes levied under the Social Security Act (Titles VIII and IX) are administered by the Bureau of Internal Revenue of the Department of the Treasury. The recent decisions of the Supreme Court affect only the duties of the latter and of the Social Security Board.

Title XI of the Act makes it applicable to Alaska, Hawaii, and the District of Columbia, as well as to the states. The Secretary of Labor and the Secretary of the Treasury, as well as the Social Security Board, are authorized to make such rules and regulations as will facilitate the performance of the duties which are imposed upon them in the Act.

Of far greater significance than the administrative Titles of the Act are those making provision for grants-in-aid.[33] There are six such Titles (I, III, IV, V, VI, and X). None of these Titles bears any relation to the taxing Titles (VIII and IX), except possibly Title III.[34] Title I provides for grants to states maintaining old-age assistance plans approved by the Social Security Board in accordance with provisions set forth in the Title. Such old age assistance is to be sharply differentiated from the federal old age benefits provided for under Title II in that the latter is administered entirely by the

[33]For an excellent critique of the grants-in-aid as used in the Social Security Act, see Horack, *Federal-State Cooperation for Social Security: The Grant-in-Aid* (1935) 30 ILL. L. REV. 292.

[34]The Court found no legal relation between Titles III and IX, Charles C. Steward v. Davis, *supra* note 1, p. 793.

Federal Government and is a matter of right instead of need. Title IV provides in much the same form for grants to the states for aid to dependent children, and Title X for grants to the states for aid to the needy blind.

Title V is divided into four parts. Part I authorizes an annual appropriation to be allocated among states having approved plans for promoting the health of mothers and children, especially in rural and depressed areas. Part II authorizes an annual appropriation to be allocated for aid to crippled children. Part III authorizes an annual appropriation for child-welfare services for use by state welfare agencies cooperating on the basis of plans developed jointly by the state and federal agencies. Part IV authorizes an annual appropriation for cooperation with the states in the extension of vocational rehabilitation programs developed under the Act of June 2, 1920.

Title VI authorizes an annual appropriation to be allocated among the states by the Surgeon General of the Public Health Service for aid in establishing and maintaining adequate public health services and another annual appropriation to the Public Health Service for the investigation of disease and problems of sanitation.

These grant-in-aid Titles present no constitutional problems other than those involved in *Massachusetts v. Mellon* and *Frothingham v. Mellon*.[35] In these cases it was sought to enjoin enforcement of the Sheppard-Towner Maternity Act.[36] By the terms of this Act, the Federal Government, for the purpose of reducing maternal and infant mortality, offered grants of money to the states complying with stipulated conditions. The Supreme Court held that neither a state nor a taxpayer had any standing to ask for a judicial review of a federal appropriation statute.[37] A taxpayer was held to have an interest in the general funds of the treasury which was too minute and indeterminable to furnish a basis for a challenge of the use of such funds. A state could not object since it was under no obligation to accept the federal offer; nor could it object as *parens patriae* since the Federal Government, not the state, properly filled the rôle of *parens patriae* in all relations between the Federal Government and the citizen. The authority of these cases was expressly saved in *United States v. Butler*.[38] It is significant that Mr. Justice Sutherland in a dictum in his dissenting opinion in the *Federal Unemployment Insurance Tax* case stated that Title I providing for old age

[35]262 U. S. 447 (1923).

[36]42 STAT. 224 (1921).

[37]That the grants-in-aid cannot be assailed and that in any case they are valid on the merits is conceded by Charles Denby, Jr., *The Case Against the Constitutionality of the Social Security Act* (April, 1936) 3 LAW AND CONTEMPORARY PROBLEMS 315, 329. That on principle this procedural limitation is unsound was asserted by J. A. C. Grant, *Commerce, Production, and the Fiscal Powers of Congress* (1936) 45 YALE L. J. 751, 776, and see Frank E. Horack, Jr., *Federal-State Coöperation for Social Security: The Grant-in-Aid* (1935) 30 ILL. L. REV. 292, 308.

[38]297 U. S. 1, 56 Sup. Ct. 312, 315 (1936).

assistance was an illustration of permissible cooperation between the state and federal governments.[39]

The Titles which were litigated in the recent Supreme Court cases, Titles II, III,[40] VIII, and IX may be referred to as the social insurance Titles since they were designed largely to prevent destitution rather than to relieve it and since they made provision for contributions by the beneficiaries of their employers. These Titles set up programs of unemployment compensation and federal old-age benefits.

Excise Character of the Taxes on Employers

Title IX lays a tax on certain employers of eight or more, and Title VIII lays a tax on certain employers of one or more. It was strongly argued that these taxes were not excises,[41] since a tax based on employment was not embraced within the constitutional concept of excise taxes. The Court rejected both the historical and logical arguments that these taxes were not excises.[42]

With respect to the historical argument, the Court pointed out that though in Colonial days excises were usually associated with the enjoyment or the use of property, this did not mean that the existing forms of excises could not be enlarged. The Court was, however, able to find several cases of other forms of excises both in English and Colonial history. In 1777, Parliament had laid upon employers an annual "duty" of twenty-one shillings for "every male Servant" employed in certain forms of work.[43] The Court pointed out that this was an example of a tax not based on the use of commodities and deemed it immaterial that it was regarded as a tax upon a luxury, since it did not cover employments in business. Moreover a Virginia statute of 1780 laid a tax on employment in general.[44]

The Court also rejected the argument based on logic, namely, that while an excise tax may be laid upon the exercise of a "privilege" it could not be laid upon a "natural" right such as employment. The Court squarely ruled that so-called natural rights are as much subject to taxation as are

[39]57 Sup. Ct. 883, 81 L. ed. 779, 799, 800 (1937).

[40]The Court did not pass on Title III, though its validity was attacked.

[41]The Circuit Court of Appeals for the First Circuit in a two to one decision holding Title IX invalid held that the tax was not an excise in George P. Davis v. Boston & Maine R. R., 89 F. (2d) 368 (April 14, 1937). The court made the same ruling as to the Title VIII tax. Davis v. Edison Electric Illuminating Co. of Boston, 89 F. (2d) 393 (1937).

[42]*Supra* note 8, p. 783. The Federal Old Age Pension case incorporated the reasoning of the Federal Unemployment Insurance Tax case, Helvering v. Dauls, 81 L. ed. 804, 810 (1936). The Alabama State Unemployment Compensation case applied similar reasoning to the Alabama tax on employers though not definitely calling the tax on excise. Carmichael v. Southern Coal & Coke Co., *supra* note 8, p. 815 (1936).

[43]Revenue Act of 1777, 17 GEO. III, c. 39.

[44]10 HENING'S STATUTES OF VIRGINIA, p. 244.

lesser rights.[45] The government was, therefore, not confined to the taxing of vocations or activities which might be absolutely prohibited. In the *Federal Unemployment Insurance Tax* case, the court assumed that the states could unquestionably levy a tax based on employment for it stated that the power of Congress as to the subject matter of taxation is as broad as that of the states, except that the method of apportionment may at times be different. The *Alabama State Unemployment Insurance Tax* case upheld the power of a state to levy such a tax.[46]

That the privilege of employment might be created by state law was held to make no difference. It was pointed out that Congress has lawfully taxed the transmission of property by inheritance or will in spite of the fact that the states have created the privilege of succession; and Congress has rightfully taxed the enjoyment of a corporate franchise though a state has brought the franchise into being.

