

Social Security

NOTE

Three cases concerning the Social Security Act of 1935 were decided by the Supreme Court on 24 May 1937.¹ The Social Security Act was passed in answer to a demand for national assistance to protect individuals against the hazards of sickness, old-age and unemployment. After the 1929 depression it became more obvious that such misfortunes could not be met by either individual or family action or from local taxes. Temporary relief measures of the 1930-35 period were designed for recovery rather than permanent programs of insurance.

President Roosevelt in presenting the social security program to Congress pointed out that 'security was attained in the earlier days through the interdependence of members of families upon each other and of the families within a small community upon each other. The complexities of great communities and of organized industry make less real these simple means of security. Therefore, we are compelled to employ the active interest of the nation as a whole through government in order to encourage a greater security for each individual who composes it.'² It was advocated that the program be one of co-operation between the states and the national government. Some congressmen felt that social security measures should provide for the greatest variation in local needs and others doubted the constitutionality of a nation-wide program.

The Act provides for several types of social legislation and incorporates three distinct methods of taxation and administration each expressly separable from the other. By this division it was expected to avoid the criticisms of the AAA in *United States v. Butler*.³ If part of the Act were declared unconstitutional, the remainder would not be invalidated.⁴

1. The Old Age and Survivors Insurance (OASI) is a compulsory insurance plan provided for selected classes of wage-earners and administered directly by the federal government. A pay roll tax is collected from employers and employees, but with specific exemptions, notably agricultural workers, domestic servants, self-employed and those employed by governmental, educational, or charitable institutions. The amount of the tax was to be assessed gradually until it reached a

¹ *Steward Machine Company v. Davis*, 301 U.S. 548 (1937), *Helvering v. Davis*, 301 U.S. 619 (1937), and *Carmichael v. Southern Coal and Coke Company*, 301 U.S. 495 (1937), interpreting 49 Stat. 620 (1935).

² Message of the President of the United States, *Congressional Record*, 73rd Cong., 2d sess. (8 June 1934), p. 10,770. For further study of the background of social security legislation see Douglas, Paul H., *Social Security in the United States*, New York, 1936, and Meriam, Lewis, *Relief and Social Security*, Washington, 1946.

³ 297 U.S. 1 (1936). See *ante*, p. 142.

⁴ *Pollock v. Farmers' Loan and Trust Company*, 158 U.S. 601 (1895).

maximum of three per cent on employers and three per cent on employees in 1949. The tax, however, has been 'frozen' at one per cent.⁵ The persons who meet the qualifications for insurance are given a social security number, and a record of earnings and payment is kept by the federal government. If the insured complies with all provisions of the Act, he or certain of his dependents are entitled to benefits after age 65. This measure was held to be a valid exercise of the power to spend for the general welfare and the separable tax feature was held not to be arbitrary or unreasonable.⁶

2. Old Age Assistance, Aid to Dependent Children, Aid to the Blind, Maternal and Child Welfare Services, Vocational Rehabilitation and Public Health facilities are provided on a grant-in-aid basis in the Social Security Act. By this process the federal government, for example in the Old Age Assistance program, has made available to the states grants to be matched on a fifty-fifty basis up to \$40 a month for men and women over 65 years of age who meet certain minimum qualifications of residence and need. In a similar fashion other grants are provided to extend services in the other fields under specific regulations. Money for these services comes from the United States Treasury. The Act is administered by state and county agencies under federal supervision if the state is willing to match the grant.

The right of a taxpayer to sue the national government or its agents on an expenditure coming from the general funds of the Treasury was denied in *Frothingham v. Mellon*⁷ on the ground that there was no real case or controversy. In that case it was claimed that grants-in-aid for maternal and child welfare under the Sheppard-Towner Act⁸ were not a legal expenditure of the federal government since it did not 'provide for the general welfare.' The Court dismissed the case for lack of jurisdiction but argued in *obiter dictum* that to provide for maternal and child welfare might be considered to be for the general good of the nation. This decision limits the possibility of bringing the grant-in-aid provisions of the Social Security Act to the Court.

3. Unemployment Compensation Plans are encouraged under the Social Security Act by a system of tax credits or tax offsets extended to the states. Provision is made for a three per cent federal pay roll tax on all business enterprises employing eight or more persons.⁹ In states where an unemployment compensation law, which meets the approval of the Social Security Board has been passed, ninety per cent of this pay roll tax is credited to the state's unemployment compensation fund. By a grant-in-aid process further money is appropriated for the administration of the fund.

