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CONFLICTS BETWEEN FEDERAL REGULATION THROUGH TAXATION AND THE STATES

F. D. G. RIBBLE

The failure of ambitious national planning, which sought constitutional sanction under the commerce clause,¹ has brought forth notable results. It has contributed to an awareness of the Constitution and of constitutional law which has not been equalled since the stormy era at the time of the Dred Scott decision. Naturally, some of this awareness is the awareness of vexation. The adjudged incompetency of the commerce power has occasioned what is perhaps the sharpest divergence between the Chief Executive and the Supreme Court in the history of the Nation. And it has led to an increased searching for other powers to serve national purposes. A notable result of this search is found in increased emphasis upon taxing and spending powers.

The commerce power found a substantial limitation in conceptions of the dual system of government existing under the United States Constitution. In notable instances the Supreme Court has felt that the national planning which it rejected trespassed on governmental areas reserved for the states. Turning from the commerce to the taxing power, it may prove useful to inquire how far concepts which served to mark out boundaries for the former are or may be similarly used upon the latter.

The use of state power as a limitation on national power appears to fit strangely into orthodox statements of constitutional theory.² It is axiomatic that the National Government is supreme in its sphere. As to the powers granted to it, it must take precedence. The state powers comprise only what is left after the grant to the central government. There is thus an apparent denial of the plan of the Constitution when reserved powers serve to measure those which are granted.

A difficulty of the application of this statement of granted and reserved powers lies in finding in all cases suitable measures of the commerce power which completely ignore the states. Relevancy exists between any economic activity and interstate commerce. The corner bootblack doubtless uses brush or paste coming from another state. Certainly some of his earnings go into the purchase of articles having extra state-origin or connections. This relevancy is not limited to business activity. An interesting example is found in the argument supporting the attempt by Congress to control the

¹A. L. A. Schechter Poultry Corporation v. United States, 295 U. S. 495 (1935); Carter v. Carter Coal Co., 298 U. S. 238 (1936).

²See Corwin, *National State Cooperation—Its Present Possibilities* (1937) 46 YALE L. J. 599.

shooting of migratory birds prior to the regulation under the treaty powers.³ The argument presented a clear chain of causation and ran as follows: Birds eat bugs. Bugs harm trees. Trees affect the flow of surface waters into rivers. Rivers bear commerce. Hence, it was argued, Congress could protect the birds. There may be an impatient shrug at extravagant illustrations. Yet impatience furnishes no suitable measure of extravagance.

An effective and much quoted statement is found in the concurring opinion of Justice Cardozo in the *Schechter* case:⁴

"There is a view of causation that would obliterate the distinction between what is national and what is local in the activities of commerce. Motion at the outer rim is communicated perceptibly, though minutely, to recording instruments at the center. A society such as ours 'is an elastic medium which transmits all tremors through its territory; the only question is of their size.' Per 'Learned Hand, J., in the court below."

To prevent the obliteration of "the distinction between what is national and what is local," there is necessitated the search for differences of degree and in this search some criteria are needed. The court has often viewed the problem as one demanding a wise division between the states and the nation. Such a division contemplates a consideration of both governmental structures, involving a determination of the capabilities and the needs of each. Thus it has not been unnatural in the designation of the outer reaches of the commerce power that an eye should be cast upon the position of the states. This is illogical in the sense of being inconsistent with the premise that state powers comprise that part of governmental authority which is left after granted powers, presently *ascertainable* and *ascertained* without reference to the states, have been withdrawn. The trouble lies with the premise since we have no such granted power under the commerce clause. Though the sphere of national control is clear enough in familiar instances, yet along its outer fringes but little help is gained from the words "regulate commerce among the several states" or from the fact that the activity in question has some discernible connection with interstate commerce. In such instances the objective of a wise division between the nation and the states furnishes a useful guide in construing the constitutional terms, and one which is in accord with the plan of the framers. The wisdom of the division agreed upon may often be open to question. Likewise the area assigned to the states has exhibited at times a rigidity and a formalism which ignores or obscures the basic consideration upon which it initially depended. Yet the practice of viewing the commerce power of the national government in

³Treaty of December 8, 1916 between the United States and Great Britain. See *Missouri v. Holland*, 252 U. S. 416 (1920).