Uniformity of the Taxes

As excises, the taxes were bound to conform to the constitutional principle of uniformity. The Court had no difficulty with this requirement. Uniformity under the settled doctrine was held to mean geographical, not intrinsic, uniformity.[47] The tax was uniform though the rates of taxation would vary from state to state because of the credit plan. That such credit

[45]The court cited the essay by Professor John McArthur Maguire, *"Taxing the Exercise of Natural Rights"* HARVARD LEGAL ESSAYS (1934) pp. 273, 332. The seemingly contrary Massachusetts cases were said to rest on the peculiar language of the Massachusetts Constitution.

However, in Foster & Creighton Co. v. Graham, 154 Tenn. 412, 285 S. W. 570, 47 A. L. R. 971 (1926), the court stated that an "excise tax is synonymous with a privilege tax."

[46]One of the noteworthy features of the Alabama case was the willingness of the Supreme Court to follow the view of the Alabama Supreme Court, treating the exaction as a tax levied under the taxing power of the State rather than as a contribution levied under the police power. In Mountain Timber Co. v. Cohington, 243 U. S. 219 (1919), the Court expressly refused to consider whether the Washington Workmen's Compensation Act involved a tax or a regulation under the state's police power. The state acts are not ordinarily in the form of revenue measures in two respects: merit rating is inconsistent with the ordinary concept of a tax; and the funds are earmarked for the payment of benefit claims. The taxing power seems broader than the police power. See Rice, *A Note on the Constitutionality of State Unemployment Compensation Laws* (1936) 3 LAW & CONTEMPORARY PROBLEMS, 138, 145. The New York and California courts seemed to view the exaction as being a tax. W. H. H. Chamberlin, Inc. v. Andrews, 271 N. Y. 1, 2 N. E. (2d) 22 (1936); Gillum v. Johnson, 62 P. (2d) 1037, 108 A. L. R. 595 (1936). The Massachusetts Court leaned to the police power theory. Howes Bros. v. Massachusetts Unemployment Commission, 5 N. E. (2d) 720, 728 (Mass. 1936). Workmen's Compensation Insurance was once viewed by some as involving an exercise of the taxing power, but today is viewed as an exercise of the police power. James A. Pike, *Unemployment Insurance and Workmen's Compensation* (1937) 10 So. L. REV. 253, 258, n. 39.

[47]Steward Machine Co. v. Davis, 81 L. ed. 779, 786. (1936).

did not detract from uniformity was expressly held in *Florida v. Mellon,* the statutory model for Title IX.[48]

But the additional credit provisions strain even the doctrine of *Florida v. Mellon.* They are designed to protect the advantages secured by the merit-rating and reserve devices. They give credit against the tax beyond amounts actually paid to the state; that is to say, they give credit for good behavior. Thus, the percentage of the federal tax is varied not only by the amounts payable to the states as in *Florida v. Mellon,* but also by the existence of merit rating and reserve plans. The Court did not expressly pass upon the validity of the additional credit provisions.[49] There was no need of so doing since they were not yet operative.

Income Tax on Employees

The Title IX tax, as has been seen, was levied only on employers. Title VIII, however, provides not only for an excise tax on employers[50] but also for an income tax on employees.[51] *The Federal Old Age Pension* case, however, did not pass on the validity of this latter tax, although the employer sought to attack it on the ground that it caused restlessness among the employees.[52] No employee was attacking the imposition of such tax. Suit was brought by the shareholder of a corporation, which was an employer subject to the excise tax imposed. In the *Alabama State Unemployment Compensation* case it was expressly held that the employer could not attack the Alabama state tax levied on employees.[53]

As a practical matter, it is not likely that employees will ever attack Title VIII. They stand to gain too much under the present act for such action. They receive not only the benefit of their own contributions, but that of their employers. Only the younger men with relatively high salaries could do better with private insurance companies and then only if both their own and their employers' contributions were invested.[54] Although the maximum taxes on employees are three per cent of wages, each employee or his estate will receive back at least three and one-half per cent of his wages and one drawing monthly benefits may receive back considerably more.[55]

---

[48]273 U S. 12, 47 Sup. Ct. 265, 71 L. ed. 511 (1937).

[49]The circuit court below expressly stated that it did not consider the additional credit provisions since they were not yet operative. See fn. 89 F. (2d) 207, 209 (1937).

[50]§ 804.

[51]§ 801.

[52]Steward Machine Co v. Davis, 81 L. ed. 804, 810 (1936). The Circuit Court below passed on the tax on employees as well as employers, holding both invalid. 89 F. (2d) 393 (1936). The latter court intimated that since the tax on employers was invalid, that on employees must also be invalid since Congress would not have exposed only the latter tax.

[53]81 L. ed. 811, 818 (1936).

[54]EPSTEIN, INSECURITY, A CHALLENGE TO AMERICA (3d ed. 1936) 765-766; STEWART, SOCIAL SECURITY (1937) 153.

[55]§§ 202-204.

Due Process Aspect

Neither the Title IX nor Title VIII taxes cover all classes of employment. The argument that the exemptions amounted to violations of the Fifth Amendment was rejected.[56] In no case had such an attack upon a federal tax been sustained. The Court, however, stated that it assumed that discrimination, if great enough, was equivalent to confiscation and in violation of the Fifth Amendment. The Court pointed out that the Fifth Amendment, which governs the powers of Congress, has no equal protection clause such as does the Fourteenth Amendment governing the states. Furthermore, even the states have great discretion in selecting the subjects of taxation. The states might properly tax a particular kind of business without taxing other kinds of closely related businesses.

The Court, in passing upon the exemptions laid down in Title IX, regarded them as justified on grounds of policy and practical convenience. It relied upon the same considerations as justified the exemptions in the case of the Alabama unemployment compensation law and instead of repeating or elaborating such considerations, simply made reference to the opinion in the Alabama case.[57] The validity of the Title IX exemptions was regarded as an *a fortiori* case since Congress is subject to no equal protection clause. The *Federal Old Age Pensions* case also relied on the reasoning of the *Alabama Unemployment Compensation* case.[58] In the latter case, a tax on employers of eight or more, such as that in Title IX, was held valid.[59] The line had to be drawn at some point, and eight was not an arbitrary number. It might be more expensive and inconvenient to collect taxes from small employers. No such problem arose as to the Title VIII tax since it covered employers of one or more. Charitable institutions might be excepted in order to foster what the legislature conceives to be beneficent enterprise. The same is true as to agriculture and shipping. Businesses operating for less than twenty weeks in the year might be exempted for similar reasons or to encourage seasonal or unstable industries.

As in the case of employers of less than eight, employers of domestic servants, farmers, and family businesses, none of which is likely to maintain adequate employment records, may be exempted because of the greater expense and inconvenience of collection. Government employees need not be taxed since this amounts to self-taxation. A state, of course, may not constitutionally tax federal employees and the converse is also true.

The Court did not consider the possible objection in the case of the Title VIII taxes that such taxes were not levied on wages over $3,000.00. This

[56] 81 L. ed. 779, 786 (1936); 81 L. ed. 804, 810 (1936).
[57] 81 L. ed. 779, 787 (1936).
[58] 81 L. ed. 804, 810 (1936).
[59] 81 L. ed. 811, 816 (1936).

was contrary to the economic principle of taxing those best able to pay, and it also cut down the amount of revenue which might be raised. The seemingly anomalous result followed that an employer having one employee to whom he pays $6,000.00 is taxed upon $3,000.00 while an employer having two employees during an entire year to each of whom he pays $3,000.00, or one employee for six months at $3,000.00 and another employee for the other six months at $3,000.00 is taxed upon $6,000.00 and a worker earning $6,000.00 from one employer is taxed on $3,000.00, while a worker earning $3,000.00 from each of two employers is taxed on $6,000.00. But each of these objections may be met. The employers' tax is based on the privilege of employment and this privilege is exercised to a greater extent when more workers are employed. Moreover, Congress could have fixed a flat rate of $30.00 for employees upon the exercise of the right of employment. This would be equal to the maximum tax imposed by Title VIII for 1937. The $3,000.00 limitation as to workers may be justified on the ground of avoiding cumulation of taxes since income above that amount is subject to the graduated income tax; and since the Court ruled that Title II was valid, it might have pointed out that no benefits were paid as to wages over $3,000.00, thus making it inequitable to tax wages over that amount.