This provision then makes it possible for the state to retain a portion of the

⁵ A 1947 amendment to the act 'froze' the tax at 1 per cent through 1949, and requires its increase to 1½ per cent through 1950 and 1951, and to 2 per cent thereafter. Act of August 10, 1947, Public Law 379, ch. 510, 80th Cong. 1st. sess.

⁶ *Helvering v. Davis*, 301 U.S. 619 (1937).

⁷ 262 U.S. 447 (1923) decided with *Massachusetts v. Mellon*.

⁸ 42 Stat. 224 (1921).

⁹ Agricultural workers, government officials, and workers for educational and charitable organizations are not covered.

money collected from this federal pay roll tax if the state passes a satisfactory unemployment compensation law. If no law is passed in the state, the national government places the tax proceeds in its general funds. The states, however, pass the law, not the national government. The states' authority in the realm of general welfare is broader, thus better provision for individual state problems can be initiated. In *Carmichael v. Southern Coal and Coke Company*¹⁰ the Court held that the Alabama unemployment compensation law did not violate the due process and equal protection clauses of the Fourteenth Amendment nor had the law been adopted as a result of federal coercion amounting to a violation of the Tenth Amendment. The *Steward Machine Company* case was brought to question the legality of the federal tax.

STEWARD MACHINE CO. v. DAVIS

301 U.S. 548 (1937)

MR. JUSTICE CARDOZO delivered the opinion of the Court.

The validity of the tax imposed by the Social Security Act on employers of eight or more is here to be determined.

Petitioner, an Alabama corporation, paid a tax in accordance with the statute, filed a claim for refund with the Commissioner of Internal Revenue, and sued to recover the payment (\$46.14), asserting a conflict between the statute and the Constitution of the United States. Upon demurrer the District Court gave judgment for the defendant dismissing the complaint, and the Circuit Court of Appeals for the Fifth Circuit affirmed. . . . An important question of constitutional law being involved, we granted certiorari.

The Social Security Act (Act of August 14, 1935, c. 531, 49 Stat. 620, 42 U.S.C., c. 7 (Supp.)) is divided into eleven separate titles, of which only Titles IX and III are so related to this case as to stand in need of summary.

The caption of Title IX is "Tax on Employers of Eight or More." Every employer (with stated exceptions) is to pay for each calendar year 'an excise tax, with respect to having individuals in his employ,' the tax to be measured by prescribed percentages of the total wages payable by the

employer during the calendar year with respect to such employment. § 901. One is not, however, an 'employer' within the meaning of the act unless he employs eight persons or more. § 907 (a). There are also other limitations of minor importance. The term 'employment' too has its special definition, excluding agricultural labor, domestic service in a private home and some other smaller classes. § 907 (c). The tax begins with the year 1936, and is payable for the first time on January 31, 1937. During the calendar year 1936 the rate is to be one per cent, during 1937 two per cent, and three per cent thereafter. The proceeds, when collected, go into the Treasury of the United States like internal-revenue collections generally. § 905 (a). They are not earmarked in any way. In certain circumstances, however, credits are allowable. § 902. If the taxpayer has made contributions to an unemployment fund under a state law, he may credit such contributions against the federal tax, provided, however, that the total credit allowed to any taxpayer shall not exceed 90 per centum of the tax against which it is credited, and provided also that the state law shall have been certified to the Secretary of the Treasury by the Social Security Board as satisfying certain minimum cri-

¹⁰ 301 U.S. 495 (1937).

teria. § 902. . . Some of the conditions thus attached to the allowance of a credit are designed to give assurance that the state unemployment compensation law shall be one in substance as well as name. Others are designed to give assurance that the contributions shall be protected against loss after payment to the state. To this last end there are provisions that before a state law shall have the approval of the Board it must direct that the contributions to the state fund be paid over immediately to the Secretary of the Treasury to the credit of the 'Unemployment Trust Fund. . .' For the moment it is enough to say that the Fund is to be held by the Secretary of the Treasury, who is to invest in government securities any portion not required in his judgment to meet current withdrawals. He is authorized and directed to pay out of the Fund to any competent state agency such sums as it may duly requisition from the amount standing to its credit. § 904 (f).

