

The Taxing Power

NOTE

The Constitution provides that 'The Congress shall have power to lay and collect taxes, duties, imposts and excises, to pay the debts and provide for the common defense and general welfare of the United States.' It is therefore apparent that Congress is authorized to 'provide' in some way or other 'for the general welfare.'

From the very beginning of our constitutional system there has been some controversy over the interpretation of this clause. Opinions on the subject reflect the many approaches to the problem of the proper functions of government in general and, more particularly, the proper functions of the Federal government. It has been a basic source from which a large amount of socio-economic legislation has derived. Accordingly, some of the history of this doctrinal struggle will serve to place *United States v. Butler*, decided in 1936, in its proper setting.

Three more or less distinct views of the meaning of the general welfare clause have at one time or another been advanced and supported by reputable authorities. The first of these is an extreme view. It declares that the general welfare clause is an entirely separate clause granting Congress a separate, substantive power to act as it may see fit for the common defense and general welfare. It would endow Congress with power to regulate many matters not specifically referred to in the Constitution. Logic does not support this interpretation. To accept it would be to ignore normal grammatical construction, since the words in question are part of a sentence dealing with the collection of taxes. Furthermore, it is unlikely that the framers of the Constitution would have enumerated the powers of the central government in such detail if a general, undefined power to legislate for the general welfare had been intended in addition to the powers enumerated.

The second view has come to be identified with James Madison; it approaches the opposite extreme. In a letter to Andrew Stevenson, 27 November 1830,¹ he described the general welfare clause as simply a qualification upon the taxing power and denied that it granted any separate, substantive power. Moreover, it should be construed as ancillary to the other specifically granted powers, i.e., Federal taxation may be imposed only for the collection of money to be expended for the execution of the other explicit powers of Congress.

In the *Federalist* Madison elaborated upon this position and elsewhere insisted that 'Money cannot be applied to the general welfare, otherwise than by application of it to some particular measure conducive to general welfare.'

¹ *The Records of the Federal Convention of 1787*, ed. by Max Farrand, New Haven, 1937, III, p. 483.

Whenever, therefore, money has been raised by the General Authority, and is to be applied to a particular measure, a question arises whether the particular measure be within the enumerated authorities vested in Congress. If it be, the money requisite for it may be applied to it; if it be not, no such application can be made.² Such an interpretation makes the scope of the Federal government's power to tax and spend coextensive with the scope of its other powers and renders the general welfare clause somewhat superfluous.

Intermediate between these two extreme views of the general welfare clause is the interpretation placed upon it by Alexander Hamilton and later adopted by Joseph Story. Favoring a strong central government, the Federalists considered Congress as having authority to tax and spend for anything that fell in the category of the general welfare and insisted that the only limitation upon this authority was that it must serve a public purpose.

In his famous *Report on Manufactures*, 1791, Hamilton wrote: 'It is therefore of necessity left to the discretion of the national legislature to pronounce upon the objects which concern the national welfare, and for which, under that description, an appropriation of money is requisite and proper. . . The only qualification of the generality of the phrase in question which seems to be admissible is this: That the object to which an appropriation of money is to be made must be general, and not local; its operation extending in fact or by possibility, throughout the Union, and not being confined to a particular spot.'³

Thus, while it confers no separate, substantive power of regulation upon Congress, the general welfare clause does amplify the taxing power and extends the purposes of spending beyond the narrow fields of the enumerated powers. As thus expressed, this Hamiltonian view, elaborated by Judge Story, was for the first time explicitly adopted by the United States Supreme Court in *United States v. Butler*. However, despite its acceptance of the Hamilton-Story doctrine, the Court found the Agricultural Adjustment Act of 1933 to be unconstitutional.⁴ The processing taxes imposed by the Act were held not to be taxes in the proper sense; instead, they were levies placed upon one class for the benefit of another. No decision was announced as to whether appropriations for the aid of agriculture would withstand the requirement that expenditures be for the general and not for the particular welfare. Furthermore, the Act was unconstitutional because it sought to regulate a matter (agricultural production) which fell within the reserved powers of the states.

UNITED STATES v. BUTLER

297 U.S. 1 (1936)

MR. JUSTICE ROBERTS delivered the opinion of the Court.

In this case we must determine whether certain provisions of the Agricultural Ad-

² *Works*, ed. by Gaillard Hunt, New York, 1906, vi, p. 357. See also the *Federalist*, No. 41.

³ *Works*, ed. by Henry Cabot Lodge, New York, 1904, iv, p. 70.

⁴ A new Agricultural Adjustment Act was passed in 1938 with objectives similar to those in the Act of 1933. Based upon the commerce power rather than the taxing power, it was upheld in *Mulford v. Smith*, *post*, p. 206.

justment Act, 1933, conflict with the Federal Constitution.

Title 1 of the statute is captioned 'Agricultural Adjustment.' Section 1 recites that an economic emergency has arisen, owing to disparity between the prices of agricultural and other commodities, with consequent destruction of farmers' purchasing power and breakdown in orderly exchange, which, in turn, have affected transactions in agricultural commodities with a national public interest and burdened and obstructed the normal currents of commerce, calling for the enactment of legislation.

Section 2 declares it to be the policy of Congress:

'To establish and maintain such balance between the production and consumption of agricultural commodities, and such marketing conditions therefor, as will re-establish 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.'

The base period, in the case of cotton, and all other commodities except tobacco, is designated as that between August, 1909, and July, 1914.

The further policies announced are an approach to the desired equality by gradual correction of present inequalities 'at as rapid a rate as is deemed feasible in view of the current consumptive demand in domestic and foreign markets,' and the protection of consumers' interest by readjusting farm production at such level as will not increase the percentage of the consumers' retail expenditures for agricultural commodities or products derived therefrom, which is returned to the farmer, above the percentage returned to him in the base period.

Section 8 provides, amongst other things, that 'In order to effectuate the declared policy,' the Secretary of Agriculture shall have power

'(1). To provide for reduction in the acreage or reduction in the production for market, or both, of any basic agricultural commodity, through agreements with producers or by other voluntary methods, and to provide for rental or benefit payments in connection therewith or upon that part of the production of any basic agricultural commodity required for domestic consumption, in such amounts as the Secretary deems fair and reasonable, to be paid out of any moneys available for such payments. . .'

'(2). To enter into marketing agreements with processors, associations of producers, and others engaged in the handling, in the current of interstate or foreign commerce of any agricultural commodity or product thereof, after due notice and opportunity for hearing to interested parties. . .'

'(3). To issue licenses permitting processors, associations of producers, and others to engage in the handling, in the current of interstate or foreign commerce, of any agricultural commodity or product thereof, or any competing commodity or product thereof.'

It will be observed that the Secretary is not required, but is permitted, if, in his uncontrolled judgment, the policy of the act will so be promoted, to make agreements with individual farmers for a reduction of acreage or production upon such terms as he may think fair and reasonable.

Section 9 (a) enacts:

'To obtain revenue for extraordinary expenses incurred by reason of the national economic emergency, there shall be levied processing taxes as hereinafter provided. When the Secretary of Agriculture determines that rental or benefit payments are to be made with respect to any basic agricultural commodity, he shall proclaim such determination, and a processing tax shall be in effect with respect to such commodity from the beginning of the marketing year therefor next following the date

of such proclamation. The processing tax shall be levied, assessed, and collected upon the first domestic processing of the commodity, whether of domestic production or imported, and shall be paid by the processor. . . .'

Section 9 (b) fixes the tax 'at such rate as equals the difference between the current average farm price for the commodity and the fair exchange value,' with power in the Secretary, after investigation, notice, and hearing, to readjust the tax so as to prevent the accumulation of surplus stocks and depression of farm prices.

Section 9 (c) directs that the fair exchange value of a commodity shall be such a price as will give that commodity the same purchasing power with respect to articles farmers buy as it had during the base period and that the fair exchange value and the current average farm price of a commodity shall be ascertained by the Secretary from available statistics in his department.

Section 12 (a) appropriates \$100,000,000 'to be available to the Secretary of Agriculture for administrative expenses under this title and for rental and benefit payments . . .'; and § 12 (b) appropriates the proceeds derived from all taxes imposed under the act 'to be available to the Secretary of Agriculture for expansion of markets and removal of surplus agricultural products . . . administrative expenses, rental and benefit payments, and refunds on taxes.'

Section 15 (d) permits the Secretary, upon certain conditions, to impose compensating taxes on commodities in competition with those subject to the processing tax.

By § 16 a floor tax is imposed upon the sale or other disposition of any article processed wholly or in chief value from any commodity with respect to which a processing tax is to be levied in amount equivalent to that of the processing tax which would be payable with respect to the commodity from which the article is

processed if the processing had occurred on the date when the processing tax becomes effective.

On July 14, 1933, the Secretary of Agriculture, with the approval of the President, proclaimed that he had determined rental and benefit payments should be made with respect to cotton; that the marketing year for that commodity was to begin August 1, 1933; and calculated and fixed the rates of processing and floor taxes on cotton in accordance with the terms of the act.

The United States presented a claim to the respondents as receivers of the Hoosac Mills Corporation for processing and floor taxes on cotton levied under §§ 9 and 16 of the act. The receivers recommended that the claim be disallowed. The District Court found the taxes valid and ordered them paid. Upon appeal the Circuit Court of Appeals reversed the order. . . .