⁴*A. L. A. Schechter Poultry Corporation v. United States*, 295 U. S. 495, 554 (1935).

relation to governmental needs and abilities of the states is as old as the judicial exposition of that power. Thus Marshall, never parsimonious with respect to the central government, was willing to leave to the states those powers "which can be most advantageously exercised by the states themselves."⁵ As to the taxing power he insisted, "Congress is not empowered to tax for those purposes which are within the exclusive province of the states."⁶

This measure of the commerce power has no place when Congress proceeds within familiar and established limits and for objectives which the court accepts as fairly connected with interstate commerce. Thus a state operated railway, transporting goods in interstate commerce, was not excused from compliance with the Federal Safety Appliance Act.⁷ It is only where the court deems the exercise in question to be on the outer rim of the commerce power or it considers the statute in question is not substantially concerned with the effectiveness of interstate commerce that the state limitation has assumed importance.

The course of judicial decisions under the commerce clause is of some assistance in viewing the convergence of federal and state powers in matters of taxation. In the first judicial exposition of the commerce power, it was carefully compared and contrasted with the power of raising revenue. Marshall warned that these two powers "are not, it is conceived, alike in their terms or in their nature."⁸ Each government may raise revenue from the same subject without substantially interfering with the other. There is the suggestion that if the sum of both taxes exceeds the value of the subject, the national government will be preferred.⁹ But happily, the exigencies of governmental finance have not yet raised the demands for taxes above 100% of the value of the thing taxed. While both governments can, without conflict, tax the same subject, both cannot prescribe the rule by which the same activity in interstate commerce is to be governed. In recognition of this difference in the nature of the two powers it has been common practice to speak of the commerce power as "exclusive"¹⁰ and of the taxing power as "concurrent."¹¹

In accord with this difference the elaborate doctrine of the effect on the states of congressional inactivity under the commerce power and the accompanying speculations into the "silence of Congress"¹² have no counter-

⁵Gibbons v. Ogden, 9 Wheat. 1, 203 (1824).

⁶*Ibid.* p. 199.

⁷United States v. California, 297 U. S. 175 (1936).

⁸Gibbons v. Ogden, 9 Wheat. 1, 198 (1824).

⁹Lane v. Oregon, 7 Wall. 71, 77 (1868); Frick v. Pennsylvania, 268 U. S. 473 (1925).

¹⁰New Mexico v. Denver and Rio Grande R. R., 203 U. S. 38, 49, 50 (1906).

¹¹See Gibbons v. Ogden, 9 Wheat. 1, 199 (1824).

¹²See Biklé, *The Silence of Congress* (1927) 41 HARV. L. REV. 200.

parts in connection with the taxing power. The power of Congress to tax, when unexercised, cannot limit or affect the power of the states to tax. There are few private fiscal reserves for the national government, and in these it is not the national taxing power which keeps the states out. Again a conflict between national and state tax statutes would serve to defeat the latter only when there was not enough money to go around or where the provisions were such that the taxpayer could not comply with both. The mere fact that the statutes were framed to serve opposing or inconsistent policies is not sufficient to overcome the state act. Thus in a struggle between competing industries, one may be favored by federal and the other by state taxation.

In its revenue producing aspects, the taxing power finds a limitation arising out of the existence of the state governments only when there is an effort to tax fundamental or traditional state governmental functions.¹³ A similar limitation exists upon the states with reference to national activities.¹⁴ It is a curious principle whereby a state official enjoying the benefits of the national government should not bear his share of the cost. The principle arises in connection with Marshall's pronouncement that "the power to tax involves the power to destroy"¹⁵ and the proposition deduced therefrom that the power to destroy state officialdom is the power to destroy the states. Yet the case in which Marshall's declaration was made was one involving a discriminatory tax. So long as the tax on state officials is not discriminatory their positions cannot be destroyed except in a general ruin. The state officers face no greater danger from taxes than that shared in by the citizenry generally. Thus the protection of state governments would seem to be amply provided for by a construction of the taxing power which proscribed discriminatory taxation only. The present system amounts to a federal subsidy for state action and a similar state subsidy for national action. Yet the vigor of the principle that the national powers are limited by "the necessity of maintaining our dual system of government"¹⁶ is nowhere more strikingly illustrated than in the exemption of state officials from federal income taxation. This exemption exists in apparent disregard of the power of Congress to levy taxes on incomes "from whatever source derived."¹⁷

Naturally, national taxation for purposes of regulation has been confronted with the limitation arising out of existence of state governments. A consideration of such taxation presents first a question of definition. Any taxation is likely to involve some regulation in the sense of providing for or

¹³Collector v. Day, 11 Wall. 113 (1871). See Ohio v. Helvering, 292 U. S. 360 (1934); Magill, *Tax Exemption of State Employees* (1926) 35 YALE L. J. 956.