Title III, which is also challenged as invalid, has the caption 'Grants to States for Unemployment Compensation Administration.' Under this title, certain sums of money are 'authorized to be appropriated' for the purpose of assisting the states in the administration of their unemployment compensation laws, the maximum for the fiscal year ending June 30, 1936 to be \$4,000,000, and \$49,000,000 for each fiscal year thereafter. § 301. No present appropriation is made to the extent of a single dollar. All that the title does is to authorize future appropriations. Actually only \$2,250,000 of the \$4,000,000 authorized was appropriated for 1936 (Act of Feb. 11, 1936, c. 49, 49 Stat. 1109, 1113) and only \$29,000,000 of the \$49,000,000 authorized for the following year. Act of June 22, 1936, c. 689, 49 Stat. 1597, 1605. The appropriations when made were not specifically out of the proceeds of the employment tax, but out of any moneys in the Treasury. Other sections of the title prescribe the method by which the pay-

ments are to be made to the state (§ 302) and also certain conditions to be established to the satisfaction of the Social Security Board before certifying the propriety of a payment to the Secretary of the Treasury. § 303. They are designed to give assurance to the Federal Government that the moneys granted by it will not be expended for purposes alien to the grant, and will be used in the administration of genuine unemployment compensation laws.

The assault on the statute proceeds on an extended front. Its assailants take the ground that the tax is not an excise; that it is not uniform throughout the United States as excises are required to be; that its exceptions are so many and arbitrary as to violate the Fifth Amendment; that its purpose was not revenue, but an unlawful invasion of the reserved powers of the states; and that the states in submitting to it have yielded to coercion and have abandoned governmental functions which they are not permitted to surrender.

The objections will be considered seriatim with such further explanation as may be necessary to make their meaning clear.

First. The tax, which is described in the statute as an excise, is laid with uniformity throughout the United States as a duty, an impost or an excise upon the relation of employment.

1. We are told that the relation of employment is one so essential to the pursuit of happiness that it may not be burdened with a tax. Appeal is made to history. From the precedents of colonial days we are supplied with illustrations of excises common in the colonies. They are said to have been bound up with the enjoyment of particular commodities. Appeal is also made to principle or the analysis of concepts. An excise, we are told, imports a tax upon a privilege; employment, it is said, is a right, not a privilege, from which it follows that employment is not subject to an excise. Neither the one appeal nor the other leads to the desired goal.

As to the argument from history: Doubtless there were many excises in colonial days and later that were associated, more or less intimately, with the enjoyment or the use of property. This would not prove, even if no others were then known, that the forms then accepted were not subject to enlargement. . . . But in truth other excises *were* known, and known since early times. Thus in 1695 (6 & 7 Wm. III. c. 6), Parliament passed an act which granted 'to His Majesty certain Rates and Duties upon Marriage, Births and Burials,' all for the purpose of 'carrying on the War against France with Vigour.' See *Opinion of the Justices*, 196 Mass. 603, 609, 85 N.E. 545. No commodity was affected there. The industry of counsel has supplied us with an apter illustration where the tax was not different in substance from the one now challenged as invalid. In 1777, before our Constitutional Convention, Parliament laid upon employers an annual 'duty' of 21 shillings for 'every male Servant' employed in stated forms of work. Revenue Act of 1777, 17 George III, c. 39. The point is made as a distinction that a tax upon the use of male servants was thought of as a tax upon a luxury. *Davis v. Boston & Maine R. Co.*, *supra*. It did not touch employments in husbandry or business. This is to throw over the argument that historically an excise is a tax upon the enjoyment of commodities. But the attempted distinction, whatever may be thought of its validity, is inapplicable to a statute of Virginia passed in 1780. There a tax of three pounds, six shillings and eight pence was to be paid for every male tithable above the age of twenty-one years (with stated exceptions), and a like tax for 'every white servant whatsoever, except apprentices under the age of twenty-one years.' 10 Henning's Statutes of Virginia, p. 244. Our colonial forbears knew more about ways of taxing than some of their descendants seem to be willing to concede.