First. At the outset the United States contends that the respondents have no standing to question the validity of the tax. The position is that the act is merely a revenue measure levying an excise upon the activity of processing cotton,—a proper subject for the imposition of such a tax,—the proceeds of which go into the federal treasury and thus become available for appropriation for any purpose. It is said that what the respondents are endeavoring to do is to challenge the intended use of the money pursuant to Congressional appropriation when, by confession, that money will have become the property of the Government and the taxpayer will no longer have any interest in it. *Massachusetts v. Mellon*, 262 U.S. 447, is claimed to foreclose litigation by the respondents or other taxpayers, as such, looking to restraint of the expenditure of government funds. That case might be an authority in the petitioners' favor if we were here concerned merely with a suit by a taxpayer to restrain the expenditure of the public moneys. It was there held that a taxpayer

of the United States may not question expenditures from its treasury on the ground that the alleged unlawful diversion will deplete the public funds and thus increase the burden of future taxation. Obviously the asserted interest of a taxpayer in the federal government's funds and the supposed increase of the future burden of taxation is minute and indeterminate. But here the respondents who are called upon to pay moneys as taxes, resist the exaction as a step in an unauthorized plan. This circumstance clearly distinguishes the 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.

The tax can only be sustained by ignoring the avowed purpose and operation of the act, and holding it a measure merely laying an excise upon processors to raise revenue for the support of government. Beyond cavil the sole object of the legislation is to restore the purchasing power of agricultural products to a parity with that prevailing in an earlier day; to take money from the processor and bestow it upon farmers who will reduce their acreage for the accomplishment of the proposed end, and, meanwhile to aid these farmers during the period required to bring the prices of their crops to the desired level.

The tax plays an indispensable part in the plan of regulation. As stated by the Agricultural Adjustment Administrator, it is 'the heart of the law'; a means of 'accomplishing one or both of two things intended to help farmers attain parity prices and purchasing power.' A tax auto-

matically goes into effect for a commodity when the Secretary of Agriculture determines that rental or benefit payments are to be made for reduction of production of that commodity. The tax is to cease when rental or benefit payments cease. The rate is fixed with the purpose of bringing about crop-reduction and price-raising. It is to equal the difference between the 'current average farm price' and 'fair exchange value.' It may be altered to such amount as will prevent accumulation of surplus stocks. If the Secretary finds the policy of the act will not be promoted by the levy of the tax for a given commodity, he may exempt it. (§ 11.) The whole revenue from the levy is appropriated in aid of crop control; none of it is made available for general governmental use. The entire agricultural adjustment program embodied in Title 1 of the act is to become inoperative when, in the judgment of the President, the national economic emergency ends; and as to any commodity he may terminate the provisions of the law, if he finds them no longer requisite to carrying out the declared policy with respect to such commodity. (§ 13.)

The statute not only avows an aim foreign to the procurement of revenue for the support of government, but by its operation shows the exaction laid upon processors to be the necessary means for the intended control of agricultural production. . . .

It is inaccurate and misleading to speak of the exaction from processors prescribed by the challenged act as a tax, or to say that as a tax it is subject to no infirmity. A tax, in the general understanding of the term, and as used in the Constitution, signifies an exaction for the support of the Government. The word has never been thought to connote the expropriation of money from one group for the benefit of another. We may concede that the latter sort of imposition is constitutional when imposed to effectuate regulation of a matter in which both groups are interested

and in respect of which there is a power of legislative regulation. But manifestly no justification for it can be found unless as an integral part of such regulation. The exaction cannot be wrested out of its setting, denominated an excise for raising revenue and legalized by ignoring its purpose as a mere instrumentality for bringing about a desired end. To do this would be to shut our eyes to what all others than we can see and understand. *Child Labor Tax Case*, 259 U.S. 20, 37.

We conclude that the act is one regulating agricultural production; that the tax is a mere incident of such regulation and that the respondents have standing to challenge the legality of the exaction. . .

Second. The Government asserts that even if the respondents may question the propriety of the appropriation embodied in the statute their attack must fail because Article 1, § 8 of the Constitution authorizes the contemplated expenditure of the funds raised by the tax. This contention presents the great and the controlling question in the case. We approach its decision with a sense of our grave responsibility to render judgment in accordance with the principles established for the governance of all three branches of the Government.

There should be no misunderstanding as to the function of this court in such a case. It is sometimes said that the court assumes a power to overrule or control the action of the people's representatives. This is a misconception. The Constitution is the supreme law of the land ordained and established by the people. All legislation must conform to the principles it lays down. When an act of Congress is appropriately challenged in the courts as not conforming to the constitutional mandate the judicial branch of the Government has only one duty,—to lay the article of the Constitution which is invoked beside the statute which is challenged and to decide whether the latter squares with the former. All the court does, or can do, is to an-

nounce its considered judgment upon the question. The only power it has, if such it may be called, is the power of judgment. This court neither approves nor condemns any legislative policy. Its delicate and difficult office is to ascertain and declare whether the legislation is in accordance with, or in contravention of, the provisions of the Constitution; and, having done that, its duty ends.

The question is not what power the Federal Government ought to have but what powers in fact have been given by the people. It hardly seems necessary to reiterate that ours is a dual form of government; that in every state there are two governments,—the state and the United States. Each State has all governmental powers save such as the people, by their Constitution, have conferred upon the United States, denied to the States, or reserved to themselves. The federal union is a government of delegated powers. It has only such as are expressly conferred upon it and such as are reasonably to be implied from those granted. In this respect we differ radically from nations where all legislative power, without restriction or limitation, is vested in a parliament or other legislative body subject to no restrictions except the discretion of its members.

Article 1, § 8, of the Constitution vests sundry powers in the Congress. But two of its clauses have any bearing upon the validity of the statute under review.

The third clause endows the Congress with power 'to regulate Commerce . . . among the several States.' Despite a reference in its first section to a burden upon, and an obstruction of the normal currents of commerce, the act under review does not purport to regulate transactions in interstate or foreign commerce. Its stated purpose is the control of agricultural production, a purely local activity, in an effort to raise the prices paid the farmer. Indeed, the Government does not attempt to uphold the validity of the act on the basis of

the commerce clause, which, for the purpose of the present case, may be put aside as irrelevant.

The clause thought to authorize the legislation,—the first,—confers upon the Congress power 'to lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the common Defense and general Welfare of the United States. . . .' It is not contended that this provision grants power to regulate agricultural production upon the theory that such legislation would promote the general welfare. The Government concedes that the phrase 'to provide for the general welfare' qualifies the power 'to lay and collect taxes.' The view that the clause grants power to provide for the general welfare, independently of the taxing power, has never been authoritatively accepted. Mr. Justice Story points out that if it were adopted 'it is obvious that under color of the generality of the words, to "provide for the common defence and general welfare," the government of the United States is, in reality, a government of general and unlimited powers, notwithstanding the subsequent enumeration of specific powers.' The true construction undoubtedly is that the only thing granted is the power to tax for the purpose of providing funds for payment of the nation's debts and making provision for the general welfare.

Nevertheless the Government asserts that warrant is found in this clause for the adoption of the Agricultural Adjustment Act. The argument is that Congress may appropriate and authorize the spending of moneys for the 'general welfare'; that the phrase should be liberally construed to cover anything conducive to national welfare; that decision as to what will promote such welfare rests with Congress alone, and the courts may not review its determination; and finally that the appropriation under attack was in fact for the general welfare of the United States.

The Congress is expressly empowered to lay taxes to provide for the general wel-

fare. Funds in the Treasury as a result of taxation may be expended only through appropriation. (Art. 1, § 9, cl. 7.) They can never accomplish the objects for which they were collected unless the power to appropriate is as broad as the power to tax. The necessary implication from the terms of the grant is that the public funds may be appropriated 'to provide for the general welfare of the United States.' These words cannot be meaningless, else they would not have been used. The conclusion must be that they were intended to limit and define the granted power to raise and to expend money. How shall they be construed to effectuate the intent of the instrument?

Since the foundation of the Nation sharp differences of opinion have persisted as to the true interpretation of the phrase. Madison asserted it amounted to no more than a reference to the other powers enumerated in the subsequent clause of the same section; that, as the United States is a government of limited and enumerated powers, the grant of power to tax and spend for the general national welfare must be confined to the enumerated legislative fields committed to the Congress. In this view the phrase is mere tautology, for taxation and appropriations are or may be necessary incidents of the exercise of any of the enumerated legislative powers. Hamilton, on the other hand, maintained the clause confers a power separate and distinct from those later enumerated, is not restricted in meaning by the grant of them, and Congress consequently has a substantive power to tax and to appropriate, limited only by the requirement that it shall be exercised to provide for the general welfare of the United States. Each contention has had the support of those whose views are entitled to weight. This court has noticed the question, but has never found it necessary to decide which is the true construction. Mr. Justice Story, in his Commentaries, espouses the Hamiltonian position. We shall not

review the writings of public men and commentators or discuss the legislative practice. Study of all these leads us to conclude that the reading advocated by Mr. Justice Story is the correct one. While, therefore, the power to tax is not unlimited, its confines are set in the clause which confers it, and not in those of § 8 which bestow and define the legislative powers of the Congress. It results that the power of Congress to authorize expenditure of public moneys for public purposes is not limited by the direct grants of legislative power found in the Constitution.

But the adoption of the broader construction leaves the power to spend subject to limitations.

As Story says:

'The Constitution was, from its very origin, contemplated to be the frame of a national government, of special and enumerated powers, and not of general and unlimited powers.'

Again he says:

'A power to lay taxes for the common defence and general welfare of the United States is not in common sense a general power. It is limited to those objects. It cannot constitutionally transcend them.'

That the qualifying phrase must be given effect all advocates of broad construction admit. Hamilton, in his well known Report on Manufactures, states that the purpose must be 'general, and not local.' Monroe, an advocate of Hamilton's doctrine, wrote: 'Have Congress a right to raise and appropriate the money to any and to every purpose according to their will and pleasure? They certainly have not.' Story says that if the tax be not proposed for the common defence or general welfare, but for other objects wholly extraneous, it would be wholly indefensible upon constitutional principles. And he makes it clear that the powers of taxation and appropriation extend only to matters of national, as distinguished from local welfare.

