

Control of National Agricultural Production and Consumption Through Taxation

Elbert P. Tuttle

Follow this and additional works at: <http://scholarship.law.cornell.edu/clr>

 Part of the [Law Commons](#)

Recommended Citation

Elbert P. Tuttle, *Control of National Agricultural Production and Consumption Through Taxation*, 23 Cornell L. Rev. 117 (1937)
Available at: <http://scholarship.law.cornell.edu/clr/vol23/iss1/7>

This Article is brought to you for free and open access by the Journals at Scholarship@Cornell Law: A Digital Repository. It has been accepted for inclusion in Cornell Law Review by an authorized administrator of Scholarship@Cornell Law: A Digital Repository. For more information, please contact jmp8@cornell.edu.

CONTROL OF NATIONAL AGRICULTURAL PRODUCTION AND CONSUMPTION THROUGH TAXATION

ELBERT P. TUTTLE

It is somewhat disconcerting to a lawyer who has followed the fortunes of the Agricultural Adjustment Act through the Courts to read repeated statements of Congressional and administration leaders all pointing to new controls of agricultural production and consumption through the use of processing taxes. Disconcerting, let us hasten to say, not because of any appraisal of the policy of federal control of agriculture, because the lawyer, as lawyer, is no more interested in the policy question involved in a planned economy than are the courts. Disconcerting, however, because we thought we had learned in *United States v. Butler*¹ that such a plan was not permissible to the national government. The lawyer's perplexity is not allayed when he finds that, in spite of the *Butler* case, Congress has already enacted, and the President has approved, a processing tax on manufacturers of sugar as a part of the Sugar Act of 1937,² and that this processing tax is levied as part and parcel of a plan looking to national control of sugar production, both within and without the continental limits of the United States.

If it were not for these developments, the fate of the Triple A processing taxes, the repeal of the Bankhead Cotton Act,³ and the Kerr Tobacco Act,⁴ not to speak of the Potato Control Act,⁵ might make unnecessary the inclusion in any tax symposium of a consideration of the regulation of agricultural production by taxation.

In the light, however, of the renewed and repeated statements that control of agricultural production must be accomplished, and by the use of the familiar though discredited method of taxing the processors and paying over the proceeds from such taxes to the complying producers, it is important to consider what methods can be used to restrict production through the means of a system of taxation.

Since we are concerned not only with restriction but also with other types of control, both of agricultural production and agricultural consumption, there are three possible types of tax devices that should be considered:

- (1) Taxes that are in reality imposed as penalties, and in such burdensome amounts as to exclude the idea of obtaining revenue. Within this group come the Bankhead Cotton Act, the Kerr Tobacco Act, and the Potato Control Act.

¹297 U. S. 1 (1936).

²Public No. 414, 75th Congress, approved September 1, 1937.

³Cotton Control Act, April 21, 1934, c. 157, 48 STAT. 598. 7 U. S. C. A. §§ 701-25.

⁴Tobacco Control Act, June 28, 1934, c. 866, 48 STAT. 1275. 7 U. S. C. A. §§ 751-766.

⁵Potato Act of 1935, August 24, 1935, c. 641, 49 STAT. 782-793. 7 U. S. C. A. §§ 801-833.

(2) Taxes that are imposed for the purpose of producing revenue that can then be used to purchase regulatory compliance by federal grants or contract payments to producers. This is the group that includes the invalidated A.A.A. processing taxes.

(3) Taxes that are expected to be paid in substantial amounts, which amounts will control either production or consumption by throwing competitive conditions out of natural balance. Under this classification come the tariffs and oleomargarine taxes.

Roughly speaking, the classification suggested above is given in the order here used because, speaking again very generally, it may be said that the taxes included within each group become progressively more likely to withstand attack, depending upon whether they fall within group (1), (2) or (3).