Coercion of the States

One of the most dubious, if not the most dubious, feature of the Title IX tax was its apparently coercive effects. It was argued that these coercive effects amounted to a contravention of the Tenth Amendment. The Title VIII tax on its face contained none of these apparently coercive or regulatory features; it contained no credit provision and did not contemplate the passage of any state laws; it was more clearly desigued to bring in a large amount of revenue.

The Court disposed of the contention in several ways.[60] It pointed out that the ninety per cent credit was largely relied on to show coercion. It then proceeded to lay down a very heavy burden on the petitioner, who was required to show (1) that separated from the credit provisions the revenue provisions could not stand by themselves, and (2) that the tax and the credit provisions when taken together were weapons of coercion. The Court found it unnecessary to inquire as to whether there had been a showing of the former[61] inasmuch as the petitioner failed to make a showing of the latter.

---

[60]Steward Machine Co. v. Davis, 81 L. ed. 779, 787 (1936).

[61]The Circuit Court in the decision below seemed to doubt the separability of the tax and credit. Circuit Judge Sibley stated in 89 F. (2d) 207 at 210: "Notwithstanding the separability section of the act, it might be a serious question whether or not Congress would have enacted the tax without the credit provisions."

In concluding that Title IX amounts only to inducement and not to duress or coercion, the Court cited the recent facts as to unemployment[62] and in so many words stated that the use of federal money during a crisis to relieve the unemployed and their dependents was not a use "for any purpose narrower than the promotion of the general welfare."[64] Thus for the first time in an important case, the Court applied the liberal holding of *United States v. Butler*[63] as to expenditures for the general welfare. Congress might pass measures designed to induce cooperation between the federal government and the states to relieve unemployment. Without some stimulus from Congress, the states would fail to act because of the fear of placing themselves in a position of economic disadvantage as compared with other states.[65] Furthermore, if the states were not induced to pass laws, a disproportionate burden of relief would have to be borne by the Federal Government. Therefore, the Court resorted to the argument that the tax was for a legitimate, expressly conferred power of the Federal Government, namely, its fiscal and currency power.

A makeweight in support of constitutionality was the fact that the effect of the credit provision was to avoid a duplication of taxes.[66] The avoidance of such duplication has been recognized as a legitimate end. It should be noted, however, that if a state had an unapproved plan, dual taxation would not be avoided. Nor can the additional credit provisions[67] be defended in the ground of avoiding double taxation.

The Court, in examining the possible subjects of coercion, was unable to find that any person or state had been coerced. The individual taxpayer was not coerced since he paid only because the state, not the federal government, compelled him to pay the contributions required under a state law. It might have pointed out, also, that the taxpayer had to pay at all events, the only difference being with respect to which government collected the tax. Viewing the situation realistically, however, workers would certainly be coerced since their employers would have to pay a tax without obtaining

---

[62]Mr. Justice McReynolds, in his dissenting opinion, 81 L. ed. 779, 794 (1936) refers to this as an "ostentatious parade of irrelevant statistics" which should not obscure the fact that the reserved power of the states are being violated.

[63]U. S. v. Butler, 297 U. S. 1, 65, 66, 56 Sup. Ct. 312, 102 A. L. R. 914 (1936).

[64]81 L. ed. 779, 788 (1936).

[65]Any similar power under the Commerce Clause to equalize economic conditions was denied in Hammer v. Dagenhart, 247 U. S. 251, 273 (1917).

[66]Professor Thomas Reed Powell contends that the major purpose of the federal estate tax credit was to minimize cumulative taxation and that the purpose to induce the states to impose inheritance taxes was secondary. *The Processing Tax and the Social Security Act,* (Jan. 1936) 5 BR'KLYN L. REV. 125, 134. Professor Powell insists that from one standpoint the Title IX tax credit is even more clearly constitutional than the estate tax credit, inasmuch as the former results in relieving the Federal Government from the necessity of federal expenditures for a federal purpose while the latter does not.

[67]§§ 909-910.

thereby corresponding benefits to their employees, who might also receive less wages as a result of the tax.

Nor was the state coerced. The state of Alabama was not objecting that it had been coerced.[68] Every tax is to some extent regulatory. Motive must not be confused with coercion. The Court does not even admit that any such concept as that of undue influence is applicable to the relations between state and nation. As a matter of fact, the Supreme Court has now three times denied that acts of Congress aimed to secure legislation by the states were coercive, once as to grants-in-aid, and twice as to tax credits.[69] It further stated that even if the concept were applicable, it would be a question of degree when pressure ceased to be lawful inducement and turned into unconstitutional compulsion. No such pressure was shown with respect to the Title IX tax.

The Court made specific reference to the example of coercion in the case of the Federal Estate Tax Act. It stated that thirty-six states were induced to make material changes in their laws because of the credit provision.[70] Had the Court been disposed to draw a distinction as to the basis of the amount of coercion, it might have done so. In the case of the Federal Estate Tax Act there was an eighty per cent credit instead of a ninety per cent; there had previously been estate or inheritance taxes in almost every state, whereas only a few states had unemployment compensation laws; the thirty-six states which changed their inheritance or estate tax laws did so over a period of seven years, whereas forty-three states adopted unemployment compensation laws in less than two years, and by July, 1937, every state

[68]Even the three judges of the Federal District Court which held the Alabama law invalid found no coercion by the Federal Government. Gulf States Paper Corporation v. Carmichael, 17 F. Supp. 225, 229 (1936). The Supreme Court of Alabama also found no coercion. Beeland Wholesale Co. v. Kaufman, 174 So. 516 (Ala. 1937). The same was true as to the Massachusetts Act, Howes Bros. Co. v. Mass. Unemployment Comp. Commission, 5 N. E. (2d) 720 (Mass. 1936) and the California Act, Gillum v. Johnson. 62 P. (2d) 1037, 108 A. L. R. 595 (Cal. 1936). However in Carter v. Carter Coal Co., 298 U. S. 238, 56 Sup. Ct. 855, 20 L. ed. 1160 (1935) the Court seems to have been impressed by the statements of the representatives of a number of the coal mining states that there was no coercion on the states. That case, however, involved the commerce power rather than the taxing power.

[69]The previous cases were Massachusetts v. Mellon, 262 U. S. 447 (1923) and Florida v. Mellon, 273 U. S. 12 (1927). Thus no weight seems to have been given to the contention that the latter case only held that Florida had no standing to test the constitutionality of the estate tax because it could show no direct injury and that the remainder of the opinion was dictum. See Mackes, *The Strange Case of Florida v. Mellon* (1928) 13 CORNELL L. Q. 351.