As elsewhere throughout the Constitu-

tion the section in question lays down principles which control the use of the power, and does not attempt meticulous or detailed directions. Every presumption is to be indulged in favor of faithful compliance by Congress with the mandates of the fundamental law. Courts are reluctant to adjudge any statute in contravention of them. But under our frame of government, no other place is provided where the citizen may be heard to urge that the law fails to conform to the limits set upon the use of a granted power. When such a contention comes here we naturally require a showing that by no reasonable possibility can the challenged legislation fall within the wide range of discretion permitted to the Congress. How great is the extent of that range, when the subject is the promotion of the general welfare of the United States, we hardly need remark. But, despite the breadth of the legislative discretion, our duty to hear and to render judgment remains. If the statute plainly violates the stated principle of the Constitution we must so declare.

We are not now required to ascertain the scope of the phrase 'general welfare of the United States' or to determine whether an appropriation in aid of agriculture falls within it. Wholly apart from that question, another principle embedded in our Constitution prohibits the enforcement of the Agricultural Adjustment Act. The act invades the reserved rights of the states. It is a statutory plan to regulate and control agricultural production, a matter beyond the powers delegated to the federal government. The tax, the appropriation of the funds raised, and the direction for their disbursement, are but parts of the plan. They are but means to an unconstitutional end.

From the accepted doctrine that the United States is a government of delegated powers, it follows that those not expressly granted, or reasonably to be implied from such as are conferred, are reserved to the states or to the people. To forestall any

suggestion to the contrary, the Tenth Amendment was adopted. The same proposition, otherwise stated, is that powers not granted are prohibited. None to regulate agricultural production is given, and therefore legislation by Congress for that purpose is forbidden.

It is an established principle that the attainment of a prohibited end may not be accomplished under the pretext of the exertion of powers which are granted.

'Should Congress, in the execution of its powers, adopt measures which are prohibited by the Constitution; or should Congress, under the pretext of executing its powers, pass laws for the accomplishment of objects not intrusted to the government; it would become the painful duty of this tribunal, should a case requiring such a decision come before it, to say that such an act was not the law of the land.' *McCulloch v. Maryland*, 4 Wheat. 316, 423.

'Congress cannot, under the pretext of executing delegated power, pass laws for the accomplishment of objects not entrusted to the Federal Government. And we accept as established doctrine that any provision of an act of Congress ostensibly enacted under power granted by the Constitution, not naturally and reasonably adapted to the effective exercise of such power but solely to the achievement of something plainly within power reserved to the States, is invalid and cannot be enforced.' *Linder v. United States*, 268 U.S. 5, 17.

These principles are as applicable to the power to lay taxes as to any other federal power. Said the court, in *McCulloch v. Maryland*, *supra*, 421:

'Let the end be legitimate, let it be within the scope of the Constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consist with the letter and spirit of the constitution, are constitutional.'

The power of taxation, which is ex-

pressly granted, may, of course, be adopted as a means to carry into operation another power also expressly granted. But resort to the taxing power to effectuate an end which is not legitimate, not within the scope of the Constitution, is obviously inadmissible. . .

In the *Child Labor Tax Case*, 259 U.S. 20 and in *Hill v. Wallace*, 259 U.S. 44, this court had before it statutes which purported to be taxing measures. But their purpose was found to be to regulate the conduct of manufacturing and trading, not in interstate commerce, but in the states,—matters not within any power conferred upon Congress by the Constitution—and the levy of the tax a means to force compliance. The court held this was not a constitutional use, but an unconstitutional abuse of the power to tax. In *Linder v. United States*, *supra*, we held that the power to tax could not justify the regulation of the practice of a profession, under the pretext of raising revenue. In *United States v. Constantine*, 296 U.S. 287, we declared that Congress could not, in the guise of a tax, impose sanctions for violation of state law respecting the local sale of liquor. These decisions demonstrate that Congress could not, under the pretext of raising revenue, lay a tax on processors who refuse to pay a certain price for cotton, and exempt those who agree so to do, with the purpose of benefiting producers.

Third. If the taxing power may not be used as the instrument to enforce a regulation of matters of state concern with respect to which the Congress has no authority to interfere, may it, as in the present case, be employed to raise the money necessary to purchase a compliance which the Congress is powerless to command? The Government asserts that whatever might be said against the validity of the plan if compulsory, it is constitutionally sound because the end is accomplished by voluntary co-operation. There are two sufficient answers to the contention. The regu-

lation is not in fact voluntary. The farmer, of course, may refuse to comply, but the price of such refusal is the loss of benefits. The amount offered is intended to be sufficient to exert pressure on him to agree to the proposed regulation. The power to confer or withhold unlimited benefits is the power to coerce or destroy. If the cotton grower elects not to accept the benefits, he will receive less for his crops; those who receive payments will be able to undersell him. The result may well be financial ruin. The coercive purpose and intent of the statute is not obscured by the fact that it has not been perfectly successful. 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. This progression only serves more fully to expose the coercive purpose of the so-called tax imposed by the present act. It is clear that the Department of Agriculture has properly described the plan as one to keep a non-co-operating minority in line. This is coercion by economic pressure. The asserted power of choice is illusory. . . .

But if the plan were one for purely voluntary co-operation it would stand no better so far as federal power is concerned. At best it is a scheme for purchasing with federal funds submission to federal regulation of a subject reserved to the states.

It is said that Congress has the undoubted right to appropriate money to executive officers for expenditure under contracts between the government and individuals; that much of the total expenditures is so made. But appropriations and expenditures under contracts for proper governmental purposes cannot justify contracts which are not within federal power. And contracts for the reduction of acreage and the control of production are outside the range of that power. An appropria-

tion to be expended by the United States under contracts calling for violation of a state law clearly would offend the Constitution. Is a statute less objectionable which authorizes expenditure of federal moneys to induce action in a field in which the United States has no power to intermeddle? The Congress cannot invade state jurisdiction to compel individual action; no more can it purchase such action.

We are referred to numerous types of federal appropriation which have been made in the past, and it is asserted no question has been raised as to their validity. We need not stop to examine or consider them. As was said in *Massachusetts v. Mellon, supra* (p. 487):

' . . . as an examination of the acts of Congress will disclose, a large number of statutes appropriating or involving the expenditure of moneys for non-federal purposes have been enacted and carried into effect.'

As the opinion points out, such expenditures have not been challenged because no remedy was open for testing their constitutionality in the courts.

We are not here concerned with a conditional appropriation of money, nor with a provision that if certain conditions are not complied with the appropriation shall no longer be available. By the Agricultural Adjustment Act the amount of the tax is appropriated to be expended only in payment under contracts whereby the parties bind themselves to regulation by the Federal Government. There is an obvious difference between a statute stating the conditions upon which moneys shall be expended and one effective only upon assumption of a contractual obligation to submit to a regulation which otherwise could not be enforced. Many examples pointing the distinction might be cited. We are referred to appropriations in aid of education, and it is said that no one has doubted the power of Congress to stipulate the sort of education for which money shall be expended. But an appropriation

to an educational institution which by its terms is to become available only if the beneficiary enters into a contract to teach doctrines subversive of the Constitution is clearly bad. An affirmance of the authority of Congress so to condition the expenditure of an appropriation would tend to nullify all constitutional limitations upon legislative power.

But it is said that there is a wide difference in another respect, between compulsory regulation of the local affairs of a state's citizens and the mere making of a contract relating to their conduct; that, if any state objects, it may declare the contract void and thus prevent those under the state's jurisdiction from complying with its terms. The argument is plainly fallacious. The United States can make the contract only if the federal power to tax and to appropriate reaches the subject matter of the contract. If this does reach the subject matter, its exertion cannot be displaced by state action. To say otherwise is to deny the supremacy of the laws of the United States; to make them subordinate to those of a State. This would reverse the cardinal principle embodied in the Constitution and substitute one which declares that Congress may only effectively legislate as to matters within federal competence when the States do not dissent.

Congress has no power to enforce its commands on the farmer to the ends sought by the Agricultural Adjustment Act. It must follow that it may not indirectly accomplish those ends by taxing and spending to purchase compliance. The Constitution and the entire plan of our government negative any such use of the power to tax and to spend as the act undertakes to authorize. It does not help to declare that local conditions throughout the nation have created a situation of national concern; for this is but to say that whenever there is a widespread similarity of local conditions, Congress may ignore constitutional limitations upon its own powers and usurp those reserved to the

states. If, in lieu of compulsory regulation of subjects within the states' reserved jurisdiction, which is prohibited, the Congress could invoke the taxing and spending power as a means to accomplish the same end, clause 1 of § 8 of Article 1 would become the instrument for total subversion of the governmental powers reserved to the individual states.

If the act before us is a proper exercise of the federal taxing power, evidently the regulation of all industry throughout the United States may be accomplished by similar exercises of the same power. It would be possible to exact money from one branch of an industry and pay it to another branch in every field of activity which lies within the province of the states. The mere threat of such a procedure might well induce the surrender of rights and the compliance with federal regulation as the price of continuance in business. A few instances will illustrate the thought.

Let us suppose Congress should determine that the farmer, the miner or some other producer of raw materials is receiving too much for his products, with consequent depression of the processing industry and idleness of its employes. Though, by confession, there is no power vested in Congress to compel by statute a lowering of the prices of the raw material, the same result might be accomplished, if the questioned act be valid, by taxing the producer upon his output and appropriating the proceeds to the processors, either with or without conditions imposed as the consideration for payment of the subsidy.

We have held in *Schechter Poultry Corp. v. United States*, 295 U.S. 495, that Congress has no power to regulate wages and hours of labor in a local business. If the petitioner is right, this very end may be accomplished by appropriating money to be paid to employers from the federal treasury under contracts whereby

they agree to comply with certain standards fixed by federal law or by contract.

Should Congress ascertain that sugar refiners are not receiving a fair profit, and that this is detrimental to the entire industry, and in turn has its repercussions in trade and commerce generally, it might, in analogy to the present law, impose an excise of two cents a pound on every sale of the commodity and pass the funds collected to such refiners, and such only, as will agree to maintain a certain price.