¹⁴New York v. Graves, 299 U. S. 401 (1937); Note (1937) 23 VA. L. REV. 922.

¹⁵McCulloch v. Maryland, 4 Wheat. 316, 431 (1819).

¹⁶Board of Trustees of University of Illinois v. United States, 289 U. S. 48, 59 (1933).

¹⁷U. S. CONST. SIXTEENTH AMEND.

encouraging some change in human conduct. Tax avoidance, directing taxpayers to follow new ways in place of old, is doubtless as old as taxation. The Supreme Court has recently declared that "a tax, in the general understanding of the term, and as used in the Constitution, signifies an exaction for the support of the government."¹⁸ This meaning would not preclude the effort to accomplish several purposes by taxation, though it would indicate that a statute based on the taxing power must be such as may be fairly expected to produce some revenue. Illustrations of regulatory results in revenue acts are numerous. Recent examples will be found in the undistributed profits tax,¹⁹ the treatment of consolidated returns²⁰ and the taxation of dividends.²¹

The inquiry into the purpose of a statute and the finding that it exists for substantial reasons other than the raising of revenue may involve, as is charged, a venture into the realm of psychoanalysis.²² But it will only be the venture which that familiar character in the law "the man in the street" would readily make without realizing that his conduct deserved so formidable a name. Though courts sometimes deny themselves admission to this realm, no other humans seem to feel such reticence.

This judicial self denial is one method of limiting the substitution by judiciary of its will for the will of Congress. There has been a wide variance among members of the Court as to how far it should be bound by legislative determinations. This variance is most noticeable in due process decisions, ranging all the way from a view which would sustain legislative acts only where the Court pretty well agreed with the legislature that the acts were desirable,²³ to a position which demanded simply that the acts must not be so grotesque or extreme as to be absurd.²⁴

In situations involving the wisdom of a national legislative program or a state legislative program, and presenting no conflict between the states and the nation, judicial self denial is one of the greatest virtues. In broad matters of policy there is scant justification for substitution by the Court of its judgment for the judgment of the legislature, except where the legislature has encroached upon fundamental human rights. A republican form of government presupposes that the people are willing to take a chance on

¹⁸United States v. Butler, 297 U. S. 1, 56 Sup. Ct. 317 (1936).

¹⁹Revenue Act of 1936, § 14.

²⁰See Revenue Act of 1932, § 141(d); Revenue Act of 1934, § 141; Revenue Act of 1936, § 141.

²¹Compare Revenue Act of 1918, § 234 (a) (6); Revenue Act of 1935, § 102 (b); Revenue Act of 1936, § 26 (b). The effect of these changes is to offer some discouragement to holding companies.

²²See dissenting opinion of Justice Cardozo in United States v. Constantine, 296 U. S. 287, 299 (1935).

²³Adkins v. Children's Hospital, 261 U. S. 525 (1923).

²⁴Powell v. Pennsylvania, 127 U. S. 678 (1888).

legislative wisdom or stupidity. Somewhat different considerations are presented, however, when the controversy involves an adjustment between the spheres of the states and the nation. The Court has here viewed itself as the umpire, keeping the one from encroaching on the other. To the extent that the Court abandons this task, the umpiring must fall upon Congress or upon the states. Manifestly the task would fall upon Congress, and the states would occupy that position in our governmental scheme which Congress sees fit to allow them. This is not to suggest that Congress would have no regard for constitutional limitations, but it is to affirm that under the interpretations those limitations would receive the importance of the states as governmental units would doubtless shrivel very considerably. To some minds such a result is a consummation devoutly to be wished. To others it would be a major calamity. The record of the United States Supreme Court for a century places it very definitely in the latter group.

It is thus apparent that the United States Supreme Court has declared for two principles which, in a given case, may prove inconsistent. It has insisted that it should not look behind the face of a statute to ascertain what the purpose really is.²⁵ This is well named the doctrine of "objective constitutionality."²⁶ Such a qualified constitutionality must suggest that there is a catch in the situation somewhere. The Court has also protected vigorously the governmental area which it has deemed appropriate to the states. If the draftsmen are sufficiently clever in preparing a statute so that it reads like a tax statute and looks like a tax statute but, in effect, prohibits some activity which the Court believes rests within the jurisdiction of the states, then a Court desiring to maintain the aura of consistency is very definitely in a difficult situation. It may seize upon some drafting ineptitude which lets the face of the act suggest that which everybody knows, and thus escape. But drafting errors furnish a precarious base upon which to rest the grand structure of symmetry in the law. And, though the drafting is perfect, the whole process by which the Court refuses to see what is apparent to all is more than slightly suggestive of Kipling's delightful poem about the shut-eye sentry.²⁷

Numerous examples have been presented of national taxation which involves definite regulatory purposes. Viewing such cases with the eyes of our friend "the man in the street" and claiming his perquisites in the art

²⁵McCray v. United States, 195 U. S. 27 (1904).