[70]The Court cited Perkins, *State Action Under the Federal Estate Tax Credit Clause* (1935) 13 No. CAR. L. REV. 271, 280. Possibly the rejection of the ninety per cent rebate provision in the Guffey Coal Act may be reconciled on the ground that there state action was not involved. Carter v. Carter Coal Co., 298 U. S. 238 (1936). The government had argued in the Carter Case that an exercise of the power to regulate commerce was involved. The rebate provision was thought analogous to the Social Security Credit by a former Assistant Attorney General. Youngquist, *Administration and Effect of Social Security Legislation* (1937) 21 MINN. L. REV. SUPP. 46, 56.

had such a law; and the changes in the estate and inheritance laws were confined to the very largest estates. It seems fair to conclude that having decided that the coercion or inducement was for a constitutional purpose, the Court was not concerned with the degree of coercion.

The Court is careful to say that its holding is not to be interpreted as permitting Congress an unlimited power to impose conditions or credits with respect to federal taxes. Congress could not lay a tax containing a condition that a state might escape a tax through the adoption of a statute unrelated in subject matter to activities fairly within the scope of national policy and power. Mr. Justice Butler in his dissenting opinion stated:

> "And, if valid as so employed, this tax and credit device may be made effective to enable federal authorities to induce, if not indeed to compel, state enactments for any purpose within the realm of state power and generally to control state administration of state laws."[71]

The Title IX tax was distinguished from that involved in *United States v. Butler*[72] on several grounds. The Title IX tax was not earmarked for a special group. The unemployment compensation law which was necessary before the credit might be obtained had been passed by the state, whereas no state action was contemplated in the case of the Agricultural Adjustment Act. There was no irrevocable agreement linked with the condition since the state might at its pleasure repeal its unemployment compensation law. The condition is directed at a lawful end, the relief of unemployment.

The Court might have distinguished the previous improperly regulatory tax cases as follows: There were two types of such cases (1) where the ulterior purpose of the tax, if accomplished at all, would be accomplished at the point of collection; and (2) where the ulterior purpose of the tax would be accomplished at a later point as through the spending of the funds. *The Child Labor Tax* case[73] and *Hill v. Wallace*[74] were examples of the former; *United States v. Butler*[75] was an example of the latter. The Social Security taxes clearly were not of the former type since there was no intention to regulate persons paying the tax; they could not escape the tax by complying with certain regulations prescribed by the government. The apparently regulatory provisions in Title IX really were not regulatory but were merely

---

[71]81 L. ed. 779, 802, 803. The Circuit Court for the First Circuit in holding that there was coercion said in George P. Davis v. Boston and Maine R. Co., 89 F. (2d) 368, 379, (1937): "If the United States can take control by the coercive use of taxation, it can equally take control of education and local health conditions by levying a heavy tax and remitting it in the states which conform their edueational system or their health laws to the dictates of a Federal Board."

[72]297 U. S. 180, 56 Sup. Ct. 312, 102 A. L. R. 914 (1936).

[73]Child Labor Tax Case, 259 U. S. 20, 21 A. L. R. 1432 (1922).

[74]Hill v. Wallace, 259 U. S. 44 (1922).

[75]British Columbia Mills Tug & Barge Co. v. Mylraie, 259 U. S. 1, 102 A. L. R. 914 (1922).

descriptive of what a state unemployment compensation law is. Nor were these taxes of the second type since they were not earmarked for any particular purpose or, at least, not earmarked for an improper purpose.[76]

In the case of Titles II and VIII, there was quite clearly no coercion of the states since the old age benefits program was a strictly national one. Title VIII had no credit provisions. Persons receiving the benefits under Title II are not required by way of contract or condition to act or refrain from acting in any manner, as they were under the Agricultural Adjustment Act.[77] In fact, persons are not coerced into retiring in order to received their benefits, since for a long time at least benefit payments will be much smaller than wages. It was doubtless, however, the object of the drafters of the act to bring about the retirement of workers over sixty-five so that younger persons might get their jobs; but the means they used were wholly ineffectual, and the repeal of the requirement of quitting employment has been frequently urged on the ground of hardship to the worker.[78] The government might have met this argument of coercion to a slight extent by pointing out that the worker could engage in work not covered by the Act and still draw his monthly benefits.[79] Moreover, workers who received lump sum payments instead of monthly benefits were not required to withdraw from any type of employment or work. Finally, although this involved connecting up Titles II and VIII, employees over sixty-five were exempted from taxation.

From a purely logical standpoint it may seem anomalous that the tax credit device used to obtain the passage of state unemployment compensation laws should have been thought more dubious than the strictly national plan embodied in federal old age benefits.[80] The tax credit device was designed to give the states a voice while the old age benefits plan completely ignores the states. Seven Justices thought the national plan valid as to old age pensions. Five thought the tax credit plan valid as to unemployment compensation though it should be noted that two others dissented, largely because of the Unemployment Trust Fund. The holding would seem to justify the view of

[76]That earmarking *per se* is not unconstitutional if for a proper purpose, was held in Cincinnati Soap Co. v. United States, 57 Sup. Ct. 764 (1937). In that case a tax on the processing of cocoanut oil of Philippine production was earmarked for the Treasury of the Philippine Island.

[77]However, it is asserted that "Title II provides what is in effect a compulsory saving plan." Charles Denby, Jr., *The Case Against the Constitutionality of the Social Security Act* (1936) 3 LAW & CONTEMPORARY PROBLEMS 315, 317.

[78]PAUL H. DOUGLAS, SOCIAL SECURITY IN THE UNITED STATES (1936).

[79]§ 202 (d) cuts off persons receiving wages with respect to "regular employment." § 210 (b) provides that where the term "employment" is used in Title II it means only covered employment. However this contention might be inconsistent with another argument advanced by the government, namely, that benefits under Title VIII were based on a means test since the worker had to cease work of any kind whether covered by the Act or not.

[80]Powell, *The Processing Tax and the Social Security Act* (1936) 5 BR'KLYN L. REV., 125, 136.

those who thought that a national system of unemployment compensation should have been adopted.[81] Interestingly enough the Canadian national unemployment insurance system was held unconstitutional first by the Supreme Court of Canada[82] and subsequently by the Judicial Committee of the Privy Council.[83] However, the Canadian Act was not intended to be a taxing act. Further, the Canadian Act expressly forbade the deduction of the employer's contribution from the wages of employees. Both decisions were by divided courts.

Very closely related to the argument of coercion on the states is the contention that under Sections 903 and 904 the states are called upon to surrender powers necessary to their quasi-sovereign existence. Section 903 lays down the criteria which a state unemployment law must meet.[84] Section 904 sets up an Unemployment Trust Fund in which the state unemployment compensation funds are to be deposited. The Court upheld Section 903 as merely requiring that a state unemployment compensation law be such in fact. It pointed out that the states were given considerable latitude as to which type of law they should enact. They might adopt the pooled unemployment or unemployment reserve type. They might establish systems of merit rating, effective at once or later. They might provide for employee contributions or put the whole burden on the employer.

The Court does not definitely rule that all the conditions required in Section 903 are valid, but suggests that if some particular condition be found invalid as too uncertain for enforcement, it might be severed from others without affecting their validity. Moreover, a state might repeal its law at any time; it does not enter into a contract. The Court specifically considered the validity of Section 903 (a) (1) under which a state law to be certified must provide that "All compensation is to be paid through public employment offices in the state or such other agencies as the Board may approve." Such a condition is not improper for several reasons. The state might disregard it,

---

[81]EPSTEIN, INSECURITY, A CHALLENGE TO AMERICA (3d ed. 1936) 696; STEWART, SOCIAL SECURITY (1937) 118; Powell, *The Processing Tax and the Social Security Act* (1936) 5 BR'KLYN L. REV. 125, 137; Cowan, *The Social Security Act and Free Judicial Choice* (1937) 9 MISS. L. J. 407, 415.