Assume that too many shoes are being manufactured throughout the nation; that the market is saturated, the price depressed, the factories running halftime, the employes suffering. Upon the principle of the statute in question Congress might authorize the Secretary of Commerce to enter into contracts with shoe manufacturers providing that each shall reduce his output and that the United States will pay him a fixed sum proportioned to such reduction, the money to make the payments to be raised by a tax on all retail shoe dealers or their customers.

Suppose that there are too many garment workers in the large cities; that this results in dislocation of the economic balance. Upon the principle contended for an excise might be laid on the manufacture of all garments manufactured and the proceeds paid to those manufacturers who agree to remove their plants to cities having not more than a hundred thousand population. Thus, through the asserted power of taxation, the federal government, against the will of individual states, might completely redistribute the industrial population.

A possible result of sustaining the claimed federal power would be that every business group which thought itself under-privileged might demand that a tax be laid on its vendors or vendees, the proceeds to be appropriated to the redress of its deficiency of income.

These illustrations are given, not to suggest that any of the purposes mentioned

are unworthy, but to demonstrate the scope of the principle for which the Government contends; to test the principle by its applications; to point out that, by the exercise of the asserted power, Congress would, in effect, under the pretext of exercising the taxing power, in reality accomplish prohibited ends. It cannot be said that they envisage improbable legislation. The supposed cases are no more improbable than would the present act have been deemed a few years ago.

Until recently no suggestion of the existence of any such power in the Federal Government has been advanced. The expressions of the framers of the Constitution, the decisions of this court interpreting that instrument, and the writings of great commentators will be searched in vain for any suggestion that there exists in the clause under discussion or elsewhere in the Constitution, the authority whereby every provision and every fair implication from that instrument may be subverted, the independence of the individual states obliterated, and the United States converted into a central government exercising uncontrolled police power in every state of the Union, superseding all local control or regulation of the affairs or concerns of the states.

Hamilton himself, the leading advocate of broad interpretation of the power to tax and to appropriate for the general welfare, never suggested that any power granted by the Constitution could be used for the destruction of local self-government in the states. Story countenances no such doctrine. It seems never to have occurred to them, or to those who have agreed with them, that the general welfare of the United States, (which has aptly been termed 'an indestructible Union, composed of indestructible States,') might be served by obliterating the constituent members of the Union. But to this fatal conclusion the doctrine contended for would inevitably lead. And its sole premise is that, though the makers of the Con-

stitution, in erecting the federal government, intended sedulously to limit and define its powers, so as to reserve to the states and the people sovereign power, to be wielded by the states and their citizens and not to be invaded by the United States, they nevertheless by a single clause gave power to the Congress to tear down the barriers, to invade the states' jurisdiction, and to become a parliament of the whole people, subject to no restrictions save such as are self-imposed. The argument when seen in its true character and in the light of its inevitable results must be rejected.

Since, as we have pointed out, there was no power in the Congress to impose the contested exaction, it could not lawfully ratify or confirm what an executive officer had done in that regard. Consequently the Act of 1935 does not affect the rights of the parties.

The judgment is

Affirmed.

MR. JUSTICE STONE, dissenting.

I think the judgment should be reversed. . .

[The] pivot on which the decision of the Court is made to turn . . . is that a levy unquestionably within the taxing power of Congress may be treated as invalid because it is a step in a plan to regulate agricultural production and is thus a forbidden infringement of state power. The levy is not any the less an exercise of taxing power because it is intended to defray an expenditure for the general welfare rather than for some other support of government. Nor is the levy and collection of the tax pointed to as effecting the regulation. While all federal taxes inevitably have some influence on the internal economy of the states, it is not contended that the levy of a processing tax upon manufacturers using agricultural products as raw material has any perceptible regulatory effect upon either their production or manufacture. The tax is

unlike the penalties which were held invalid in the *Child Labor Tax Case*, 259 U.S. 20, in *Hill v. Wallace*, 259 U.S. 44, in *Linder v. United States*, 268 U.S. 5, 17, and in *United States v. Constantine*, 296 U.S. 287, because they were themselves the instruments of regulation by virtue of their coercive effect on matters left to the control of the states. Here regulation, if any there be, is accomplished not by the tax but by the method by which its proceeds are expended, and would equally be accomplished by any like use of public funds, regardless of their source.

The method may be simply stated. Out of the available fund payments are made to such farmers as are willing to curtail their productive acreage, who in fact do so and who in advance have filed their written undertaking to do so with the Secretary of Agriculture. In saying that this method of spending public moneys is an invasion of the reserved powers of the states, the Court does not assert that the expenditure of public funds to promote the general welfare is not a substantive power specifically delegated to the national government, as Hamilton and Story pronounced it to be. It does not deny that the expenditure of funds for the benefit of farmers and in aid of a program of curtailment of production of agricultural products, and thus of a supposedly better ordered national economy, is within the specifically granted power. But it is declared that state power is nevertheless infringed by the expenditure of the proceeds of the tax to compensate farmers for the curtailment of their cotton acreage. Although the farmer is placed under no legal compulsion to reduce acreage, it is said that the mere offer of compensation for so doing is a species of economic coercion which operates with the same legal force and effect as though the curtailment were made mandatory by Act of Congress. In any event it is insisted that even though not coercive the expenditure of public funds to induce the recipients to

curtail production is itself an infringement of state power, since the federal government cannot invade the domain of the states by the 'purchase' of performance of acts which it has no power to compel.

Of the assertion that the payments to farmers are coercive, it is enough to say that no such contention is pressed by the taxpayer, and no such consequences were to be anticipated or appear to have resulted from the administration of the Act. The suggestion of coercion finds no support in the record or in any data showing the actual operation of the Act. Threat of loss, not hope of gain, is the essence of economic coercion. . .

It is upon the contention that state power is infringed by purchased regulation of agricultural production that chief reliance is placed. It is insisted that, while the Constitution gives to Congress, in specific and unambiguous terms, the power to tax and spend, the power is subject to limitations which do not find their origin in any express provision of the Constitution and to which other expressly delegated powers are not subject.

The Constitution requires that public funds shall be spent for a defined purpose, the promotion of the general welfare. Their expenditure usually involves payment on terms which will insure use by the selected recipients within the limits of the constitutional purpose. Expenditures would fail of their purpose and thus lose their constitutional sanction if the terms of payment were not such that by their influence on the action of the recipients the permitted end would be attained. The power of Congress to spend is inseparable from persuasion to action over which Congress has no legislative control. Congress may not command that the science of agriculture be taught in state universities. But if it would aid the teaching of that science by grants to state institutions, it is appropriate, if not necessary, that the grant be on the condition, incorporated in the Morrill Act, 12 Stat. 503, 26 Stat. 417, that

it be used for the intended purpose. Similarly it would seem to be compliance with the Constitution, not violation of it, for the government to take and the university to give a contract that the grant would be so used. It makes no difference that there is a promise to do an act which the condition is calculated to induce. Condition and promise are alike valid since both are in furtherance of the national purpose for which the money is appropriated. . .

The limitation now sanctioned must lead to absurd consequences. The government may give seeds to farmers, but may not condition the gift upon their being planted in places where they are most needed or even planted at all. The government may give money to the unemployed, but may not ask that those who get it shall give labor in return, or even use it to support their families. It may give money to sufferers from earthquake, fire, tornado, pestilence or flood, but may not impose conditions—health precautions designed to prevent the spread of disease, or induce the movement of population to safer or more sanitary areas. All that, because it is purchased regulation infringing state powers, must be left for the states, who are unable or unwilling to supply the necessary relief. The government may spend its money for vocational rehabilitation, 48 Stat. 389, but it may not, with the consent of all concerned, supervise the process which it undertakes to aid. It may spend its money for the suppression of the boll weevil, but may not compensate the farmers for suspending the growth of cotton in the infected areas. It may aid state reforestation and forest fire preventing agencies, 43 Stat. 653, but may not be permitted to supervise their conduct. It may support rural schools, 39 Stat. 929, 45 Stat. 1151, 48 Stat. 792, but may not condition its grant by the requirement that certain standards be maintained. It may appropriate moneys to be expended by the Reconstruction Finance Corporation 'to aid in financing agriculture, commerce

and industry,' and to facilitate 'the exportation of agricultural and other products.' Do all its activities collapse because, in order to effect the permissible purpose, in myriad ways the money is paid out upon terms and conditions which influence action of the recipients within the states, which Congress cannot command? The answer would seem plain. If the expenditure is for a national public purpose, that purpose will not be thwarted because payment is on condition which will advance that purpose. The action which Congress induces by payments of money to promote the general welfare, but which it does not command or coerce, is but an incident to a specifically granted power, but a permissible means to a legitimate end. If appropriation in aid of a program of curtailment of agricultural production is constitutional, and it is not denied that it is, payment to farmers on condition that they reduce their crop acreage is constitutional. It is not any the less so because the farmer at his own option promises to fulfill the condition.

That the governmental power of the purse is a great one is not now for the first time announced. Every student of the history of government and economics is aware of its magnitude and of its existence in every civilized government. Both were well understood by the framers of the Constitution when they sanctioned the grant of the spending power to the federal government, and both were recognized by Hamilton and Story, whose views of the spending power as standing on a parity with the other powers specifically granted, have hitherto been generally accepted.

The suggestion that it must now be curtailed by judicial fiat because it may be abused by unwise use hardly rises to the dignity of argument. So may judicial power be abused. 'The power to tax is the power to destroy,' but we do not, for that reason, doubt its existence, or hold that its efficacy is to be restricted by its incidental or collateral effects upon the

states. . . The power to tax and spend is not without constitutional restraints. One restriction is that the purpose must be truly national. Another is that it may not be used to coerce action left to state control. Another is the conscience and patriotism of Congress and the Executive. 'It must be remembered that legislators are the ultimate guardians of the liberties and welfare of the people in quite as great a degree as the courts.' Justice Holmes, in *Missouri, Kansas & Texas Ry. Co. v. May*, 194 U.S. 267, 270.