²⁶See Cushman, *Social and Economic Control Through Federal Taxation* (1934) 18 MINN. L. REV. 757, 774. This article by Professor Cushman is most useful.

²⁷The reader will recall the poem telling of how enlisted men kept the drunkenness of an officer from being discovered. The following lines are quoted from the poem:

"There was me 'e 'd kissed in the sentry-box
As I 'ave not told in my song
But I took my oath, which were Bible truth
I 'adn't seen nothing wrong."

of psychoanalysis or his bluntness in ignoring legal refinements in order to view statutes in the light of their objectives and probable consequences, several convenient classes may be suggested. Revenue measures have brought about regulation by the imposition of a tax not so high as to be prohibitory.²⁸ This is most noticeable when Congress has chosen for special treatment activities deemed socially undesirable. The natural trend is to abandon such activities. Revenue measures have brought about regulation by means of the inclusion of provisions which have some fair relation to the collection of revenue, and which at the same time entail substantial control of conduct.²⁹ Again, non-revenue measures in the form of taxation have, in effect, prohibited certain activities, which Congress could have dealt with directly and without the aid of the tax club.³⁰ A fourth group would include non-revenue measures, from which no substantial income is to be anticipated and which deal with activities not entrusted to Congress by the Constitution. This group has presented some inconsistency in the results of the conflict between the form of a perfect tax and the substance of a Congressional regulation of matters which the Court has deemed reserved to the states.³¹

Oleomargarine has been the subject and occasion of much regulation by means of taxation. The simple method of protecting the dairy industry from this formidable competitor was adopted by Pennsylvania in the form of a direct prohibition. The statute was sustained³² in the days when "due process" did not involve the extent of judicial censorship which it later entailed. The dairy industry, failing to gain the desired protection from state legislatures generally, sought its objectives through Congress. There the industry gained a federal statute which imposed a small tax on oleomargarine and added thereto requirements as to marking and packing. This act was sustained,³³ but it proved not to be sufficiently effective to satisfy the dairymen. By a later statute the tax on uncolored oleomargarine was reduced to $\frac{1}{4}$ cent a pound yet the tax on yellow oleomargarine was raised to 10 cents a pound. The familiar battle cry of the oleomargarine forces has been: "The bread of the poor should not be eaten dry." Under this statute the poor were not required to eat their bread dry though they must abandon aesthetic considerations in eating it. Their bread would doubtless look as if it were spread with lard. The Court did not find the aesthetic interests of the poor sufficiently important to justify looking behind that which in form

²⁸Sonzinsky v. United States, 57 Sup. Ct. 554 (1937).

²⁹Nigro v. United States, 276 U. S. (1925).

³⁰Veazie Bank v. Fenno, 8 Wall. 533 (1869).

³¹McCray v. United States, 195 U. S. 27 (1904); Bailey v. Drexel Furniture Co., 259 U. S. 20 (1922).

³²Powell v Pennsylvania, 127 U. S. 678 (1888).

³³Ex parte Kollock, 165 U. S. 526 (1897).

was a tax. The act was valid,³⁴ and the principle previously announced in *Ex parte Kollock*, sustaining an act which "is on its face an act for levying taxes,"³⁵ was upheld.

The escape from the doctrine sustaining as a tax any act which on its face appears to be a tax has been found in scrutinizing the act in question and discovering that its face gives it away. A Court anxious to find a blemish on the face of the act has been readily able to do so. Thus the Federal statute seeking to end child labor by the tax route failed of judicial approval. A similar result was reached in the effort to control future trading in grain by the use of taxes. In both cases the Court declared that it could discern the true nature of the act in question from the face of the act.³⁶ It would seem that the Court could have seen, without much strain on the judicial eye, that the act in the *McCray* case taxing yellow oleomargarine forty times as much as uncolored oleomargarine was on its face a prohibition of the sale of yellow oleomargarine.