[82]Reference re: *The Employment and Social Insurance Act* (1936) S. C. R. 427.

[83]Attorney-General of Canada v. Attorney-General of Ontario, Privy Council Appeal, No. 101 of 1936.

[84]The Federal Estate Tax Act involved no such elaborate criteria as to what is a state inheritance act. The government agreed that the latter term had a standardized meaning not requiring detailed description. GEN. DOC. No. 53, 75th CONG. 1st Sess. 108 (1937). If the Court had been disposed to find the act unconstitutional it might have seized upon this distinction, Professor T. R. Powell says in *The Processing Tax and the Social Security Act,* (1936) 5 BR'KLYN L. REV. 125, 137: "Yet there is a fairly big difference in degree between a practical inducement to adopt an inheritance tax and a practical inducement to adopt an intricate and far-reaching compensation plan. It is not a constitutional difference until made such by the Supreme Court." See also Cowan, *The Social Security Act and Free Judicial Choice* (1937) 9 MISS. L. J. 407, 424, 87.

with the only result that the tax credit will be lost. Also, the approval of the Social Security Board is not required if the state makes use of public employment offices as the disbursing instruments. It is proper that the Board approve other agencies in order that the agency be responsible. Nor is Section 903 (a) (4), providing that "all money withdrawn from the Unemployment Trust Fund by the State Agency shall be used solely in the payment of compensation, exclusive of expenses of administration" invalid. The state might repeal its law at any time. The Federal Government may not insist on the payment of the money for compensation by suit or other means, but may simply withdraw the credit. The Court might have added that this provision supplies an essential element of an unemployment compensation plan, namely, that the funds accumulated be used to pay benefits to unemployed persons and not for other purposes.

Section 904 setting up the Unemployment Trust Fund is not invalid, nor is Section 903 (a) (3) which supplements it. A state might repeal its unemployment compensation law. It might withdraw its deposits from the Fund. Deposit with the Secretary of the Treasury would result in greater protection of the funds during times of depression. That is to say the federal fiscal powers justify these provisions.

It was to these two Sections, particularly the latter, that Mr. Justice Sutherland took such exception when he found the whole title invalid.[85] A state with a certified law was bound to deposit its unemployment compensation funds in the Federal Treasury. A state could withdraw such money only on complying with federal restrictions. It could, upon so withdrawing, use such money only for unemployment compensation. Such compensation could be paid only through public employment offices in the state or such other agencies as a federal board might approve.[86] The Justice admits that a state may repeal its law, but interprets the act as not allowing a state to withdraw its funds unconditionally in such event. The majority apparently interpreted the statute otherwise.[87] It would seem that the minority has violated the fundamental rule in constitutional cases, that constitutional issues should be avoided if one reasonable interpretation of a statute is such as to make it constitutional.[88] Mr. Justice Sutherland also objects to Section

[85]81 L. ed. 779, 799, 802 (1936).

[86]Agreeing that this condition is invalid are William E. Brown and Harold W. Story. *Constitutionality of the Unemployment Compensation Features of the Social Security Act* 1936) 11 NOTRE DAME LAWYER 245, 268. They assert that the states would provide as good machinery as the Board could suggest and that this condition does not protect the federal credit. They also object to § 903 (a) (5) providing that compensation shall not be denied under certain conditions relating to labor disputes.

[87]In the Alabama State Unemployment Compensation case, Mr. Justice Stone, in the majority opinion, states that a state upon withdrawing its money may "use it for any public purpose." Carmichael v. So. Coal & Coke Co., 81 L. ed. 811, 825 (1936).

[88]Ashwander v. Tennessee Valley Authority, 297 U. S. 288, 56 Sup. Ct. 466, 483 (1936).

903 (b) which forbids the Social Security Board to certify states failing to comply with provisions of the Act on the ground that this makes the Board an overseer of the state. He also makes the seemingly trivial and technical objection that under Section 904 (f) payment out of the Federal Treasury of state moneys may be made only to the state agency and only of such amount as that agency may duly requisition.[89]

Federal Old Age Benefits

In the case of the unemployment insurance provisions of the Social Security Act, the Court found it necessary to pass only upon the taxing provisions. Only the validity of Title IX was, therefore, considered. But in the case of the federal old age benefits program, the Court passed, not only on the taxing provision with respect to employers as found in Title VIII, but also on the appropriations and benefits provisions as found in Title II. It should be noted, however, that Title II differs materially from Title III in that Title II deals directly with benefits to be paid to employees under a strictly national old age benefits program the money for which, more obviously, is to be obtained from a tax levied in another title of the Act; while Title III is concerned with sums to be paid not to employees but to states to be used not to pay benefits but for the administration of state employment compensation laws and the money for which is not so clearly to be obtained from a tax levied in another Title of the Act.

A strict application of *Massachusetts v. Mellon*[90] would seem to have barred any attack upon Title II except on the theory that it was connected with Title VIII. A taxpayer could not attack an appropriation *per se*. A taxpayer was allowed to attack the Agricultural Adjustment tax only because his tax was earmarked for an unlawful appropriation. The Court expressly ruled that providing for old-age benefits is within the power of Congress to spend for the general welfare.[91] Just as spending to relieve unemployment is for the general welfare so is spending for the aged. The Court stated that the view of Congress as to what expenditures are for the general welfare would be followed unless Congress acted arbitrarily. Having stated this prin-

[89]Mr. Justice Sutherland could not consistently throw out Title IX on the ground of coercion, in the light of his opinions in Massachusetts v. Mellon and Florida v. Mellon. But considerable weight is given to his reasoning in a note in (1937) 32 ILL. L. REV. 80, 88.

[90]262 U. S. 447 (1922).

[91]Mr. Justice McReynolds, in his dissenting opinion in the Federal Unemployment Insurance Tax case, cited at length a message by President Pierce vetoing an act of Congress making a grant of public lands to the states for the benefit of indigent insane persons. Charles C. Steward Machine Co. v. Davis, 81 L. ed. 779, 794-799 (1936). In the Old Age Pension case, Mr. Justice Cardozo, in the majority opinion states in 81 L. ed. 804, 808: "Congress may spend money in aid of the 'general welfare'. There have been great statesmen in our history who have stood for other views. We will not resurrect the contest. It is now settled by decision, United States v. Butler."

ciple, the Court went on to consider the propriety of old age benefits on the merits and found the problem national in scope.

The language of the Court in *United States v. Butler*[92] condemning the "expropriation of money from one group for the benefit of another" as in violation of due process and similar language in *Railroad Retirement Board v. Alton R. R. Co.*,[93] seems not to have troubled the Court in the *Social Security* cases. Obviously it could not apply to the Title IX tax since the Court expressly found that there was no connection between Titles IX and III. Moreover, the money paid under Title III was not to be paid to individuals but to states and was to be used by the states not to pay to unemployed individuals but for the expenses of administration of the State Act.