1. *Penalty Taxes*

No determination of the validity of either the Bankhead Cotton Act,⁶ the Kerr Tobacco Act,⁷ or the Potato Control Act⁸ was awaited in the Supreme Court. Although cases involving the validity of these taxes were pending at the time of the *Butler* decision, the Supreme Court in that case trampled over the Bankhead Act in so rough-shod a manner that no compliance was sought with respect to any of these taxes thereafter, and Congress promptly repealed them. In the course of the *Butler* decision, the Court said:⁹

"It is pointed out, that, because there still remained a minority whom the rental and benefit payments were insufficient to induce to surrender their independence of action, the Congress has gone further and, in the Bankhead Cotton Act, used the taxing power in a more directly minatory fashion to compel submission."

That was the end of the Bankhead and similar crop control acts that in effect taxed at rates as high as fifty per cent production in excess of Government-fixed quotas.

Even without the indication given in the language of the opinion in the *Butler* case, the laws of this type could hardly have been seriously considered within the permissible range of federal action at any time. They were similar in the manner in which they were intended to operate to the taxes sought to be imposed which gave rise to the *Child Labor Tax* case (*Bailey v. Drexel Furniture Company*),¹⁰ and to the case of *Hill v. Wal-*

⁶*Supra* note 3.

⁷*Supra* note 4.

⁸*Supra* note 5.

⁹297 U. S. 1, 71 (1936).

¹⁰259 U. S. 20 (1922).

lace.¹¹ The laws involved in those cases purported to be tax measures, but in reality they were intended not to raise revenue, but to regulate child labor in the one instance, and trading in grain in the other. The law simply imposed prohibitive levies upon persons who did not comply with certain standards laid down by Congress. Obviously, what was sought was compliance with the standards and not the raising of revenue. In other words, the success of the law would be measured not by the amount of taxes received by the Federal Government, but by the degree with which affected persons avoided the tax by submitting to the required conditions. If not a cent of revenue was received, the law would be a perfect success—a rather strange test for a taxing statute!

Unquestionably, a similar result was sought by the Bankhead, Kerr, and Potato Acts. Not a penny of revenue was sought. Much the same attempt was made and precisely the same result followed the enactment of the Bituminous Coal Conservation Act¹² in *Carter v. Carter Coal Company, et al.*¹³ There the Court held that what purported to be a tax of fifteen per cent on all coal mined, with a rebate of ninety per cent of the tax to producers who complied with certain labor standards, was no tax at all, but a sanction to compel compliance with code rules relating to the local business of production.

It seems clear, therefore, that these taxes, operating in a "directly punitive fashion to compel submission" to agricultural control, are definitely out. They are not taxing statutes and are not to be considered as such. This does not mean, of course, that the courts will not sustain what is imposed under the guise of a tax, but is really no tax at all, if it is a regulatory measure in a field in which the Federal Government has the Constitutional power to act.¹⁴ It is only where what purports to be a tax is, instead, a regulatory measure concerning a subject matter with which the Federal Government has no power to deal that the levy will be held bad.¹⁵

2. Processing Taxes

There is, of course, nothing inherently bad with processing taxes; bad, that is to say, from the standpoint of legality, since that is the only standpoint with which we shall here concern ourselves. Neither is there anything fundamentally new in processing taxes. The only two new things about them are the name and the use to which they have recently been put. The Federal Government has the undoubted power to tax the business of making

¹¹259 U. S. 44 (1922).

¹²Guffey-Snyder Coal Act August 30, 1935, c. 824, 49 STAT. 991. 15 U. S. C. A §§ 801-827.

¹³298 U. S. 238 (1936).

¹⁴Cf. *Head Money Cases*—*Edye v. Robertson*, 112 U. S. 580, 596 (1884).

¹⁵Cf. *I. W. Hamblton, Jr. & Co. v. United States*, 276 U. S. 394 (1928).

cotton into yarn, or of turning wheat into flour, if it sees fit to do so, and that after all is but an illustration of what is meant by processing taxes. However, in the light of the specialized use to which the words were put as a part of the Agricultural Adjustment Act, the term is now more than likely to be taken in its specialized meaning, i.e., a tax on the processors of an agricultural commodity to be used for the benefit of the original producers of the commodity.