In comparing the Child Labor and the *McCray* cases it seems necessary that the difference between the policies involved be borne in mind. The economic struggle between the dairies and oleomargarine has never been deemed a matter of great public importance, nor has it presented a battlefield in the nationalist-states' rights controversy. The opposite has been true in the case of child labor. The Court had definitely reached the conclusion that the regulation of child labor was beyond the national power before the tax case was presented.³⁷ It would have been difficult for it to recede from this position merely because a new weapon was used in the attack. The history of the proposed Child Labor Amendment will illustrate the strength of opposition to national control. Thus far, the *Child Labor* cases have not been overruled by the people.³⁸

Following the notable failures in the *Child Labor* and *Grain Futures* cases the earlier belief that a statute which is carefully drawn in the form of a tax will be so held irrespective of its true nature has not prospered.³⁹

³⁴*McCray v. United States*, 195 U. S. 27 (1904).

³⁵165 U. S. 526, 536 (1897).

³⁶*Bailey v. Drexel Furniture Co.*, 259 U. S. 20, 36, 37 (1922); *Hill v. Wallace*, 259 U. S. 44, 66 (1922).

³⁷*Hammer v. Dagenhart*, 247 U. S. 251 (1918).

³⁸An interesting decision and opinion will be found in *Wise v. Chandler*, decided by the Court of Appeals of Kentucky on October 1, 1937, opinion by Judge Stites.

³⁹In *Magnano Co. v. Hamilton*, 292 U. S. 40 (1934), a unanimous court sustained the tax of the State of Washington which, in effect, prohibited the sale of oleomargarine. The Court, said at page 47:

"From the beginning of our government, the courts have sustained taxes although imposed with the collateral intent of effecting ulterior ends which, considered apart, were beyond the constitutional power of the lawmakers to realize by legislation directly addressed to their accomplishment. Those decisions, as the foregoing discussion discloses, rule the present case."

It is significant that the Court relied heavily on *Veazie Bank v. Fenno*, 8 Wall. 533, which does not support the above statement, in that the result in the *Veazie* Case might

The case of *United States v. Constantine*⁴⁰ presents a late instance in which the face of an act failed to sustain it. Here the Court was confronted with a federal enactment which imposed a "special excise tax of \$1000" in the case of persons carrying on business in intoxicating liquors contrary to state law. The Court found that the fact the sum was grossly disproportionate to the normal tax and that the exaction was for an act which was in violation of state law, indicated that there was no tax, but a penalty. These facts appeared on the face of the statutes, but there was no emphasis by the Court on facial blemishes. On the contrary the Court said:⁴¹

"If in reality a penalty it cannot be converted into a tax by so naming it, and we must ascribe to it the character disclosed by its purpose and operation regardless of its name."

Here is a denial in terms of the earlier rule of objective constitutionality.

The result in this case is the more striking in that, fairly considered, the statute does not involve a federal invasion of the states, that step which has been fatal to other legislation. This act might reasonably be considered as cooperation rather than encroachment. It is hard to see why Congress could not pick out this conduct for particular tax treatment, even though the federal levy did make the violation of state laws less attractive. There is no question about the right to tax an unlawful act, nor is there any question about the right of Congress to fix the rate of the tax. There was here a lesser burden on a lawful dealer and this made the act a penalty though it served to raise revenue from taxable sources.

On the outskirts of the commerce power when the words of the Constitution speak in no crisp or precise tones, the Court has sought assistance in the ideal of a wise division between the states and nation. In doing this it has looked for appropriate spheres for state action as a help in construing the powers of the national government. The sphere assigned to the states has been so unfortunate in certain instances, that it has resulted in the removal of some activities from the control of both national and state governments, leaving such activities in an area without law.⁴² Yet the basic idea of achieving the greatest advantage in the use of the two systems of government is obviously good, so long as the dual system is maintained.

have been reached under the powers of Congress over currency. It is also significant that under an earlier decision of the United States Supreme Court a state prohibition of the manufacture and sale of oleomargarine was sustained. *Powell v. Pennsylvania*, 127 U. S. 678 (1888). The statement in the *Magnamo* case may also be read in the light of the decision dealing with the Louisiana tax statute apparently designed to give the state government a substantial power over the press. *Grosjean v. American Press Co.*, 297 U. S. 233 (1936). The tax features failed to conceal the nature of the statute.
⁴⁰296 U. S. 287 (1935).

⁴¹*Ibid.*, p. 294.