In the case of Titles II and VIII, however, the Court made no finding of separability. The benefits under Title II were to be paid to individuals and to be paid them directly by the Federal Government. But the Court found that such payments were for the general welfare. Though the Court did not say so, it probably has returned to the common sense view that many if not all taxes are exactions from one group for the benefit of another.[94] The income tax on workers levied under Title VIII was clearly for their own benefit.[95] The excise tax levied on employers was not so obviously beneficial to them though it would add to the contentment of their workers.[96] Aside from the legal aspects, the employer, as in the case of workmen's compensation, would pass the expense on to the consumers[97] who would in many cases be workers. In fact, one of the sharpest criticisms of the Social Security Act has been that the funds for the benefits to be paid out will come very largely from the pockets of the workers, particularly those with low wages.[98] There is no contribution from the government as in many other nations and no graduated income or inheritance taxes are levied on those with large incomes.

In upholding the scheme of federal old age benefits, the Court seems not to have been troubled by any possible contention that the Constitution forbade the Federal Government from embarking in business in competition with

---

[92]297 U. S. 1, 56 Sup. Ct. 312, 317 (1936).

[93]295 U. S. 330, 357 (1935). This case, however, involved an exercise of the commerce power.

[94]In the Alabama State Unemployment Compensation Law case, Mr. Justice Stone, makes a lucid statement of this view. *Supra* Note 8. [See "A General View of the Income Tax" by Irving Fisher, *supra* p. 39—*Ed.*]

[95]The court did not, however, pass on the tax on employees.

[96]But no weight was given to such contention in Railroad Retirement Board v. Alton R. Co., 295 U. S. 330, 55 Sup. Ct. 758, 770 (1935).

[97]Mr. Justice Stone, in the Alabama State Unemployment Compensation case, *supra* note 87, p. 824; Joseph H. Beale, Jr., *Social Justice and Business Costs* (1936) 49 HARV. L. REV. 593, 608.

[98]BURNS, TOWARDS SOCIAL SECURITY (1936) 153-175; DOUGLAS, SOCIAL SECURITY IN THE UNITED STATES (1936) 62-28; EPSTEIN, INSECURITY, A CHALLENGE TO AMERICA (3rd ed. 1936) 42-49, 769; note (1935) 35 COL. L. REV. 1262, 1277.

private enterprise.[99] As a practical matter, many workers covered by the act would not take out private insurance anyhow. Insurance agents frequently praise the act as making the public better acquainted with the value of insurance. But even if the act did result in competition with private business or were so amended as to result in such competition, that would not condemn the act. So long as it can be shown that such competition was a result of the exercise of a power granted by the Constitution, then the consequence is one permitted by the Constitution. The Tennessee Valley Authority, the Land Banks, and the War Risk Insurance Act are all examples of legitimate competition with private enterprise. Indeed, putting old age pensions on an insurance rather than a relief basis may be regarded as an exercise, not only of the taxing power, but also of the fiscal powers inasmuch as the drain on the federal treasury is tremendously relieved. Also, perhaps it will not be splitting hairs to say that the old age benefits program legally and factually is not insurance.[100] No contracts are entered into. Benefits are not paid according to the amount of taxes paid, that is to say, the lower salaried workers and older workers just coming under the Act receive more benefits in proportion to taxes paid than do higher salaried or younger workers. Finally, workers are required to retire as a prerequisite to the payment of monthly benefits.

Separability of Appropriation and Taxing Titles

It was the finding of the Court that Title III, providing for appropriations for the grants to the states for the administration of unemployment compensation laws, was separable from Title IX levying a tax. The validity of Title III was therefore, not at issue according to the opinion of the Court.[101] Title III made no appropriations but was simply an authorization to appropriate. Title IX would stand unaltered even though Title III were repealed or omitted. The Court might also have concluded that the Titles were separable (1) since there are several other Titles between them, (2) since Title IX does not expressly state that the tax is to be the basis of the appropriations made under Title III, (3) since the spending is provided for first instead of last, (4) since a certified law under Title IX differs somewhat from an approved plan under Title III (thus holding forth a separate inducement), (5) since the Title IX tax goes into the general funds, and (6) since there was a separability clause. If the Court had been at all inclined to follow

[99]Professor Thomas Reed Powell reminds us in *The Processing Tax and the Social Security Act* (1936) 5 BR'KLYN L. REV. 125, 136 "That ultimate judical notion of what encroaches too much on the idea of rugged individualism always has to be faced, and the best of technical argument must often bow in defeat."

[100]Lynch v. United States, 291 U. S. 571, 576-577 (1933).

[101]Even if the Court had found Title IX invalid when considered by itself, it would not have automatieally followed that Title III would also be found invalid.

the realism of *United States v. Butler*,[102] it might well have found a relation between Titles III and IX on the ground that both Titles are in the same act whose stated purpose is to provide aid to the states for the administration of their unemployment compensation laws and also on the ground that the state plans under both. Titles are much alike. Section 303 (a) makes specific reference to laws "approved by the Board under Title IX." A finding of such relation would not have meant the overthrow of either or both Titles since it was a tax for the general welfare.[103]

The Court even went so far as to say that although there had been no separability clause, the two Titles would still be regarded as separable. The narrow doctrine of *Carter v. Carter Coal Co.*[104] received no mention. Although it was argued in the *Old Age Pension* case that Titles II and VIII were separable, the Court did not so rule as it had in the case of Titles III and IX. Any ruling on separability was rendered unnecessary since the Court expressly ruled that Title II was valid,[105] whereas it had made no ruling as to the validity of Title III.

If the Court had gone into the issue of separability it might have considered the following arguments: There is no express tie-up between Titles II and VIII. The taxes levied under Title VIII are not earmarked but go into the general funds of the government. The appropriations are to be made from the general funds. No reference is made in either Title to the other. There was a separability clause.

On the other hand the Court might have considered the fact that the preamble of the Act stated as one of its purposes the establishing of a system of federal old age benefits, that the same workers who paid taxes and with respect to whom their employers paid taxes under Title VIII were to receive benefits under Title II, and that at least a rough correspondence between the amount of taxes received and benefits paid was intended.[106]

[102]United States v. Butler, 297 U. S. 1, 56 Sup. Ct. 312, 80 L. ed. 477, 102 A. L. R. 914 (1936).

[103]For an argument that even though Titles III and IX were treated as connected they would still be valid, see Brown and Story, *Constitutionality of the Unemployment Compensation Features of the Federal Social Security Act* (1936) 11 NOTRE DAME LAWYER 245, 254. The Circuit Court seems to have treated the title as connected. 89 F. (2d) 207, 209 (1937). The Circuit Court for the First Circuit held that the titles were connected and the act unconstitutional. George P. Davis v. Boston and Maine R., 89 F. (2d) 368, 377 (1937).

[104]298 U. S. 238, 56 Sup. Ct. 855, 80 L. ed. 1160 (1935).

[105]In the District Court Title VIII was ruled to be separable in view of the separability provision of the Social Security Act and the Court did not pass on Title II. Davis v. Edison Electric Illuminating Co. of Boston, 18 F. Supp. (D. Mass. 1937). The Circuit Court held that the titles were connected. 89 F. (2d) 383, 385 (1937). It has been argued that United States v. Butler, if followed, would compel the court to consider whether or not the two titles were regulatory, therefore independently valid. Note (1937) 32 ILL. L. REV. 80, 94. But such a view would greatly cramp the use of the taxing power.

[106]The District Court for the District of Columbia held inseparable not simply taxing

It may perhaps be concluded that as to the Title IX tax the government had two defenses either of which was sufficient to uphold constitutionality, namely, (1) that no definite relation was shown between the taxes and the exercise of governmental powers objected to, and (2) that even if such relation were shown Congress was taxing for the general welfare.[107] As to the Title VIII tax, only the latter defense was clearly sustained by the Court.