The historical prop failing, the prop or

fancied prop of principle remains. We learn that employment for lawful gain is a 'natural' or 'inherent' or 'inalienable' right, and not a 'privilege' at all. But natural rights, so called, are as much subject to taxation as rights of less importance. An excise is not limited to vocations or activities that may be prohibited altogether. It is not limited to those that are the outcome of a franchise. It extends to vocations or activities pursued as of common right. What the individual does in the operation of a business is amenable to taxation just as much as what he owns, at all events if the classification is not tyrannical or arbitrary. 'Business is as legitimate an object of the taxing powers as property.' *Newton v. Aitchison*, 31 Kan. 151, 154 (per Brewer, J.); 1 Pac. 288. Indeed, ownership itself, as we had occasion to point out the other day, is only a bundle of rights and privileges invested with a single name. *Henneford v. Silas Mason Co.*, 300 U.S. 577. 'A state is at liberty, if it pleases, to tax them all collectively, or to separate the faggots and lay the charge distributively.' *Ibid.* Employment is a business relation, if not itself a business. It is a relation without which business could seldom be carried on effectively. The power to tax the activities and relations that constitute a calling considered as a unit is the power to tax any of them. The whole includes the parts. *Nashville, C. & St. L. Ry. Co. v. Wallace*, 288 U.S. 249, 267, 268.

The subject matter of taxation open to the power of the Congress is as comprehensive as that open to the power of the states, though the method of apportionment may at times be different. 'The Congress shall have power to lay and collect taxes, duties, imposts and excises.' Art. I, § 8. If the tax is a direct one, it shall be apportioned according to the census or enumeration. If it is a duty, impost, or excise, it shall be uniform throughout the United States. Together, these classes include every form of tax appropriate to

sovereignty. Cf. *Burnet v. Brooks*, 288 U.S. 378, 403, 405; *Brushaber v. Union Pacific R. Co.*, 240 U.S. 1, 12. Whether the tax is to be classified as an 'excise' is in truth not of critical importance. If not that, it is an 'impost' (*Pollock v. Farmers' Loan & Trust Co.*, 158 U.S. 601, 622, 625; *Pacific Insurance Co. v. Soule*, 7 Wall. 433, 445), or a 'duty' (*Veazie Bank v. Fenno*, 8 Wall. 533, 546, 547; *Pollock v. Farmers' Loan & Trust Co.*, 157 U.S. 429, 570; *Knowlton v. Moore*, 178 U.S. 41, 46). A capitation or other 'direct' tax it certainly is not. 'Although there have been from time to time intimations that there might be some tax which was not a direct tax nor included under the words "duties, imposts and excises," such a tax for more than one hundred years of national existence has as yet remained undiscovered, notwithstanding the stress of particular circumstances has invited thorough investigation into sources of powers.' *Pollock v. Farmers' Loan & Trust Co.*, 157 U.S. 429, 557. There is no departure from that thought in later cases, but rather a new emphasis of it. Thus, in *Thomas v. United States*, 192 U.S. 363, 370, it was said of the words 'duties, imposts and excises' that 'they were used comprehensively to cover customs and excise duties imposed on importation, consumption, manufacture and sale of certain commodities, privileges, particular business transactions, vocations, occupations and the like.' At times taxpayers have contended that the Congress is without power to lay an excise on the enjoyment of a privilege created by state law. The contention has been put aside as baseless. Congress may tax the transmission of property by inheritance or will, though the states and not Congress have created the privilege of succession. *Knowlton v. Moore*, *supra*, p. 58. Congress may tax the enjoyment of a corporate franchise, though a state and not Congress has brought the franchise into being. *Flint v. Stone Tracy Co.*, 220 U.S. 107, 155. The statute books of the states are strewn with

illustrations of taxes laid on occupations pursued of common right. We find no basis for a holding that the power in that regard which belongs by accepted practice to the legislatures of the states, has been denied by the Constitution to the Congress of the nation.

2. The tax being an excise, its imposition must conform to the canon of uniformity. There has been no departure from this requirement. According to the settled doctrine the uniformity exacted is geographical, not intrinsic. . .

Second. The excise is not invalid under the provisions of the Fifth Amendment by force of its exemptions.

The statute does not apply, as we have seen, to employers of less than eight. It does not apply to agricultural labor, or domestic service in a private home or to some other classes of less importance. Petitioner contends that the effect of these restrictions is an arbitrary discrimination vitiating the tax.