The reader is undoubtedly familiar with the principal features of the taxing provisions of the Agricultural Adjustment Act, and knows that benefits were provided for the producers of basic commodities such as cotton, corn, wheat, hogs, rice, tobacco, and milk in order.¹⁶

"To establish and maintain such balance between the production and consumption of agricultural commodities, and such marketing conditions, therefor, as will reestablish prices to farmers at a level that will give agricultural commodities a purchasing power with respect to articles that farmers buy, equivalent to the purchasing power of agricultural commodities in the base period."¹⁷

The Act, of course, provided for a reduction in the acreage or in production of the basic commodities through contracts between the Secretary of Agriculture and the farmers, provided that the funds required to pay these benefits should be obtained by the levying of processing taxes on the first domestic processing of the respective commodities. It further appropriated the proceeds derived from all taxes imposed under the Act and made them available to the Secretary of Agriculture for rental and benefit payments to farmers.

Without question, this Act, or at least the taxing provisions of the Act, were intended to produce revenue to the Federal Government and it was hoped that the revenue thus produced would be substantial.¹⁸ From that standpoint, therefore, the taxing provisions did not fall within the condemnation of the type of taxes discussed under the first section. Critics of the decision of the Supreme Court in the *Butler* case pointed out that Congress was clearly within its taxing power in levying the processing taxes, and that really what was being attacked was the appropriation of the proceeds of the tax, and, therefore, under the familiar doctrine of *Frothingham v. Mellon*,¹⁹ and *Massachusetts v. Mellon*,²⁰ no such attack was available to the taxpayer. The Court held, however, after the two schools of thought

¹⁶Agricultural Adjustment Act, May 12, 1933, c. 25, 48 STAT. 31, 7 U. S. C. A. §§ 601-620.

¹⁷The basic period in the case of substantially all commodities was designated as that between August 1909 and July 1914.

¹⁸The total amount collected in processing taxes exceeded \$900,000,000.00.

¹⁹262 U. S. 447 (1923).

²⁰262 U. S. 447 (1923).

had been vigorously debated (as is indicated by the dissenting opinion written by Mr. Justice Stone and concurred in by two other Justices) that the levy was in fact no tax at all because it was not an exaction of "taxes, duties, imposts, and excises to pay the debts and provide for the common defense and general welfare of the United States,"²¹ but that it was an exaction of funds for carrying on a regulatory activity with which the Federal Government could not interfere, to wit, "to regulate agricultural production."²²

The decision by the majority in the *Butler* case was facilitated by reason of the fact that the levy against processors was there specifically stated to be for the purpose of producing funds with which agricultural production could and should be regulated. This fact lent weight to the Court's conclusion that it must consider the taxing sections and the regulatory provisions of the Act as a single whole. To be sure, so far as would lie within the reach of any taxpayer to complain, the purpose sought under the Agricultural Adjustment Act in the way of purchasing compliance by farmers with a scheme of curtailment of production could easily have been accomplished if the Agricultural Adjustment Act had concerned itself merely with the provisions relating to regulation and benefit payments and the appropriation of the funds with which to carry out the plan had been left for an entirely different enactment. This is true because of the inability of the individual taxpayer to raise effective protest against illegal expenditures by Congress, no matter how glaring the illegality.²³

To be sure, this circumstance fully justifies the criticism that to hold the Agricultural Adjustment Act bad because the taxing provisions were included within the four corners of the Act, whereas a different result would have followed if they had been left for subsequent legislation, puts too great a premium upon legislative draftsmanship. Professor Powell in his article, written before but published just after the *Butler* case, after pointing out that his prophecy as to the Court's expected action had gone awry, said:²⁴

"The Court would be foolish to say that Congress could not do in one way what it could do in another and thus kill the processing tax just to give a lesson in legislative draftsmanship."

The circumstances that have been outlined in the beginning of this article will now present to the Supreme Court the problem of deciding just how well Congress has learned its lesson in legislative draftsmanship, for it seems conceded that the effort to reinstate the processing taxes with respect

²¹U. S. CONST. ART. I, § 8.

²²*United States v. Butler*, 297 U. S. 1, 61 (1936).

²³*Frothingam v. Mellon*, *supra* note 19.

²⁴See Powell, *The Processing Tax and the Social Security Act* (1936) 5 BR'KLYN L. REV. 125.

to basic agricultural commodities will continue unabated until a measure of control broadly comparable to that under the A.A.A. has again been accomplished. In fact, as pointed out above, a start has already been made in the Sugar Act of 1937.