Holding as it did that none of the Titles challenged was unconstitutional, the Court was not forced to decide upon the separability of the grants-in-aid Titles of the Social Security Act (except Title III). That such Titles are separable seems clear. They may be administered without reference to other Titles of the Act; no provision is made for taxes to raise the appropriations made by the Title; the purpose of such Titles is for the general welfare; and there is a separability clause. Yet only four out of the eight members of the Committee on Social Security and Unemployment Insurance Law of the American Bar Association definitely thought such Titles separable. The report of the Committee finding all Titles of the Act invalid was not adopted by the American Bar Association at its 1936 meeting.

Delegation of Legislative Power

Such cases as *Panama Refining Company v. Ryan*[108] and *Schechter Corp. v. United States*[109] involved chiefly important questions concerning delegation of legislative power. The *Social Security* cases involved a number of such problems but the Supreme Court did not touch upon them.

In a case arising in the state of Washington, *Johnson v. State,*[110] in which the Washington unemployment compensation law was found invalid, it was argued to the Court that since the tax credits depend upon state law, it is the state law which fixes the federal tax rate. The case of *Florida v. Mellon,*[111] however, had approved such credits. In a number of cases it had been held that Congress may make the operation of federal law depend on state legislation.[112] In the same case it was argued that Section 906, per-

---

and benefit titles but two taxing and benefit acts passed the same day by Congress in a case involving the Second Railroad Retirement Act. Alton R. Co. v. Railroad Retirement Board, 16 F. Supp. 955 (1936). A third act has since been passed.

[107]See the excellent analysis by Jane Alvies, *"The Constitutionality of the Unemployment Insurance Titles of the Social Security Act,"* an unpublished study in the Yale University School of Law.

[108]293 U. S. 388 (1934).

[109]295 U. S. 495 (1934).

[110]60 P. (2d) 681 (Wash. 1936).

[111]273 U. S. 12 (1927).

[112]Hanover National Bank v. Moyses, 186 U. S. 181, 46 L. ed. 113 (1902); Clark Distilling Co. v. Western Maryland Ry. Co., 242 U. S. 311, 61 L. ed. 326 (1917); First National Bank v. Union Trust Co., 244 U. S. 416, 61 L. ed. 1233 (1917). The case of Knickerbocker Ice Co. v. Stewart, 253 U. S. 149, 64 L. ed. 834 (1920), which was cited on argument as *contra,* in reality turned on the peculiar constitutional provision applicable to jurisdiction in admiralty.

mitting state acts to apply to transactions in interstate commerce, constituted a delegation of legislative power. But here again the Supreme Court has expressly held that Congress may withdraw the protection of the Commerce Clause.[113] It has even held that an act of Congress permitting states to tax federal instrumentalities otherwise exempt is valid.[114]

Probably the most important problem concerning delegation of legislative power was that arising under Section 302 (a) of Title III, one which was avoided since the Court found it unnecessary to pass upon Title III. This Section authorized the Social Security Board to determine the amount to be granted to states for the expense of administering their unemployment compensation laws. The government, it would seem, met this argument effectively by pointing out (1) that the Constitution does not require Congress to specify in detail the manner in which public money is to be expended and (2) that proper standards were provided to guide the Board.[115] The English practice,[116] the practice of the Colonies and of the states,[117] all have recognized that the details of an expenditure is not a legislative function. The same result has been arrived at in a number of recent decisions of the lower federal courts concerning New Deal legislation.[118] A recent Supreme Court decision would seem to settle the issue.[118a]

Moreover, even though the doctrine of delegation of legislative powers were applicable, the Section supplies adequate standards.[119] The primary standard was the amount "which the Board determines to be necessary for the proper administration of such law during the fiscal year." This standard was further defined by the specifications of four other factors which the Board is required to take into consideration: (1) The population of the state; (2) an estimate of the number of people covered by the state law; (3) the

---

[113]In re Rahrer, 140 U. S. 545, 35 L. ed. 572 (1891); Whitfield v. Ohio, 297 U. S. 471, 80 L. ed. 778 (1936).

[114]Van Allen v. The State Assessors, 3 Wall 573, 18 L. ed. 229 (1866); Baltimore National Bank v. State Tax Commission, 297 U. S. 209, 80 L. ed. 586 (1876).

[115]See Brief for the Respondent, Charles C. Stewart Mach. Co. v. Davis, pp. 140-149.

[116]Corwin, *Constitutional Aspects of Federal Housing* (1935) 84 U. OF PA. L. REV. 131. 163.

[117]People v. Tremaine, 252 N. Y. 27, 168 N. E. 817 (1930); State ex rel Bonsteel Allen 83 Fla. 214, 91 So. 104, 26 A. L. R. 735 (1922); Abbott v. Commissioners, 160 Ga. 657, 129 S. E. 38 (1925); Edwards v. Childer, 102 Okla. 158 (19); Holmes v. Olcott, 96 Ore. 33, 189 Pac. 202 (1920); State v. Zimmerman, 183 Wis., 132, 196 N. W. 848 (1924). See also United States v. Hansen, 167 Fed. 881 (C. C. A. 9th 1909).

[118]Kansas Gas and Electric Co. v. City of Independence, 79 F. (2d) 32 (C. C. A. 10th 1935); Greenwood County v. Duke Power Co., 81 F. (2d) 986 (C. C. A. 4th 1936). See *contra,* Franklin Township v. Tugwell, 85 F. (2d) 208 (App. D. C. 1936), where, however the argument here made was not presented to or considered by the court.

[118a]Cincinnati Soap Co. v. United States, 57 Sup. Ct. 764, 770, 81 L. ed. 707, 714 (1937). This holding is cited in Duke Power Co. v. Greenwood County, 91 F. (2d) 665, 674, (C. C. A. 4th 1937).

[119]No such standards existed in Franklin Township v. Tugwell, 85 F. (2d) 208 (App. D. C. 1936).

total for all states must not exceed the appropriated amount; and (4) such other factors as the Board finds relevant. These standards are well within the prior decisions of the Court.[120]

State Unemployment Compensation Laws

The state unemployment compensation laws have been asserted to violate the Fourteenth Amendment chiefly on three grounds: (1) that the burden is imposed upon employers, who as a class, it is alleged, are not responsible for unemployment; (2) that it is unfair to assess all employers at the same rate, regardless of regularity of employment; and (3) that the pooling principle under which the unemployed in one industry may draw benefits from a fund to which other industries must contribute is unconstitutional under the decision in *Railroad Retirement Board v. Alton R. R. Co.*[121]

As to the first argument there are several possible answers. Although unemployment in many cases cannot be controlled by employers, it does occur largely as a result of maladjustments in the industrial process itself. Furthermore, even during normal times, industry has to keep a "reservoir" of labor. Finally, there are numerous instances where the cost of a necessary evil has been allocated to a particular group, out of whose activity the evil arises. The best examples are the workmen's compensation cases.[122]

As to the second argument, that it is unreasonable to assess all employers at the same rate irrespective of their employment experience, it should be noted that almost every state law, including the Alabama law, provides for an eventual differentiation on the basis of employment experience. The New York Law which did not do so but simply provided for study of the problem was, however, upheld by a four to four decision of the Supreme Court.[123] In all states the rates are uniform for at least the early years.

Since almost every state which made provision for unemployment compensation has adopted the pooled fund system, the holding of the Supreme Court in the *Alabama State Unemployment Compensation* case was of the utmost importance. The decision in *Railroad Retirement Board v. Alton R. R. Co.*[124] had seemed to cast serious doubt as to the constitutionality of pooled fund insurance. In that case, however, the uniform rate upon the railroads was prescribed in spite of the existence of facts, pleaded and proved, that from the outset the age groups employed differed widely among the

[120]Field v. Clark, 143 U. S. 649, 692 (1892); Hampton and Co. v. United States, 276 U. S. 394 (1927).