The Fifth Amendment unlike the Fourteenth has no equal protection clause. *La Belle Iron Works v. United States*, *supra*; *Brushaber v. Union Pacific R. Co.*, *supra*, p. 24. But even the states, though subject to such a clause, are not confined to a formula of rigid uniformity in framing measures of taxation. *Swiss Oil Corp. v. Shanks*, 273 U.S. 407, 413. They may tax some kinds of property at one rate, and others at another, and exempt others altogether. . . They may lay an excise on the operations of a particular kind of business, and exempt some other kind of business closely akin thereto. . . If this latitude of judgment is lawful for the states, it is lawful, *a fortiori*, in legislation by the Congress, which is subject to restraints less narrow and confining. . .

The classifications and exemptions directed by the statute now in controversy have support in considerations of policy and practical convenience that cannot be condemned as arbitrary. The classifications and exemptions would therefore be upheld

if they had been adopted by a state and the provisions of the Fourteenth Amendment were invoked to annul them. This is held in two cases passed upon today in which precisely the same provisions were the subject of attack, the provisions being contained in the Unemployment Compensation Law of the State of Alabama. *Carmichael v. Southern Coal & Coke Co.*, and *Carmichael v. Gulf States Paper Corp.*, ante, p. 495. The opinion rendered in those cases covers the ground fully. It would be useless to repeat the argument. The act of Congress is therefore valid, so far at least as its system of exemptions is concerned, and this though we assume that discrimination, if gross enough, is equivalent to confiscation and subject under the Fifth Amendment to challenge and annulment.

Third. The excise is not void as involving the coercion of the States in contravention of the Tenth Amendment or of restrictions implicit in our federal form of government.

The proceeds of the excise when collected are paid into the Treasury at Washington, and thereafter are subject to appropriation like public moneys generally. . . . No presumption can be indulged that they will be misapplied or wasted. Even if they were collected in the hope or expectation that some other and collateral good would be furthered as an incident, that without more would not make the act invalid. *Sonzinsky v. United States*, 300 U.S. 506. This indeed is hardly questioned. The case for the petitioner is built on the contention that here an ulterior aim is wrought into the very structure of the act, and what is even more important that the aim is not only ulterior, but essentially unlawful. In particular, the 90 per cent credit is relied upon as supporting that conclusion. But before the statute succumbs to an assault upon these lines, two propositions must be made out by the assailant. . . . There must be a showing in the first place that separated from the credit the revenue provisions are in-

capable of standing by themselves. There must be a showing in the second place that the tax and the credit in combination are weapons of coercion, destroying or impairing the autonomy of the states. The truth of each proposition being essential to the success of the assault, we pass for convenience to a consideration of the second, without pausing to inquire whether there has been a demonstration of the first.

To draw the line intelligently between duress and inducement there is need to remind ourselves of facts as to the problem of unemployment that are now matters of common knowledge. *West Coast Hotel Co. v. Parrish*, 300 U.S. 379. The relevant statistics are gathered in the brief of counsel for the Government. Of the many available figures a few only will be mentioned. During the years 1929 to 1936, when the country was passing through a cyclical depression, the number of the unemployed mounted to unprecedented heights. Often the average was more than 10 million; at times a peak was attained of 16 million or more. Disaster to the breadwinner meant disaster to dependents. Accordingly the roll of the unemployed, itself formidable enough, was only a partial roll of the destitute or needy. The fact developed quickly that the states were unable to give the requisite relief. The problem had become national in area and dimensions. There was need of help from the nation if the people were not to starve. It was too late today for the argument to be heard with tolerance that in a crisis so extreme the use of the moneys of the nation to relieve the unemployed and their dependents is a use for any purpose narrower than the promotion of the general welfare. . . . The *pavens patriae* has many reasons—fiscal and economic as well as social and moral—for planning to mitigate disasters that bring these burdens in their train.

In the presence of this urgent need for some remedial expedient, the question is to be answered whether the expedient