With such an eminent authority as Professor Powell stating that he was a poor prophet in prophesying that the processing tax in its substantive features would not meet with judicial condemnation, it would be sheer folly to attempt to prognosticate the future of the Sugar Act and of other similar legislation which may be expected to follow. It is probably not out of place, however, to discuss briefly some of the differences between the provisions of the Sugar Act and those provisions of the A.A.A. which were intended to accomplish a similar purpose.

Two sharp attacks have been levelled against the decision of the Supreme Court in the *Butler* case. The first is that though Congress has the undoubted power to levy an excise tax on the processing of agricultural products, the Court held the tax levied under the A.A.A. unconstitutional because of the use to which its proceeds were to be put. The second was that the Court held the conditional grants for the benefits of farmers not to be "for the general welfare."²⁵

As to the second of these attacks, limits of both time and space forbid that we enter into a discussion of what is permissible under the authority to levy "taxes . . . for the general welfare." However, in view of the apparently determined effort of the Administration and of Congressional leaders to attempt again the control of agricultural surpluses by the use of processing taxes, it is important to give some consideration to the first attack, because it will undoubtedly be a part of the legislative tactics to attempt to draft any such regulatory laws as may be enacted in such manner as to deprive the taxpayer of any ground upon which he can launch an attack of illegality.

As the Supreme Court has repeatedly pointed out, it is possible for Congress to engage in illegal ventures which it does not lie within the province of the courts to prevent. Such an instance is the illegal appropriation of federal funds. If we are to read the language of the *Butler* decision but casually, it is clear that the Supreme Court has definitely held that the Federal Government has not the power to appropriate funds in order to regulate agricultural production. In answering the contention that Congress had frequently in the past made appropriations for non-federal purposes, the Court quoted from its prior decision in *Massachusetts v. Mellon*²⁶ and recognized that the courts were powerless to prevent such improper appro-

²⁵See the dissenting opinion of Mr. Justice Stone in *United States v. Butler*, 297 U. S. 1, 79 (1936).

²⁶*Supra* note 20.

priations, because "no remedy was open for testing their constitutionality in the courts." The greater part of the *Butler* decision was devoted to pointing out the evils that the Court feared would follow if the Federal Government should be permitted to invade the province of the states and regulate matters of local concern. The Court, however, recognized in the language just quoted that the Federal Government could accomplish precisely the result objected to and that the courts would be powerless to interfere unless the illegal appropriation used to accomplish such improper regulation should be tied up either with a penalty through which the regulatory measures could be attacked, or with a tax through the imposition of which the taxpayer could raise the issue, as was done in the *Butler* case.

If Congress, therefore, is intent upon accomplishing agricultural regulation on a national scale and is not deterred by reason of the expressed opinion of the majority of the Supreme Court that such regulation is illegal, the way is open for the accomplishment of this result. Congress need only set up the regulatory and benefit provisions of the Agricultural Adjustment Act and appropriate the funds with which to carry them out from the general revenues of the United States. Of course, having adopted such a program, there is no provision of the Constitution that would prevent Congress from levying a processing tax calculated to the dollar to be sufficient to pay the benefits provided for under such a new Agricultural Adjustment Act; and no taxpayer could resist payment of such processing tax, because the money thus received would be derived from a revenue measure, pure and simple, and would be available for the general purposes of government.

It is probably fair to assume that the Sugar Act of 1937 will be the model for other processing tax acts if the lesson in legislative draftsmanship given by the Supreme Court in the *Butler* case has enabled Congress to avoid in the Sugar Act the pitfalls that were so apparent in the A.A.A. In the Sugar Act, the provisions relative to the levying of processing taxes bear no apparent relation to the expenditures for benefit payments. The only connection between the benefit payments and the taxes there imposed is that they both appear within the four corners of the same legislative enactment. There is no bold statement in the Sugar Act that the revenues produced by the processing taxes are appropriated "to be available to the Secretary of Agriculture for . . . rental and benefit payments and refunds on taxes." There is no appropriation of the processing taxes contained in the Sugar Act. Moreover, there is no reference in the sections relating to the levying of the taxes to the fact that such taxes are levied in accordance with the general policy of the Act, nor is the amount of the taxes made dependent, as it was originally in the A.A.A., upon a finding as to the amount that was necessary

to equal "the difference between the current average farm price for the commodity and the fair exchange value."²⁷