[121]295 U. S. 330, 55 Sup. Ct. 758, 79 L. ed. 146 (1935).

[122]New York Central Railroad Co. v. White, 243 U. S. 188, 37 Sup. Ct. 247, 6 L. ed. 667 (1917); Mountain Timber Co. v. Washington, 243 U. S. 219, 37 Sup. Ct. 260, 61 L. ed. 685 (1917). See James A. Pike, *Unemployment Insurance and Workmen's Compensation* (1937) 10 So. CALIF. L. REV. 253.

[123]W. H. H. Chamberlin v. Andrews, 299 U. S. 515, 57 Sup. Ct. 122 (1936).

[124]295 U. S. 330, 55 Sup. Ct. 758 (1935).

various roads. The Railroad Retirement Act also operated retroactively. It involved an exercise of the commerce power and not of the taxing power. The opinion did not purport to overrule the holdings in earlier cases involving uniform rates and pooled funds.[125] There was nothing in the opinion indicating that a pooled fund with contributions at a uniform rate would be unreasonable in a statute which acted wholly prospectively, since there was then no existing basis in fact for varying the contribution rates among employees.[126]

Conclusion

The Social Security decisions made clear a number of matters which had previously been obscure. A state unemployment compensation law might be regarded as an exercise of the state taxing power. The federal exactions to secure the passage of state unemployment compensation laws and for old age pensions were also taxes, those on employers being excise taxes. Both the state and the national government might impose taxes on the right of the employer to employ. The federal taxes on employers meet the test of uniformity required of federal excise taxes.

Both the state and the national government have wide powers to select the subjects of taxation and to grant exemptions. Hence, they might exempt employers of less than eight, employers of agricultural laborers, domestic servants, seamen, close relatives, charitable workers, government employees, and seasonal workers. Such exemptions might be justified by considerations of administrative convenience and expense.

If a tax on employees is levied whether by state or nation, the employer will not be allowed to raise the question of constitutionality.

A state in taxing for unemployment compensation is taxing for a public purpose within the Fourteenth Amendment. The national government in taxing for the same purpose and for old age pensions is taxing for the general welfare of the United States. Whether such expenditures are for the general welfare is primarily for the legislature and Congress to decide and the courts will only interfere in the case of arbitrary action.

A state may pay unemployment compensation to employees without proof of indigence and even to employees discharged for cause. The effect of the decision in Title VIII seems to be that the Federal Government may pay old age pensions to persons not in need, though the government argued that a needs test was set up. A state may pay unemployment benefits to individuals without violating the rule that the public money must be spent for a public purpose. Likewise, Congress under its power to tax and spend for the general welfare may pay old age benefits to individuals.

[125]Mountain Timber Co. v. Washington, 243 U. S. 219, 37 Sup. Ct. 260, 61 L. ed. 685 (1917); Noble State Bank v. Haskell, 219 U. S. 104, 31 Sup. Ct. 186, 55 L. ed. 112 (1911);
[126]Thomas Reed Powell, *Commerce, Pensions and Codes* (1935) 49 HARV. L. REV. 1.

A state may not only select certain classes of employers to pay taxes for employment compensation, but may also select certain classes of employees to receive the benefits, particularly where such employees are the employees of those who pay the tax, the doctrine of administrative convenience and expense applying. Inferentially, the same is true as to old age pensions paid by the Federal Government.

A state may compel individuals to pay taxes for unemployment compensation though they have not contributed to the unemployment and may not be benefited by the expenditure. This seems to be a circumlocutious way of saying that employers as a class may be compelled to pay even though unemployment has not been a result of their acts. Moreover, not only may employers be compelled to contribute, but they may be compelled to contribute irrespective of their employment experience. Pooled fund unemployment compensation laws are, therefore, valid. This is on the theory that where a tax is valid as a tax and the purpose is a legal purpose, the tying-in of the tax and the expenditure is immaterial. The want of knowledge as to the causes of unemployment is an additional though not indispensable reason for permitting pooled fund laws. Employees are better protected; and employers may add to the price of their products and thus shift the tax. The Court does not lay down any requirement of merit rating even when more accurate and complete data became available.

Not only are state unemployment compensation acts valid in and of themselves, but they are valid in spite of the fact that the Federal Government has induced their passage. The pressure exerted by the Federal Government was inducement not coercion; the Court does not say that even coercion would render a state act invalid. A state may legitimately deposit its employment compensation fund in the Treasury of the United States; and the United States may legitimately require such deposit. The federal and the state governments may properly cooperate to relieve unemployment through state laws and a federal tax credit system.

The Title IX tax is not coercive because of its credit clause. The Court does not deny that a credit clause may be separated from the revenue provisions of the tax. Even if inseparable, the credit clause is not coercive. *Inducement* by the Federal Government is proper since expenditures for the relief of unemployment are for the general welfare. Since a credit clause permits the states to act more freely for the general welfare and to cooperate better with the federal government this shows inducement not coercion. This is particularly true when the drain on the Federal Treasury is relieved. The credit clause is also proper since it prevents double taxation. The Court even throws doubt on the existence of any concept of undue influence as between state and nation. Even if the existence of such a concept be ad-

mitted, it would be a question of degree when such pressure turned into unconstitutional compulsion, and no such compulsion was shown here. The credit provision related to a subject matter within the scope of national power since there was less drain on the Federal Treasury. The Court denies that every sort of credit provision would be valid, and the credit provision in *Florida v. Mellon* supplies a precedent though the Court intimates that no precedent would be needed.

The various provisions which a state unemployment compensation act must contain do not call for a surrender of the quasi-sovereign powers of the state since they are merely criteria of a state unemployment compensation act and leave broad discretion to the states. Compliance with the conditions does not amount to a contract by the states since the state act may be repealed. The Unemployment Trust Fund does not violate the sovereign powers since the state act may be repealed and the deposits withdrawn and since the fiscal powers of the national government are safeguarded. Even if there were a contract, such a contract would be valid since sovereigns may contract.

Title III providing for grants to the states for the administration of their unemployment compensation laws is separable from Title IX and would be so even without a separability clause since Title III merely authorizes appropriations and since Title III might be stricken out without affecting Title IX. Hence, the Court did not pass on the validity of Title III.

But while the Court found Titles III and IX separable and did not pass on the validity of Title III, it did determine the validity of Title II as well as that of Title VIII and, therefore, found it unnecessary to pass on the question whether the two Titles were separable. Presumably, the Court thought the Titles connected since otherwise *Massachusetts v. Mellon* and *United States v. Butler* would stand in the way of passing on the validity of appropriations. The opinion does not make clear just why the Court passed on the validity of Title II.

The decisions in the *Social Security* cases will go down in history as landmark cases. They make social insurance whether carried on by the national or state governments feasible without Constitutional amendment. Not only may the Federal Government cooperate with the states through grants-in-aid and tax credits, but it may proceed to set up strictly material systems. Content is poured into the term "general welfare." The national taxing power is restored to its earlier vigor, if not actually enhanced. The device of separating a tax from an appropriation by having the tax flow into the general treasury funds and having the appropriation come out of the general funds is given the judicial blessing. After a period of negativism, if not obstruction, the Supreme Court has turned back to the judicial statesmenship and creativeness of Chief Justice Marshall.