adopted has overleapt the bounds of power. The assailants of the statute say that its dominant end and aim is to drive the state legislatures under the whip of economic pressure into the enactment of unemployment compensation laws at the bidding of the central government. Supporters of the statute say that its operation is not constraint, but the creation of a larger freedom, the states and the nation joining in a co-operative endeavor to avert a common evil. Before Congress acted, unemployment compensation insurance was still, for the most part, a project and no more. Wisconsin was the pioneer. Her statute was adopted in 1931. At times bills for such insurance were introduced elsewhere, but they did not reach the stage of law. In 1935, four states (California, Massachusetts, New Hampshire and New York) passed unemployment laws on the eve of the adoption of the Social Security Act, and two others did likewise after the federal act and later in the year. The statutes differed to some extent in type, but were directed to a common end. In 1936, twenty-eight other states fell in line, and eight more the present year. But if states had been holding back before the passage of the federal law, inaction was not owing, for the most part, to the lack of sympathetic interest. Many held back through alarm lest, in laying such a toll upon their industries, they would place themselves in a position of economic disadvantage as compared with neighbors or competitors. . . . Two consequences ensued. One was that the freedom of a state to contribute its fair share to the solution of a national problem was paralyzed by fear. The other was that in so far as there was failure by the states to contribute relief according to the measure of their capacity, a disproportionate burden, and a mountainous one, was laid upon the resources of the Government of the nation.

The Social Security Act is an attempt to find a method by which all these public agencies may work together to a common

end. Every dollar of the new taxes will continue in all likelihood to be used and needed by the nation as long as states are unwilling, whether through timidity or for other motives, to do what can be done at home. At least the inference is permissible that Congress so believed, though retaining undiminished freedom to spend the money as it pleased. On the other hand fulfillment of the home duty will be lightened and encouraged by crediting the taxpayer upon his account with the Treasury of the nation to the extent that his contributions under the laws of the locality have simplified or diminished the problem of relief and the probable demand upon the resources of the fisc. Duplicated taxes, or burdens that approach them, are recognized hardships that government, state or national, may properly avoid. . . . If Congress believed that the general welfare would better be promoted by relief through local units than by the system then in vogue, the co-operating localities ought not in all fairness to pay a second time.

Who then is coerced through the operation of this statute? Not the taxpayer. He pays in fulfillment of the mandate of the local legislature. Not the state. Even now she does not offer a suggestion that in passing the unemployment law she was affected by duress. . . . For all that appears she is satisfied with her choice, and would be sorely disappointed if it were now to be annulled. The difficulty with the petitioner's contention is that it confuses motive with coercion. '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.' *Sonzinsky v. United States*, *supra*. In like manner every rebate from a tax when conditioned upon conduct is in some measure a temptation. But to hold that motive or temptation is equivalent to coercion is to plunge the law in endless difficulties. The outcome of such a doctrine is the acceptance of a philosophical

determinism by which choice becomes impossible. Till now the law has been guided by a robust common sense which assumes the freedom of the will as a working hypothesis in the solution of its problems. The wisdom of the hypothesis has illustration in this case. Nothing in the case suggests the exertion of a power akin to undue influence, if we assume that such a concept can ever be applied with fitness to the relations between state and nation. Even on that assumption the location of the point at which pressure turns into compulsion, and ceases to be inducement, would be a question of degree,—at times, perhaps, of fact. The point had not been reached when Alabama made her choice. We cannot say that she was acting, not of her unfettered will, but under the strain of a persuasion equivalent to undue influence, when she chose to have relief administered under laws of her own making, by agents of her own selection, instead of under federal laws, administered by federal officers, with all the ensuing evils, at least to many minds, of federal patronage and power. There would be a strange irony, indeed, if her choice were now to be annulled on the basis of an assumed duress in the enactment of a statute which her courts have accepted as a true expression of her will. . . . We think the choice must stand.

In ruling as we do, we leave many questions open. We do not say that a tax is valid, when imposed by act of Congress, if it is laid upon the condition that a state may escape its operation through the adoption of a statute unrelated in subject matter to activities fairly within the scope of national policy and power. No such question is before us. In the tender of this credit Congress does not intrude upon fields foreign to its function. The purpose of its intervention, as we have shown, is to safeguard its own treasury and as an incident to that protection to place the states upon a footing of equal opportunity. Drains upon its own resources are to be checked;

obstructions to the freedom of the states are to be leveled. It is one thing to impose a tax dependent upon the conduct of the taxpayers, or of the state in which they live, where the conduct to be stimulated or discouraged is unrelated to the fiscal need subserved by the tax in its normal operation, or to any other end legitimately national. The *Child Labor Tax Case*, 259 U.S. 20, and *Hill v. Wallace*, 259 U.S. 44, were decided in the belief that the statutes there condemned were exposed to that reproach. Cf. *United States v. Constantine*, 296 U.S. 287. It is quite another thing to say that a tax will be abated upon the doing of an act that will satisfy the fiscal need, the tax and the alternative being approximate equivalents. In such circumstances, if in no others, inducement or persuasion does not go beyond the bounds of power. We do not fix the outermost line. Enough for present purposes that wherever the line may be, this statute is within it. Definition more precise must abide the wisdom of the future.