A tortured construction of the Constitution is not to be justified by recourse to extreme examples of reckless congressional spending which might occur if courts could not prevent—expenditures which, even if they could be thought to effect any national purpose, would be possible only by action of a legislature lost to all sense of public responsibility. Such suppositions are addressed to the mind accustomed to believe that it is the business of courts to sit in judgment on the wisdom of legislative action. Courts are not the only agency of government that must be assumed to have capacity to govern. Congress and the courts both unhappily may falter or be mistaken in the performance of their constitutional duty. But interpretation of our great charter of government which proceeds on any assumption that the responsibility for the preservation of our institutions is the exclusive concern of any one of the three branches of government, or that it alone can save them from destruction is far more likely, in the long run, 'to obliterate the constituent members' of 'an indestructible union of indestructible states' than the frank recognition that language, even of a constitution, may mean what it says: that the power to tax and spend includes the power to relieve a nationwide economic maladjustment by conditional gifts of money.

MR. JUSTICE BRANDEIS and MR. JUSTICE CARDOZO join in this opinion.

NOTE

Sonzinsky v. United States (1937) presents an instance of the use of the federal power to tax for purposes other than revenue. In general, the purpose of taxation is revenue; oftentimes, however, the tax power is used for purposes of prohibition and regulation.

In *Veazie Bank v. Fenno*¹ the Supreme Court upheld an act of Congress imposing a ten per cent tax upon the note issues of banks chartered by the states. The tax was a tax only in form; its intent was not to raise revenue but to drive out of circulation the paper money of the state banks and thus protect the note issues of the recently established national banks.² It was argued by counsel for the bank that the law was unconstitutional since so excessive a tax indicated a purpose on the part of Congress to destroy the franchise of the bank. 'The first answer to this,' said Chief Justice Chase, 'is that the judicial cannot prescribe to the legislative departments of the government limitations upon the exercise of its acknowledged powers. The power to tax may be exercised oppressively upon persons, but the responsibility of the legislature is not to the courts, but to the people by whom its members are elected.'³ The second answer was that under the Constitution Congress is given power to regulate the currency.

By taxing white phosphorus matches two cents per hundred matches, Congress eliminated their manufacture entirely.⁴ The use of white phosphorus in the making of matches was extremely dangerous to workers in the industry.

The White Phosphorus Match Act was never reviewed by the Supreme Court, but a roughly similar act was sustained by the Court. In the Oleomargarine Acts of 1886 and 1902, Congress sought to regulate the sale of oleomargarine colored to resemble butter. A tax of ten cents per pound upon colored oleomargarine was alleged to be so high as to make it impossible to sell such a product in competition with butter, and that the effect of the tax would be the destruction of the oleomargarine industry. In *McCray v. United States*,⁵ the Supreme Court speaking through Mr. Justice White sustained the tax. 'The act before us,' he said, 'is on its face an act for levying taxes, and although it may operate in so doing to prevent deception in the sale of oleomargarine as and for butter, its primary object must be assumed to be the raising of revenue.'⁶ As for the allegation that the tax was imposed not to raise revenue but for

¹ 8 Wall. 533 (1869).

² 12 Stat. 665 (1863); 14 Stat. 98, 146 (1866).

³ 8 Wall. 548.

⁴ 37 Stat. 81 (1912).

⁵ 195 U.S. 27 (1904).

⁶ *Ibid.* 51. Here Mr. Justice White is quoting Chief Justice Fuller in *In re Kollock*, 165 U.S. 526 (1897).

other purposes, Mr. Justice White said: "The decisions of this court from the beginning lend no support whatever to the assumption that the judiciary may restrain the exercise of lawful power on the assumption that a wrongful purpose or motive has caused the power to be exerted."⁷

The Harrison Narcotics Act⁸ of 1914 placed a special tax upon the manufacture, importation, and sale of opium or coca leaves or their compounds or derivatives. The act required every person subject to the tax to register with the Collector of Internal Revenue and forbade him to sell the drug or its derivatives except upon a written order of the person to whom the sale was made. Similar requirements were made as to sales upon prescriptions of a physician and as to the dispensing of such drugs directly to a patient by a physician. The purpose of the act was, obviously, the regulation and control of a known evil. One Doremus, a physician who had registered and paid the tax as required by the act, was indicted for supplying a known drug addict with heroin, not for the purpose of treating disease, and without requiring the written order prescribed by the act. Upon demurrer to the indictment, the District Court held the pertinent section of the act to be unconstitutional on the ground that it was not a revenue measure. The lower court also held it to be an invasion of the reserved powers of the states.

The District Court's decision was reversed, and the act sustained, by the Supreme Court in *United States v. Doremus*.⁹ 'If the legislation enacted,' said Mr. Justice Day, 'has some reasonable relation to the exercise of the taxing authority conferred by the Constitution, it cannot be invalidated because of the supposed motives which induced it. . . 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.'¹⁰ The act 'may not be declared unconstitutional,' he continued, '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.'¹¹

In the case which follows the Supreme Court had before it the question of the validity of the National Firearms Act¹² of 1934. This act, patterned closely upon the Harrison Narcotics Act, was a federal response to widespread interstate criminal activity. That the primary purpose of the act was not revenue is clear. Its object was to regulate and to control the traffic in firearms, in part through licensing the dealer.

SONZINSKY v. UNITED STATES

300 U.S. 506 (1937)

MR. JUSTICE STONE delivered the opinion of the Court.

The question for decision is whether § 2 of the National Firearms Act of June 26, 1934, c. 757, 48 Stat. 1236, 26 U.S.C., §§ 1132-1132q, which imposes a \$200 an-

⁷ *Ibid.* 56.

⁸ 38 Stat. 785.

⁹ 249 U.S. 86 (1919).

¹⁰ *Ibid.* 93-4.

¹¹ *Ibid.* 94.

¹² 48 Stat. 1236.

nual license tax on dealers in firearms, is a constitutional exercise of the legislative power of Congress.

Petitioner was convicted by the District Court for Eastern Illinois on two counts of an indictment, the first charging him with violation of § 2, by dealing in firearms without payment of the tax. On appeal the Court of Appeals set aside the conviction on the second count and affirmed on the first. 86 F. (2d) 486. On petition of the accused we granted certiorari, limited to the question of the constitutional validity of the statute in its application under the first count in the indictment.

Section 2 of the National Firearms Act requires every dealer in firearms to register with the Collector of Internal Revenue in the district where he carries on business, and to pay a special excise tax of \$200 a year. Importers or manufacturers are taxed \$500 a year. Section 3 imposes a tax of \$200 on each transfer of a firearm, payable by the transferor, and § 4 prescribes regulations for the identification of purchasers. The term 'firearm' is defined by § 1 as meaning a shotgun or a rifle having a barrel less than eighteen inches in length, or any other weapon, except a pistol or revolver, from which a shot is discharged by an explosive, if capable of being concealed on the person, or a machine gun, and includes a muffler or silencer for any firearm. As the conviction for non-payment of the tax exacted by § 2 has alone been sustained, it is unnecessary to inquire whether the different tax levied by § 3 and the regulations pertaining to it are valid. Section 16 declares that the provisions of the Act are separable. Each tax is on a different activity and is collectible independently of the other. Full effect may be given to the license tax standing alone, even though all other provisions are invalid. . .

In the exercise of its constitutional power to lay taxes, Congress may select the subjects of taxation, choosing some and

omitting others. See *Flint v. Stone Tracy Co.*, 220 U.S. 107, 158; *Nicol v. Ames*, 173 U.S. 509, 516; *Bromley v. McCaughn*, 280 U.S. 124. Its power extends to the imposition of excise taxes upon the doing of business. See *License Tax Cases*, 5 Wall. 462; *Spreckles Sugar Refining Co. v. McClain*, 192 U.S. 397, 412; *United States v. Doremus*, 249 U.S. 86, 94. Petitioner does not deny that Congress may tax his business as a dealer in firearms. He insists that the present levy is not a true tax, but a penalty imposed for the purpose of suppressing traffic in a certain noxious type of firearms, the local regulation of which is reserved to the states because not granted to the national government. To establish its penal and prohibitive character, he relies on the amounts of the tax imposed by § 2 on dealers, manufacturers and importers, and of the tax imposed by § 3 on each transfer of a 'firearm,' payable by the transferor. The cumulative effect on the distribution of a limited class of firearms, of relatively small value, by the successive imposition of different taxes, one on the business of the importer or manufacturer, another on that of the dealer, and a third on the transfer to a buyer, is said to be prohibitive in effect and to disclose unmistakably the legislative purpose to regulate rather than to tax.

The case is not one where the statute contains regulatory provisions related to a purported tax in such a way as has enabled this Court to say in other cases that the latter is a penalty resorted to as a means of enforcing the regulations. See *Child Labor Tax Case*, 259 U.S. 20, 35; *Hill v. Wallace*, 259 U.S. 44; *Carter v. Carter Coal Co.*, 298 U.S. 238. Nor is the subject of the tax described or treated as criminal by the taxing statute. Compare *United States v. Constantine*, 296 U.S. 287. Here § 2 contains no regulation other than the mere registration provisions, which are obviously supportable as in aid of a revenue purpose. On its face it is only a taxing

measure, and we are asked to say that the tax, by virtue of its deterrent effect on the activities taxed, operates as a regulation which is beyond the congressional power.

Every tax is in some measure regulatory. To some extent it interposes an economic impediment to the activity taxed as compared with others not taxed. But a tax is not any the less a tax because it has a regulatory effect, *United States v. Doremus*, *supra*, 93, 94; *Nigro v. United States*, 276 U.S. 332, 353, 354; *License Tax Cases*, *supra*; see *Child Labor Tax Case*, *supra*, 38; and it has long been established that an Act of Congress which on its face purports to be an exercise of the taxing power is not any the less so because the tax is burdensome or tends to restrict or suppress the thing taxed. *Veazie Bank v. Fenno*, 8 Wall. 533, 548; *McCray v. United States*, 195 U.S. 27, 60-61; cf. *Alaska Fish Co. v. Smith*, 255 U.S. 44, 48.