Under these circumstances, it might be a little more difficult for the Supreme Court to answer the contention of the Government that the part of the statute levying an excise on processors should be considered independently of the part which contains the prohibited regulatory provisions. Because of the difference in the draftsmanship of the two measures, the Court could not so readily say as it did in the *Butler* case:

"The Government in substance and effect asks us to separate the Agricultural Adjustment Act into two statutes, the one levying an excise on processors of certain commodities, the other appropriating the public moneys independently of the first. Passing the novel suggestion that two statutes enacted as parts of a single scheme should be tested as if they were distinct and unrelated, we think the legislation now before us is not susceptible of such separation and treatment."²⁸

There was some discussion among lawyers prior to the decision of the Supreme Court in the Social Security Act cases^{28a} (*Helvering v. Davis*,²⁹ *Charles C. Steward Machine Co. v. Davis*,³⁰ and *Carmichael v. Southern Coal & Coke Co. et al.*)³¹ to the effect that the Court might have to decide there whether the levying of a tax ostensibly for general revenue purposes as a part of an act in which the legislative scheme was to provide Social Security and unemployment relief would be considered as a general revenue statute or would be infected with any weakness that might exist in the general plan with which it was legislatively connected. The Court did not find it necessary to pass on this question. While the Social Security Acts were drawn in such manner as to avoid any appearance on their face that the taxes there raised were appropriated or to be used as a part of the Social Security scheme, the Court did not need to find specifically that the tax provisions of this Act were entirely disassociated for the purposes of the legislation, because it held the purpose of the legislation to lie within the competence of the national government. To be sure, in the *Steward Machine Company* case, the opinion did state:

"Title III of the Act (the Title setting up the unemployment grants) is separable from Title IX, and its validity is not at issue.

"The essential provisions of that title have been stated in the opinion. As already pointed out, the title does not appropriate a dollar of the

²⁷For the quoted portions of the Agricultural Adjustment Act, see *United States v. Butler*, 297 U. S. 1, 53 (1936).

²⁸*United States v. Butler*, 297 U. S. 1, 58 (1936).

^{28a}For a full discussion of the Social Security Cases see article by Lester H. Orfield, [*supra* p. 85—Ed.]

²⁹57 Sup. Ct. 904, 301 U. S. (1937).

³⁰57 Sup. Ct. 883, 301 U. S. (1937).

³¹81 L. ed. 818, 301 U. S. (1937).

public moneys. It does no more than authorize appropriations to be made in the future for the purpose of assisting states in the administration of their laws, if Congress shall decide that appropriations are desirable. The title might be expunged, and Title IX would stand intact. Without a severability clause we should still be led to that conclusion. The presence of such a clause (Section 1103) makes the conclusion even clearer. *Williams v. Standard Oil Co.*, 278 U. S. 235, 242; *Utah Power & Light Co. v. Pfost*, 286 U. S. 165, 184; *Carter v. Carter Coal Co.*, 298 U. S. 238, 312."

However, this determination was not essential to the decision and, therefore, is not binding authority.

The question as to whether a tax, in form a general revenue producing measure, but included in a general act whose purpose is not permissible under the Constitution, will be considered separately and sustained, or will be regarded as part of the illegal scheme and stricken down still remains an unsolved problem. If an attack is made on the taxing features of the Sugar Act of 1937, it is clear that the Court will have to determine this question, if it adheres to the position taken by it in the *Butler* case that national control of production of an agricultural commodity cannot be legally accomplished by a federal appropriation to purchase compliance with federal rules.