Florida v. Mellon, 273 U.S. 12, supplies us with a precedent, if precedent be needed. What was in controversy there was § 301 of the Revenue Act of 1926, which imposes a tax upon the transfer of a decedent's estate, while at the same time permitting a credit, not exceeding 80 per cent, for 'the amount of any estate, inheritance, legacy, or succession taxes actually paid to any State or Territory.' Florida challenged that provision as unlawful. Florida had no inheritance taxes and alleged that under its constitution it could not levy any. 273 U.S. 12, 15. Indeed, by abolishing inheritance taxes, it had hoped to induce wealthy persons to become its citizens. See 67 Cong. Rec., Part 1, pp. 735, 752. It argued at our bar that 'the Estate Tax provision was not passed for the purpose of raising federal revenue' (273 U.S. 12, 14), but rather 'to coerce States into adopting estate or inheritance tax laws.' 273 U.S. 12, 13. In fact, as a result of the 80 per cent credit,

material changes of such laws were made in 36 states. In the face of that attack we upheld the act as valid. Cf. *Massachusetts v. Mellon*, 262 U.S. 447, 482; also Act of August 5, 1861, c. 45, 12 Stat. 292; Act of May 13, 1862, c. 66, 12 Stat. 384.

United States v. Butler, *supra*, is cited by petitioner as a decision to the contrary. There a tax was imposed on processors of farm products, the proceeds to be paid to farmers who would reduce their acreage and crops under agreements with the Secretary of Agriculture, the plan of the act being to increase the prices of certain farm products by decreasing the quantities produced. The court held (1) that the so-called tax was not a true one (pp. 56, 61), the proceeds being earmarked for the benefit of farmers complying with the prescribed conditions, (2) that there was an attempt to regulate production without the consent of the state in which production was affected, and (3) that the payments to farmers were coupled with coercive contracts (p. 73), unlawful in their aim and oppressive in their consequences. The decision was by a divided court, a minority taking the view that the objections were untenable. None of them is applicable to the situation here developed.

(a) The proceeds of the tax in controversy are not earmarked for a special group.

(b) The unemployment compensation law which is a condition of the credit has had the approval of the state and could not be a law without it.

(c) The condition is not linked to an irrevocable agreement, for the state at its pleasure may repeal its unemployment law, § 903 (a) (6), terminate the credit, and place itself where it was before the credit was accepted.

(d) The condition is not directed to the attainment of an unlawful end, but to an end, the relief of unemployment, for which nation and state may lawfully cooperate.

Fourth. The statute does not call for a

surrender by the states of powers essential to their quasi-sovereign existence.

Argument to the contrary has its source in two sections of the act. One section (903) defines the minimum criteria to which a state compensation system is required to conform if it is to be accepted by the Board as the basis for a credit. The other section (904) rounds out the requirement with complementary rights and duties. Not all the criteria or their incidents are challenged as unlawful. We will speak of them first generally, and then more specifically in so far as they are questioned.

A credit to taxpayers for payments made to a State under a state unemployment law will be manifestly futile in the absence of some assurance that the law leading to the credit is in truth what it professes to be. An unemployment law framed in such a way that the unemployed who look to it will be deprived of reasonable protection is one in name and nothing more. What is basic and essential may be assured by suitable conditions. The terms embodied in these sections are directed to that end. A wide range of judgment is given to the several states as to the particular type of statute to be spread upon their books. For anything to the contrary in the provision of this act they may use the pooled unemployment form, which is in effect with variations in Alabama, California, Michigan, New York, and elsewhere. They may establish a system of merit ratings applicable at once or to go into effect later on the basis of subsequent experience. Cf. §§ 909, 910. They may provide for employee contributions as in Alabama and California, or put the entire burden upon the employer as in New York. They may choose a system of unemployment reserve accounts by which an employer is permitted after his reserve has accumulated to contribute at a reduced rate or even not at all. This is the system which had its origin in Wisconsin. What they may not do, if they would earn the credit, is to depart from those standards which in the judg-

ment of Congress are to be ranked as fundamental. Even if opinion may differ as to the fundamental quality of one or more of the conditions, the difference will not avail to vitiate the statute. In determining essentials Congress must have the benefit of a fair margin of discretion. One cannot say with reason that this margin has been exceeded, or that the basic standards have been determined in any arbitrary fashion. In the event that some particular condition shall be found to be too uncertain to be capable of enforcement, it may be severed from the others, and what is left will still be valid.