Inquiry into the hidden motives which may move Congress to exercise a power

constitutionally conferred upon it is beyond the competency of courts. *Veazie Bank v. Fenno*, *supra*; *McCray v. United States*, *supra*, 56-59; *United States v. Doremus*, *supra*, 93-94. . . They will not undertake, by collateral inquiry as to the measure of the regulatory effect of a tax, to ascribe to Congress an attempt, under the guise of taxation, to exercise another power denied by the Federal Constitution. *McCray v. United States*, *supra*. . .

Here the annual tax of \$200 is productive of some revenue.¹ We are not free to speculate as to the motives which moved Congress to impose it, or as to the extent to which it may operate to restrict the activities taxed. As it is not attended by an offensive regulation, and since it operates as a tax, it is within the national taxing power. . .

We do not discuss petitioner's contentions which he failed to assign as error below.

Affirmed.

¹The \$200 tax was paid by 27 dealers in 1934, and by 22 dealers in 1935. Annual Report of the Commissioner of Internal Revenue, Fiscal Year Ended 30 June 1935, pp. 129-31; *id.*, Fiscal Year ended 30 June 1936, pp. 139-41.

NOTE

In *State of New York v. United States*, decided in 1946, the Supreme Court upheld a non-discriminatory Federal excise tax on the sale, by the State of New York, of bottled mineral waters taken from State-owned springs.

The power to tax is a power exercised concurrently by both Federal and state governments. This power exercised by one government may not be used to destroy or to curtail the functions of the other. Thus, in *McCulloch v. Maryland*¹ the Supreme Court held invalid a state tax upon the note issues of the Second National Bank, on the ground that the tax was a tax upon a legitimate function of the Federal government. In *Dobbins v. Commissioners of Erie County*² the Court decided that the salary of a Federal officer, in this case the captain of a United States revenue cutter, was immune from state taxation.

Conversely, in *Collector v. Day*,³ the Supreme Court held the salary of a state judge to be immune from Federal taxation. The Constitution contains no express provision which prohibits the Federal government from taxing the instrumentalities of the states; nor does the Constitution forbid expressly state taxation of Federal instrumentalities. 'In both cases,' said Mr. Justice Nelson, 'the exemption rests upon necessary implication, and is upheld by the great law of self-preservation. . .'⁴ The Court cited *McCulloch v. Maryland* and *Dobbins v. Commissioners of Erie County*, and referred to *Veazie Bank v. Fenno*⁵ as a pertinent illustration of the position taken by John Marshall in the *McCulloch* case, namely, 'That the power to tax involves the power to destroy.'

Mr. Justice Bradley in his dissent in *Collector v. Day* anticipated future difficulties. 'In my judgment,' he declared, 'the limitation of the power of taxation in the general government, which the present decision establishes, will be found very difficult of control. Where are we to stop in enumerating the functions of the State governments which will be interfered with by Federal taxation? If a State incorporates a railroad to carry out its purposes of internal improvement, or a bank to aid its financial arrangements, reserving, perhaps, a percentage on the stock or profits, for the supply of its own treasury, will the bonds or stock of such an institution be free from Federal taxation? How can we now tell what the effect of this decision will be? I cannot but regard it as founded on a fallacy, and that it will lead to mischievous consequences.'⁶

Immunity from Federal taxation was extended in *Pollock v. Farmers' Loan & Trust Co.*,⁷ to interest derived from state and local bonds.

¹ 4 Wheat. 316 (1819).

² 16 Pet. 435 (1842).

³ 11 Wall. 113 (1871).

⁴ *Ibid.* 127.

⁵ 8 Wall. 533 (1869). See *ante*, p. 156.

⁶ 11 Wall. 113, 129.

⁷ 157 U.S. 429 (1895); 158 U.S. 601 (1895).

As a consequence of these parent decisions a large possible source of revenue was ruled to be exempt from Federal and state taxing powers. However, with increasing expansion of Federal and state governments, and with, during the depression, a decreasing area of taxation, the Federal government and the states sought new revenue sources and found them, in part, in the hitherto tax-exempt salaries of government employees.

The Supreme Court in *Helvering v. Gerhardt*, decided in 1938, approved the imposition of the Federal income tax upon the salaries of a construction engineer and two assistant general managers employed by the Port of New York Authority. Mr. Justice Stone, speaking for the Court, declared that 'we decide only that the present tax neither precludes nor threatens unreasonably to obstruct any function essential to the continued existence of the state government.'⁸

The implied constitutional immunity from income taxation of the salaries of officers or employees of the national or a state government or their instrumentalities set forth in *Collector v. Day* was expressly overruled in *Graves v. New York ex rel. O'Keefe*,⁹ decided in 1939. Here the Court was presented with the question whether a non-discriminatory state income tax on the salary of an employee of the Home Owners' Loan Corporation, a Federal instrumentality, unconstitutionally burdened the Federal government. 'Assuming, as we do,' said Mr. Justice Stone for the majority, 'that the Home Owners' Loan Corporation is clothed with the same immunity from state taxation as the government itself, we cannot say that the present tax on the income of its employees lays any unconstitutional burden upon it. All the reasons for refusing to imply a constitutional prohibition of federal income taxation of salaries of state employees, stated at length in the *Gerhardt* case, are of equal force when immunity is claimed from state income tax on salaries paid by the national government or its agencies.'¹⁰

An exception to the rule of *Collector v. Day* came in 1905 in *South Carolina v. United States*.¹¹ Here South Carolina had established by law dispensaries for the wholesale and retail sale of liquor. The dispensers made no profits for the profits were appropriated by the State; in other words, the State had entered the liquor business. In this case, South Carolina sued to recover the amounts paid for license taxes as required by Federal law. The State argued that the Federal government had no power to tax a function of the state. This argument was rejected by the Supreme Court. Suppose, queried the Court, with the thought of mingling profit and regulation the state should take possession of tobacco, oleomargarine, and all other objects of internal revenue; if one state finds such ordinary business profitable, other states may follow, and 'the whole body of internal revenue tax be thus stricken down.' 'If,' said Mr. Justice Brewer, 'the power of the state is carried to the extent suggested, and with it is relief from

⁸ 304 U.S. 405, 424.

⁹ 306 U.S. 466. *New York ex rel. Rogers v. Graves*, 299 U.S. 401 (1937), was also overruled. In this case, the salary of the general counsel of the Panama Railroad Co. had been held exempt from payment of a state income tax.

¹⁰ 306 U.S. 486.

¹¹ 199 U.S. 437 (1905).

all federal taxation, the national government would be largely crippled in its revenues.' In sustaining the tax, the Court declared that 'whenever a State engages in a business which is of a private nature that business is not withdrawn from the taxing power of the Nation.'¹² This is not always a simple rule to apply in practice, but the courts have held that the operation for profit by the state of a bank, a street-railway system, or a public wharf was not strictly and normally a governmental function. In connection with athletic contests in which the teams of the educational institutions of the state participated, Georgia claimed that the exaction of the Federal admissions tax unconstitutionally burdened a governmental function of the State. 'Where a State,' said Mr. Justice Roberts, 'embarks in a business which would normally be taxable, the fact that in doing so it is exercising a governmental power does not render the activity immune from federal taxation.'¹³

The following case provides a recent pronouncement on the subject of Federal taxation of state enterprise. As Mr. Justice Frankfurter says, 'on the basis of authority the case is quickly disposed of . . . but there comes a time when even the process of empiric adjudication calls for a more rational disposition than that the immediate case is not different from preceding cases.'¹⁴

NEW YORK ET AL. v. UNITED STATES

326 U.S. 572 (1946)

MR. JUSTICE FRANKFURTER announced the judgment of the Court and delivered an opinion in which MR. JUSTICE RUTLEDGE joined.

Section 615 (a) (5) of the 1932 Revenue Act, 47 Stat. 169, 264, imposed a tax on mineral waters. The United States brought this suit to recover taxes assessed against the State of New York on the sale of mineral waters taken from Saratoga Springs, New York. The State claims immunity from this tax on the ground that 'in the bottling and sale of the said waters the defendant State of New York was engaged in the exercise of a usual, traditional and essential governmental function.' The claim was rejected by the District Court and judgment went for the United States. 48 F. Supp. 15. The judgment was affirmed by the Circuit Court of Appeals for the Second Circuit. 140 F. 2d 608.

The strong urging of New York for further clarification of the amenability of States to the taxing power of the United States led us to grant certiorari. 322 U.S. 724. After the case was argued at the 1944 Term, reargument was ordered.

On the basis of authority the case is quickly disposed of. When States sought to control the liquor traffic by going into the liquor business, they were denied immunity from federal taxes upon the liquor business. *South Carolina v. United States*, 199 U.S. 437; *Ohio v. Helvering*, 292 U.S. 360. And in rejecting a claim of immunity from federal taxation when Massachusetts took over the street railways of Boston, this Court a decade ago said: 'We see no reason for putting the operation of a street railway [by a State] in a different category from the sale of liquors.' *Helvering v. Powers*, 293 U.S. 214, 227. We certainly see no reason for putting soft drinks

¹² *Ibid.* 463. See also *Ohio v. Helvering*, 292 U.S. 360 (1934).

¹³ *Allen v. Regents*, 304 U.S. 439, 451 (1938).

¹⁴ 326 U.S. 572, 574-5 (1946).

in a different constitutional category from hard drinks. See also *Allen v. Regents*, 304 U.S. 439.

One of the greatest sources of strength of our law is that it adjudicates concrete cases and does not pronounce principles in the abstract. But there comes a time when even the process of empiric adjudication calls for a more rational disposition than that the immediate case is not different from preceding cases. The argument pressed by New York and the forty-five other States who, as *amici curiae*, have joined her deserves an answer.