Undoubtedly the regulatory features of the Sugar Act are sufficiently similar to the outlawed A.A.A. to infect its control provisions with the same vulnerability. It is only by holding the taxing provisions entirely separable from the condemned control features that the Court can, if it is consistent, fail to outlaw the Sugar Act. It will probably be noted in this connection that we have placed some stress upon the qualifying statement, "if it is consistent." Many careful students of the Supreme Court have more than intimated that, given another *Butler* case today, the Court would decide it differently. Such an intimation can be dignified as being more than a mere surmise when we consider the *volte-face* of the Court between May 18, 1936, and April 12, 1937. From the *Carter Coal Company* case³² to the *Wagner Act* decisions (*National Labor Relations Board v. Jones and Laughlin Steel Corporation* and companion cases)³³ there elapsed only eleven months in time, but this short period witnessed a shift from the court's position that the power of Congress to regulate interstate commerce did not extend to the establishment of labor conditions in the bituminous coal mining industry (although a substantial part of the coal produced was directly sent in interstate commerce) to the attitude that national laws regulating conditions of employment could validly apply to manufacturers

³²*Carter v. Carter Coal Co.*, 298 U. S. 238 (1936).

³³301 U. S. 1 (1937).

who obtained materials in other states and whose products were substantially all sold in other states.³⁴

To the mind of the average practicing lawyer, there is no way to explain satisfactorily the complete reversal of the Court's position from *Schechter Poultry Corp. v. United States*³⁵ and the *Carter Coal Company* case to the *Wagner Act* cases. The lawyer is, therefore, not presumptuous if he questions how long the pronouncement in the *Butler* case will remain the law. Undoubtedly the Court will be given the opportunity before long either to reaffirm or recede from its position. The Sugar Act of 1937 may well provide the test. In passing on that Act, however, the Court may of course avoid the constitutional issue in the manner previously suggested by holding that the taxing provisions are not so interwoven with the regulatory parts as to make the entire Act invalid.

3. Tariffs and Oleomargarine Taxes

There remains for discussion the type of levy that is intended to combine some of the features of both of the taxes heretofore discussed: the tax that is levied on an article that, without the tax, would have an advantage in the market which, to the legislative mind, is not desirable. The two typical examples of this tax are the protective tariff and oleomargarine taxes.

If there were no tariff on the importation of sugar, it might well be that foreign sugar producers would kill the sugar industry of our western and southern states and in our non-contiguous territories. The presence of a sugar tariff produces income, but it also erects a barrier behind which American growers can charge more for their crop, and thus agricultural production in that particular field is fostered. While such protection has more often been afforded industry as distinguished from agriculture, the same procedure is available as against the importation of agricultural products that would cut too deeply into the livelihood of the American farmer. Doubtless the reason the protective tariff has not been used more frequently for the benefit of the agricultural population is that there is little demand for foreign agricultural products that can be satisfactorily raised in the United States.

While there are probably some inconsistencies in ultimate effect, if not in legal logic, between a recognition of the right of the Federal Government to control agricultural production by use of the tariff and a denial of the right to control it through the excise tax,³⁶ there can be no doubt under existing

³⁴For an excellent discussion of the impossibility of reconciling these two positions, see note (1937) 22 CORNELL L. Q. 568.

³⁵295 U. S. 495 (1935).

³⁶It was quite popular among the cotton growers of the South to speak of the processing tax on cotton as the "Cotton Farmer's Tariff."

precedents that Congress nevertheless has the power.³⁷ That there is not only inconsistency in result but also in legal reasoning between the *Butler* case and the *Hampton* case is the conclusion arrived at in an analysis by Professor Henry M. Hart, Jr., in an article entitled "Processing Taxes and Protective Tariffs."³⁸ Professor Hart urges with great force that in the fostering of American industries by means of the protective tariff, as is avowedly done by the Tariff Act of 1930,³⁹ Congress is engaging in an act of governmental regulation which is no more permissible than is the power to regulate agriculture. The Court in the *Butler* case said Congress could not do the latter under the guise of a tax though the Constitution specifically grants the power to tax. The Court said in the *Hampton* case that Congress could do the former under the guise of a tariff exaction although authority to exact the tariff arises from the same clause of the Constitution.⁴⁰ In the *Hampton* case, the Court laid considerable stress upon the fact that the first Congress, which included in its numbers many members of the Constitutional Convention of 1787, construed the duty levying powers of the Constitution as authorizing a protective tariff, and pointed out that the second act adopted by the Congress of the United States on July 4, 1789, contained the following recital:

"Section 1. Whereas it is necessary for the support of government, for the discharge of the debts of the United States, and the encouragement and protection of manufactures, that duties be laid on goods, wares and merchandises imported:"

While there may be some inconsistency between the construction of the duty levying power of the Constitution as adopted by the Court in the *Hampton* case and the construction of the tax levying power as circumscribed in the *Butler* case, the Court nevertheless did adopt as one of the canons of construction the view that:

"A contemporaneous legislative exposition of the Constitution when the founders of our Government and framers of our Constitution were actively participating in public affairs, long acquiesced in, fixes the construction to be given its provisions."⁴¹

It may also be that a further distinction should be made, namely, that while the taxing power is restricted to the levy of taxes "for the general welfare," the imposition of duties on imports is authorized not only under the Taxing Clause but also under the Commerce Clause; and there is no "general welfare" limitation in the commerce clause, so that the Government's regulation of foreign commerce is, as has been said, "exclusive and

³⁷J. W. Hampton, Jr. & Co. v. United States, 276 U. S. 394 (1928).

³⁸(1936) 49 HARV. L. REV. 610.

³⁹Tariff Act of 1930, c. 497, June 17, 1930, 46 STAT. 590, 19 U. S. C. A. §§ 1001-1654.

⁴⁰*Supra* note 21.

⁴¹276 U. S. 394, 412 (1928).

plenary" and since the power has been granted, the motive or the effect of such levy cannot be questioned.

After the *Hampton* decision and before the *Butler* case, the Supreme Court had veered from the theory that the protective tariff had to be justified under the taxing power to the position which it announced in the case of *University of Illinois v. United States*,⁴² that the power in question is referable to the commerce clause of the Constitution. As is pointed out by Professor Hart,^{42a} that decision was a convenient way for the Court to justify the imposition of a tariff on articles bought by a state institution which, under the taxing power, might not have been permissible on the theory that the Federal Government had no power to tax the instrumentalities of the state. Nevertheless, unless the Court should feel that the *Butler* case amounts to a reversal of the *Hampton* decision and of the theory of justifying the tariff as set out in *University of Illinois v. United States*, there is ample authority for Congress to affect in a vital manner both agricultural production and consumption through the tariff device.

It is probably unnecessary to include in this discussion any extended consideration of other types of federal taxing statutes which, in the minds of the public, at least, are intended to regulate conduct rather than to obtain revenues for the national government. However, something should be said about this type of legislation in the light of the significance which has been attached in the *Butler* case to the purpose of a tax levy. There is probably no person who is at all familiar with the oleomargarine tax⁴³ who does not consider it as a means whereby sales of butter substitutes can be restricted, either for the purpose of preventing deception in local trade or for the benefit of the dairy industry. Of course, neither the prevention of deception nor the regulation of production or consumption of dairy products is a concern of the Federal Government. Because of the similarity of the type of federal control, mention might also be made of the narcotic taxes.⁴⁴ Our federal court dockets are filled with prosecutions of dope peddlers. It would probably be a surprise to a good many of these unfortunates to realize that their prosecution and conviction is for a crime against the public revenues. The narcotic acts generally are understood by laymen to be laws enacted by the Federal Government for the suppression of the sale of narcotics because of the inherent harm in the traffic. Of course, Congress has no power to interfere with any such traffic as a moral or social measure.

However, in spite of the fact that these several laws are generally known

⁴²289 U. S. 48 (1933).

^{42a}*Supra* note 24.

⁴³August 2, 1886, c. 840, 24 STAT. 209, 26 U. S. C. A. § 970 *et seq.*; May 9, 1902, c. 784, 32 STAT. 193, 21 U. S. C. A. § 25; 26 *id.* §§ 971 *et seq.*

⁴⁴Dec. 17, 1914, c. 1, 38 STAT. 785, 26 U. S. C. A. §§ 1040-1051, 1053, 1054, 1383-1391.

to be regulatory in purpose and effect, the courts have consistently upheld them, and, in doing so, have put them to the extreme test, because the cases in which they were assailed have generally been on the criminal side of the court. The Supreme Court has taken the rather general view in sustaining these acts that if the levy of the tax and the regulations issued ostensibly for the purpose of assisting in the enforcement of the taxing provisions bore some reasonable relation to the raising of revenue, the acts could be sustained.⁴⁵