⁴²See Ribble, *National and State Cooperation under the Commerce Clause* (1937) 37 COL. L. REV. 43.

Similar considerations may obtain in instances wherein the taxing power is invoked by name but where the substance of a tax is doubtful. Substantial regulation is manifestly permissible by means of taxation. Congress has the broadest discretion in selecting the subjects for taxation, and the rate of taxation is to be of its choosing. Again it is not a constitutional objection to taxation that it gradually destroys that on which it feeds. But when the statute in question becomes primarily a means of controlling details of life in the United States the power of Congress is construed in the light of the appropriate distribution of jurisdiction between the states and the nation. Here, as in the case of the commerce power, there is, in theory, no curtailment of that which is expressly granted. There is merely an aid for ascertaining what has been expressly granted.

The tax and rebate system in use in the Social Security Act is not within a discussion of the power to tax out of existence undesired activities.⁴³ However, the social security cases furnish a useful illustration.^{43a} An attack on the act was based on the theory that the method involved handed over to Congress, in effect, complete control of all particulars of life within the states. Let Congress impose a heavy tax and allow a rebate in the event the state passed a series of bills as dictated by Congress. Such bills, it was argued, would be promptly passed. The Court was very careful to deny that its decisions with reference to the Social Security Act necessarily implied the existence of any such power in Congress. On this point the Court said:⁴⁴

"It is one thing to impose a tax dependent upon the conduct of the taxpayers, or of the state in which they live, where the conduct to be stimulated or discouraged is unrelated to the fiscal need subserved by the tax in its normal operation, or to any other end *legitimately national*. . . . It is quite another thing to say that a tax will be abated upon the doing of an act that will satisfy the fiscal need, the tax and the alternative being approximate equivalents." (Italics supplied.)

The Social Security Act dealt with a situation demanding substantial uniformity throughout the United States. Without it many states would refrain from passing such legislation for the relief of the aged and unemployed "lest in laying such a toll upon their industries they would place themselves in a position of economic disadvantage with neighbors or competitors."⁴⁵ Again, without state cooperation the burden of the national government for relief would be tremendous. These and other considerations indicate clearly that social security is in no sense a matter of local concern or one which can best be handled by the state independently. Thus, the

⁴³49 STAT. 620. See *Charles C. Steward Machine Co. v. Davis*, 81 L. Ed. 779 (1937); *Helvering v. Davis*, 81 L. Ed. 804 (1937).

^{43a}[The Social Security cases are discussed at length by Prof. L. B. Orfield, *supra* p. 85—*Ed.*]

⁴⁴*Charles C. Steward Machine Co. v. Davis*, 81 L. Ed. 779, 790 (1937).

⁴⁵*Ibid.*, 788.

concept of a wise division between the nation and states again served in elucidating the scope of the national power.

In the use of this concept a departure from the idea of objective constitutionality is a fortunate one. The idea was never satisfying. The objective validity depended upon the aspects of the statute which were emphasized and upon the information the Court brought with it or was willing to use in the inspection. Anyone aware of the situation in the dairy industry could not fail to observe the true nature of the statute in the *McCray* case. The face of the statute spoke to one apprised of the facts, though it might be silent to one abysmally ignorant. A principle which demands that Courts must act as if ignorant of that which everyone knows, or which suggests that little children must labor in cotton mills because the draftsman of a statute was not adroit in a game of intellectual hide and seek, has nothing to commend it. The eagerness of the Court to be guided by the face of the Act has doubtless been based chiefly on two factors: a judicial hesitancy in substituting the will of the Court for that of Congress; and a feeling of reticence in looking into the "motives" of Congress. The former principle of judicial self denial has been invoked too seldom in American constitutional law. But when it is invoked it should be frankly declared and not rested on a sort of juristic make believe.

The second principle, it is believed, has gained some support from confusion involved in the use of the word "motive." Of course, if Congress has the power to act in a given situation, the motives behind the exercise are immaterial on the question of power. Obviously the inquiry into "motive" can be used only when there is doubt as to the federal power. Again the motives of Congress viewed by the Court in such cases as that presented under the Grain Futures Act are not the impulses of an aggregate of minds individually considered. The Court was not holding a statute bad because of any mental attitude of any man or of any group of men. What the Court is concerned with in this type of case is the motive or purpose of Congress in the sense of fairly contemplated results. It is the fair meaning and probable effect of the statute which is important in its validity and not the celebrations which led to its enactment. As long as judicial review obtains, it is hard to see how a court can shut its eyes to this factor.