Enactments levying taxes made in pursuance of the Constitution are, as other laws are, 'the supreme Law of the Land.' Art. vi, Constitution of the United States; *Flint v. Stone Tracy Co.*, 220 U.S. 107, 153. The first of the powers conferred upon Congress is the power 'To lay and collect Taxes, Duties, Imposts and Excises. . . ' Art. I, § 8. By its terms the Constitution has placed only one limitation upon this power, other than limitations upon methods of laying taxes not here relevant: Congress can lay no tax 'on Articles exported from any State.' Art. I, § 9. Barring only exports, the power of Congress to tax 'reaches every subject.' *License Tax Cases*, 5 Wall. 462, 471. But the fact that ours is a federal constitutional system, as expressly recognized in the Tenth Amendment, carries with it implications regarding the taxing power as in other aspects of government. See, e.g., *Hopkins Savings Assn. v. Cleary*, 296 U.S. 315. Thus, for Congress to tax State activities while leaving untaxed the same activities pursued by private persons would do violence to the presuppositions derived from the fact that we are a Nation composed of States.

But the fear that one government may cripple or obstruct the operations of the other early led to the assumption that there was a reciprocal immunity of the instrumentalities of each from taxation by the other. It was assumed that there was an

equivalence in the implications of taxation by a State of the governmental activities of the National Government and the taxation by the National Government of State instrumentalities. This assumed equivalence was nourished by the phrase of Chief Justice Marshall that 'the power to tax involves the power to destroy.' *McCulloch v. Maryland*, 4 Wheat. 316, 431. To be sure, it was uttered in connection with a tax of Maryland which plainly discriminated against the use by the United States of the Bank of the United States as one of its instruments. What he said may not have been irrelevant in its setting. But Chief Justice Marshall spoke at a time when social complexities did not so clearly reveal as now the practical limitations of a rhetorical absolute. See Holmes, J., in *Long v. Rockwood*, 277 U.S. 142, 148, and *Panhandle Oil Co. v. Mississippi*, 277 U.S. 218, 223. The phrase was seized upon as the basis of a broad doctrine of inter-governmental immunity, while at the same time an expansive scope was given to what were deemed to be 'instrumentalities of government' for purposes of tax immunity. As a result, immunity was until recently accorded to all officers of one government from taxation by the other, and it was further assumed that the economic burden of a tax on any interest derived from a government imposes a burden on that government so as to involve an interference by the taxing government with the functioning of the other government. . . .

To press a juristic principle designed for the practical affairs of government to abstract extremes is neither sound logic nor good sense. And this Court is under no duty to make law less than sound logic and good sense. When this Court for the first time relieved State officers from a non-discriminatory Congressional tax, not because of anything said in the Constitution but because of the supposed implications of our federal system, Mr. Justice Bradley pointed out the invalidity of the

notion of reciprocal intergovernmental immunity. The considerations bearing upon taxation by the States of activities or agencies of the federal government are not correlative with the considerations bearing upon federal taxation of State agencies or activities. The federal government is the government of all the States, and all the States share in the legislative process by which a tax of general applicability is laid. 'The taxation by the State governments of the instruments employed by the general government in the exercise of its powers,' said Mr. Justice Bradley, 'is a very different thing. Such taxation involves an interference with the powers of a government in which other States and their citizens are equally interested with the State which imposes the taxation.' Since then we have moved away from the theoretical assumption that the National Government is burdened if its functionaries, like other citizens, pay for the upkeep of their State governments, and we have denied the implied constitutional immunity of federal officials from State taxes. . . .

In the meantime, cases came here, as we have already noted, in which States claimed immunity from a federal tax imposed generally on enterprises in which the State itself was also engaged. This problem did not arise before the present century, partly because State trading did not actively emerge until relatively recently, and partly because of the narrow scope of federal taxation. In *South Carolina v. United States*, 199 U.S. 437, immunity from a federal tax on a dispensary system, whereby South Carolina monopolized the sale of intoxicating liquors, was denied by drawing a line between taxation of the historically recognized governmental functions of a State, and business engaged in by a State of a kind which theretofore had been pursued by private enterprise. The power of the federal government thus to tax a liquor business conducted by the State was derived from an appeal to the Constitution 'in the light of condi-

tions surrounding at the time of its adoption.' *South Carolina v. United States*, *supra*, at 457. That there is a constitutional line between the State as government and the State as trader, was still more recently made the basis of a decision sustaining a liquor tax against Ohio. 'If a state chooses to go into the business of buying and selling commodities, its right to do so may be conceded so far as the Federal Constitution is concerned; but the exercise of the right is not the performance of a governmental function. . . . When a state enters the market place seeking customers it divests itself of its *quasi* sovereignty *pro tanto*, and takes on the character of a trader, so far, at least, as the taxing power of the federal government is concerned.' *Ohio v. Helvering*, *supra*, at 369. When the *Ohio* case was decided it was too late in the day not to recognize the vast extension of the sphere of government, both State and National, compared with that with which the Fathers were familiar. It could hardly remain a satisfactory constitutional doctrine that only such State activities are immune from federal taxation as were engaged in by the States in 1787. Such a static concept of government denies its essential nature. 'The science of government is the most abstruse of all sciences; if, indeed, that can be called a science which has but few fixed principles, and practically consists in little more than the exercise of a sound discretion, applied to the exigencies of the state as they arise. It is the science of experiment.' *Anderson v. Dunn*, 6 Wheat. 204, 226.

When this Court came to sustain the federal taxing power upon a transportation system operated by a State, it did so in ways familiar in developing the law from precedent to precedent. It edged away from reliance on a sharp distinction between the 'governmental' and the 'trading' activities of a State, by denying immunity from federal taxation to a State when it 'is undertaking a business enterprise of a sort

that is normally within the reach of the federal taxing power and is distinct from the usual governmental functions that are immune from federal taxation in order to safeguard the necessary independence of the State.' *Helvering v. Powers*, *supra*, at 227. But this likewise does not furnish a satisfactory guide for dealing with such a practical problem as the constitutional power of the United States over State activities. To rest the federal taxing power on what is 'normally' conducted by private enterprise in contradiction to the 'usual' governmental functions is too shifting a basis for determining constitutional power and too entangled in expediency to serve as a dependable legal criterion. The essential nature of the problem cannot be hidden by an attempt to separate manifestations of indivisible governmental powers. . .

The present case illustrates the sterility of such an attempt. New York urges that in the use it is making of Saratoga Springs it is engaged in the disposition of its natural resources. And so it is. But in doing so it is engaged in an enterprise in which the State sells mineral waters in competition with private waters, the sale of which Congress has found necessary to tap as a source of revenue for carrying on the National Government. To say that the States cannot be taxed for enterprises generally pursued, like the sale of mineral water, because it is somewhat connected with a State's conservation policy, is to invoke an irrelevance to the federal taxing power. Liquor control by a State certainly concerns the most important of a State's natural resources—the health and well-being of its people. . . If in its wisdom a State engages in the liquor business and may be taxed by Congress as others engaged in the liquor business are taxed, so also Congress may tax the States when they go into the business of bottling water as others in the mineral water business are taxed even though a State's sale of its mineral waters has relation to its conservation policy.

In the older cases, the emphasis was on immunity from taxation. The whole tendency of recent cases reveals a shift in emphasis to that of limitation upon immunity. They also indicate an awareness of the limited role of courts in assessing the relative weight of the factors upon which immunity is based. Any implied limitation upon the supremacy of the federal power to levy a tax like that now before us, in the absence of discrimination against State activities, brings fiscal and political factors into play. The problem cannot escape issues that do not lend themselves to judgment by criteria and methods of reasoning that are within the professional training and special competence of judges. Indeed the claim of implied immunity by States from federal taxation raises questions not wholly unlike provisions of the Constitution, such as that of Art. iv, § 4, guaranteeing States a republican form of government, see *Pacific States Tel. & Tel. Co. v. Oregon*, 223 U.S. 118, which this Court has deemed not within its duty to adjudicate.

We have already held that by engaging in the railroad business a State cannot withdraw the railroad from the power of the federal government to regulate commerce. *United States v. California*, 297 U.S. 175. See also *University of Illinois v. United States*, 289 U.S. 48. Surely the power of Congress to lay taxes has impliedly no less a reach than the power of Congress to regulate commerce. There are, of course, State activities and State-owned property that partake of uniqueness from the point of view of intergovernmental relations. These inherently constitute a class by themselves. Only a State can own a Statehouse; only a State can get income by taxing. These could not be included for purposes of federal taxation in any abstract category of taxpayers without taxing the State as a State. But so long as Congress generally taps a source of revenue by whomsoever earned and not uniquely capable of being earned only by a State,

the Constitution of the United States does not forbid it merely because its incidence falls also on a State. If Congress desires, it may of course leave untaxed enterprises pursued by States for the public good while it taxes like enterprises organized for private ends. . . . If Congress makes no such differentiation and, as in this case, taxes all vendors of mineral water alike, whether State vendors or private vendors, it simply says, in effect, to a State: 'You may carry out your own notions of social policy in engaging in what is called business, but you must pay your share in having a nation which enables you to pursue your policy.' After all, the representatives of all the States, having, as the appearance of the Attorneys General of forty-six States at the bar of this Court shows, common interests, alone can pass such a taxing measure and they alone in their wisdom can grant or withhold immunity from federal taxation of such State activities.

The process of Constitutional adjudication does not thrive on conjuring up horrible possibilities that never happen in the real world and devising doctrines sufficiently comprehensive in detail to cover the remotest contingency. Nor need we go beyond what is required for a reasoned disposition of the kind of controversy now before the Court. The restriction upon States not to make laws that discriminate against interstate commerce is a vital constitutional principle, even though 'discrimination' is not a code of specifics but a continuous process of application. So we decide enough when we reject limitations upon the taxing power of Congress derived from such untenable criteria as 'proprietary' against 'governmental' activities of the States, or historically sanctioned activities of government, or activities conducted merely for profit, and find no restriction upon Congress to include the States in levying a tax exacted equally from private persons upon the same subject matter.