In the *McCray* case, which arose from a violation of the Oleomargarine Act, the Court said:

"Since, as pointed out in all the decisions referred to, the taxing power conferred by the Constitution knows no limits except those expressly stated in that instrument, it must follow, if a tax be within the lawful power, the exertion of that power may not be judicially restrained because of the results to arise from its exercise."⁴⁶

In the *Doremus* case,⁴⁷ the Court also said:

"Nor is it sufficient to invalidate the taxing authority given to the Congress by the Constitution that the same business may be regulated by the police power of the state. License Tax Cases, *supra*.

"The Act may not be declared unconstitutional because its effect may be to accomplish another purpose as well as the raising of revenue. If the legislation is within the taxing authority of Congress—that is sufficient to sustain it. . . ."⁴⁸

As might well be expected, the language of the Court in the *McCray* case gave the Supreme Court some concern in arriving at its decision in the subsequent *Child Labor Tax* case.⁴⁹ The only real distinction between the permitted powers as found in the oleomargarine cases and the prohibited tax in the child labor case must be found in the following language, in which the Supreme Court sought to distinguish *McCray v. United States*⁵⁰ and another earlier case from the one then before the Court:

"In neither of these cases did the law objected to show on its face, as does the law before us, the detailed specifications of a regulation of a state concern and business with a heavy exaction to promote the efficacy of such regulation."⁵¹

The narrowing line of demarcation between what is permissible and what is prohibited to the Federal Government in using the taxing device to regulate conduct becomes all the more attenuated when it is considered that, as

⁴⁵*McCray v. United States*, 195 U. S. 27 (1904); *United States v. Doremus*, 249 U. S. 86 (1919); *Webb v. United States*, 249 U. S. 96 (1919).

⁴⁶195 U. S. 27, 59 (1904).

⁴⁷*Supra* note 45.

⁴⁸249 U. S. 86, 93 (1919).

⁴⁹*Bailey v. Drexel Furniture Co.*, 259 U. S. 20 (1922).

⁵⁰195 U. S. 27 (1904).

⁵¹259 U. S. 20, 42 (1922).

the A.A.A. processing taxes were destroyed by a six to three decision in the *Butler* case, both the oleomargarine taxes and the narcotic taxes were sustained by a sharply divided bench. Under the authorities as they now stand, however, so long as Congress avoids expressing within the four corners of a particular act too close a relationship between a tax levy and the regulatory motive, such excises as that contained in the oleomargarine taxing act can still be made to serve the purpose of benefiting the producers of certain types of agricultural products and thus increasing the consumption of those products and, conversely, restricting the production and decreasing the consumption of other less favored articles.

Conclusion

No attempt has been made in this article to discuss the remote and incidental effects which all taxes have upon production and consumption of agricultural commodities, but we have given attention only to those levies whose purpose is largely regulatory, whether expressed or not. Where Congress has attempted to interpose a so-called tax as a sanction to prevent conduct with which the national government has no constitutional authority to interfere, it seems clear that it is foredoomed to failure. Where taxes are imposed by the Federal Government to provide the sinews of war with which to combat an accumulation of local evils that bulk large enough to challenge national concern, it seems that the validity of such taxes may well depend upon the extent to which they are earmarked for the regulatory purpose. The *Butler* case followed as the result of too close a tie-in between the levy and the prohibited activity. Where duties or tariffs have been imposed under the exercise of the power granted in the Commerce Clause, or where the Court cannot say that the exaction bears no reasonable relation to the revenues, even though the very payment of the tax affects the internal economy of the states, the courts have declined to interfere.

While there seem to be some possible inconsistencies between the language of the *Butler* case and the holdings in the tariff, oleomargarine, and narcotic cases, it is not too hazardous a guess to say that the *Butler* case is not likely to be extended in its application. Under the present tendencies and in the light of the most recent cases reflecting the Court's opinion on the limits of Constitutional power, it is extremely likely that the exercise of the taxing power to affect and regulate the lives of the citizens will become more deeply entrenched rather than meet with any further sharply defined barriers.