Judgment affirmed.

MR. JUSTICE JACKSON took no part in the consideration or decision of this case.

[MR. JUSTICE RUTLEDGE concurred in the opinion of MR. JUSTICE FRANKFURTER and in the result and read a brief opinion. CHIEF JUSTICE STONE, MR. JUSTICE REED, MR. JUSTICE MURPHY and MR. JUSTICE BURTON concurred in the result, the CHIEF JUSTICE reading an opinion.]

MR. JUSTICE DOUGLAS, with whom MR. JUSTICE BLACK concurs, dissenting.

I

If *South Carolina v. United States*, 199 U.S. 437, is to stand, the present judgment would have to be affirmed. For I agree that there is no essential difference between a federal tax on South Carolina's liquor business and a federal tax on New York's mineral water business. Whether *South Carolina v. United States* reaches the right result is another matter. . . .

I do not believe *South Carolina v. United States* states the correct rule. A State's project is as much a legitimate governmental activity whether it is traditional, or akin to private enterprise, or conducted for profit. Cf. *Helvering v. Gerhardt*, 304 U.S. 405, 426-427. A State may deem it as essential to its economy that it own and operate a railroad, a mill, or an irrigation system as it does to own and operate bridges, street lights, or a sewage disposal plant. What might have been viewed in an earlier day as an improvident or even dangerous extension of state activities may today be deemed indispensable. But as Mr. Justice White said in his dissent in *South Carolina v. United States*, any activity in which a State engages within the limits of its police power is a legitimate governmental activity. Here a State is disposing of some of its natural resources. Tomorrow it may issue securities, sell power from its public power project, or manufacture fertilizer. Each is an exercise of its power of sovereignty. Must it pay the federal government for the privilege

of exercising that inherent power? If the Constitution grants it immunity from a tax on the issuance of securities, on what grounds can it be forced to pay a tax when it sells power or disposes of other natural resources?

II

One view, just announced, purports to reject the distinction which *South Carolina v. United States* drew between those activities of a State which are and those which are not strictly governmental, usual, or traditional. But it is said that a federal tax on a State will be sustained so long as Congress 'does not attempt to tax a State because it is a State.' Yet if that means that a federal real estate tax of general application (apportioned) would be valid if applied to a power dam owned by a State but invalid if applied to a Statehouse, the old doctrine has merely been poured into a new container. If, on the other hand, any federal tax on any state activity were sustained unless it discriminated against the State, then a constitutional rule would be fashioned which would undermine the sovereignty of the States as it has been understood throughout our history. Any such change should be accomplished only by constitutional amendment. The doctrine of state immunity is too intricately involved in projects which have been launched to be whittled down by judicial fiat.

III

Woodrow Wilson stated the starting point for me when he said that 'the States of course possess every power that government has ever anywhere exercised, except only those powers which their own constitutions or the Constitution of the United States explicitly or by plain inference withhold. They are the ordinary governments of the country; the federal government is its instrument only for particular purposes.' The Supremacy Clause, Article VI, clause 2, applies to federal laws within the powers delegated to Congress by the States. But it is antagonistic to the

very implications of our federal system to say that the power of Congress to lay and collect taxes, Article I, § 8, includes the power to tax any state activity or function so long as the tax does not discriminate against the States. As stated in *United States v. Railroad Co.*, 17 Wall. 322, 327-328, 'The right of the States to administer their own affairs through their legislative, executive, and judicial departments, in their own manner through their own agencies, is conceded by the uniform decisions of this court and by the practice of the Federal government from its organization. This carries with it an exemption of those agencies and instruments, from the taxing power of the Federal government. If they may be taxed lightly, they may be taxed heavily; if justly, oppressively. Their operation may be impeded and may be destroyed, if any interference is permitted. . .'

A tax is a powerful, regulatory instrument. Local government in this free land does not exist for itself. The fact that local government may enter the domain of private enterprise and operate a project for profit does not put it in the class of private business enterprise for tax purposes. Local government exists to provide for the welfare of its people, not for a limited group of stockholders. If the federal government can place the local governments on its tax collector's list, their capacity to serve the needs of their citizens is at once hampered or curtailed. The field of federal excise taxation alone is practically without limits. Many state activities are in marginal enterprises where private capital refuses to venture. Add to the cost of these projects a federal tax and the social program may be destroyed before it can be launched. In any case, the repercussions of such a fundamental change on the credit of the States and on their programs to take care of the needy and to build for the future would be considerable. To say the present tax will be sustained because it does not impair the

State's functions of government is to conclude either that the sale by the State of its mineral water is not a function of government or that the present tax is so slight as to be no burden. The former obviously is not true. The latter overlooks the fact that the power to tax lightly is the power to tax severely. The power to tax is indeed one of the most effective forms of regulation. And no more powerful instrument for centralization of government could be devised. For with the federal government immune and the States subject to tax, the economic ability of the federal government to expand its activities at the expense of the States is at once apparent. That is the result whether the rule of *South Carolina v. United States* be perpetuated or a new rule of discrimination be adopted. . .

The immunity of the States from federal taxation is no less clear because it is implied. The States on entering the Union surrendered some of their sovereignty. It was further curtailed as various Amendments were adopted. But the Tenth Amendment provides that 'The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.' The Constitution is a compact between sovereigns. The power of one sovereign to tax another is an innovation so startling as to require explicit authority if it is to be allowed. If the power of the federal government to tax the States is conceded, the reserved power of the States guaranteed by the Tenth Amendment does not give them the independence which they have always been assumed to have. They are relegated to a more servile status. They become subject to interference and control both in the functions which they exercise and the methods which they employ. They must pay the federal government for the privilege of exercising the powers of sovereignty guaranteed them by the Constitution, whether, as here, they are disposing of their natural resources, or tomorrow

they issue securities or perform any other acts within the scope of their police power.

Of course, the levying of the present tax does not curtail the business of the state government more than it does the like business of the citizen. But the same might be true in the case of many state activities which have long been assumed to be immune from federal taxation. When a municipality acquires a water system or an electric power plant and transmission facilities, it withdraws projects from the field of private enterprise. Is the tax immunity to be denied because a tax on the municipality would not curtail the municipality more than it would the prior private owner? Is the municipality to be taxed whenever it engages in an activity which once was in the field of private enterprise and therefore was once taxable? Every expansion of state activity since the adoption of the Constitution limits the reach of federal taxation if state immunity is recognized. Yet none would concede that the sovereign powers of the States were limited to those which they exercised in 1787. Nor can it be said that if the present tax is not sustained there will be withdrawn from the taxing power of the federal government a subject of taxation which has been traditionally within that power from the beginning. Not until *South Carolina v. United States* was it held that so-called business activities of a State were subject to federal taxation. That was after the turn of the present century. Thus the major objection to the suggested test is that it disregards the Tenth Amendment, places the sovereign States on the same plane as private citizens, and makes the sovereign States pay the federal government for the privilege of exercising the powers of sovereignty guaranteed them by the Constitution.

That this idea is hostile to the view of the Framers of the Constitution is evident from Hamilton's discussion of the taxing power of the federal government in the *Federalist*, Nos. 30-36 (*Sesquicentennial*

Ed. 1937) pp. 183-224. He repeatedly stated that the taxing powers of the States and of the federal government were to be 'concurrent'—'the only admissible substitute for an entire subordination, in respect to this branch of power, of the State authority to that of the Union' (pp. 202-3). He also stated, "The convention thought the concurrent jurisdiction preferable to that subordination; and it is evident that it has at least the merit of reconciling an indefinite constitutional power of taxation in the Federal government with an adequate and independent power in the States to provide for their own necessities' (p. 209). On such assurances could it possibly be thought that the States were so subordinate that their activities could be taxed by the federal government?

In *M'Culloch v. Maryland*, 4 Wheat. 316, the Court held unconstitutional a state tax on notes of the Bank of the United States. The statement of Chief Justice Marshall (pp. 429-30) is adequate to sustain the case for the reciprocal immunity of the state and federal governments:

'If we measure the power of taxation residing in a State, by the extent of sovereignty which the people of a single State possess, and can confer on its government, we have an intelligible standard, applicable to every case to which the power may be applied. We have a principle which leaves the power of taxing the people and property of a State unimpaired; which leaves to a State the command of all its resources, and which places beyond its reach, all those powers which are conferred by the people of the United States on the government of the Union, and all those means which are given for the purpose of carrying those powers into execution. We have a principle which is safe for the States, and safe for the Union. We

are relieved, as we ought to be, from clashing sovereignty; from interfering powers; from a repugnancy between a right in one government to pull down what there is an acknowledged right in another to build up; from the incompatibility of a right in one government to destroy what there is a right in another to preserve. We are not driven to the perplexing inquiry, so unfit for the judicial department, what degree of taxation is the legitimate use, and what degree may amount to the abuse of the power.'

IV

Those who agreed with *South Carolina v. United States* had the fear that an expanding program of state activity would dry up sources of federal revenues and thus cripple the national government. 199 U.S. pp. 454-5. That was in 1905. That fear is expressed again today when we have the federal income tax, from which employees of the States may not claim exemption on constitutional grounds. *Helvering v. Gerhardt*, *supra*. The fear of depriving the national government of revenue if the tax immunity of the States is sustained has no more place in the present decision than the spectre of socialism, the fear of which, said Holmes, 'was translated into doctrines that had no proper place in the Constitution or the common law.'

There is no showing whatsoever that an expanding field of state activity even faintly promises to cripple the federal government in its search for needed revenues. If the truth were known, I suspect it would show that the activity of the States in the fields of housing, public power and the like have increased the level of income of the people and have raised the standards of marginal or sub-marginal groups. Such conditions affect favorably, not adversely, the tax potential of the federal government.