We are to keep in mind steadily that the conditions to be approved by the Board as the basis for a credit are not provisions of a contract, but terms of a statute, which may be altered or repealed. § 903 (a) (6). The state does not bind itself to keep the law in force. It does not even bind itself that the moneys paid into the federal fund will be kept there indefinitely or for any stated time. On the contrary, the Secretary of the Treasury will honor a requisition for the whole or any part of the deposit in the fund whenever one is made by the appropriate officials. The only consequence of the repeal or excessive amendment of the statute, or the expenditure of the money, when requisitioned, for other than compensation uses or administrative expenses, is that approval of the law will end, and with it the allowance of a credit, upon notice to the state agency and an opportunity for hearing. § 903 (b) (c).

These basic considerations are in truth a solvent of the problem. Subjected to their test, the several objections on the score of abdication are found to be unreal.

Thus, the argument is made that by force of an agreement the moneys when withdrawn must be 'paid through public employment offices in the State or through such other agencies as the Board may approve.' § 903 (a) (1). But in truth there is no agreement as to the method of dis-

bursement. There is only a condition which the state is free at pleasure to disregard or to fulfill. Moreover, approval is not requisite if public employment offices are made the disbursing instruments. Approval is to be a check upon resort to 'other agencies' that may, perchance, be irresponsible. A state looking for a credit must give assurance that her system has been organized upon a base of rationality.

There is argument again that the moneys when withdrawn are to be devoted to specific uses, the relief of unemployment, and that by agreement for such payment the quasi-sovereign position of the state has been impaired, if not abandoned. But again there is confusion between promise and condition. Alabama is still free, without breach of an agreement, to change her system overnight. No officer or agency of the national Government can force a compensation law upon her or keep it in existence. No officer or agency of that Government, either by suit or other means, can supervise or control the application of the payments.

Finally and chiefly, abdication is supposed to follow from § 904 of the statute and the parts of § 903 that are complementary thereto. § 903 (a) (3). By these the Secretary of the Treasury is authorized and directed to receive and hold in the Unemployment Trust Fund all moneys deposited therein by a state agency for a state unemployment fund and to invest in obligations of the United States such portion of the Fund as is not in his judgment required to meet current withdrawals. We are told that Alabama in consenting to that deposit has renounced the plenitude of power inherent in her statehood.

The same pervasive misconception is in evidence again. All that the state has done is to say in effect through the enactment of a statute that her agents shall be authorized to deposit the unemployment tax receipts in the Treasury at Washington. Alabama Unemployment Act of Septem-

ber 14, 1935, § 10 (i). The statute may be repealed. § 903 (a) (6). The consent may be revoked. The deposits may be withdrawn. The moment the state commission gives notice to the depositary that it would like the moneys back, the Treasurer will return them. To find state destruction there is to find it almost anywhere. With nearly as much reason one might say that a state abdicates its functions when it places the state moneys on deposit in a national bank.

There are very good reasons of fiscal and governmental policy why a State should be willing to make the Secretary of the Treasury the custodian of the fund. His possession of the moneys and his control of investments will be an assurance of stability and safety in times of stress and strain. A report of the Ways and Means Committee of the House of Representatives, quoted in the margin, develops the situation clearly. Nor is there risk of loss or waste. The credit of the Treasury is at all times back of the deposit, with the result that the right of withdrawal will be unaffected by the fate of any intermediate investments, just as if a checking account in the usual form had been opened in a bank.

The inference of abdication thus dissolves in thinnest air when the deposit is conceived of as dependent upon a statutory consent, and not upon a contract effective to create a duty. By this we do not intimate that the conclusion would be different if a contract were discovered. Even sovereigns may contract without derogating from their sovereignty. . . . The states are at liberty, upon obtaining the consent of Congress, to make agreements with one

another. Constitution Art. 1, § 10, Par. 3. . . . We find no room for doubt that they may do the like with Congress if the essence of their statehood is maintained without impairment. Alabama is seeking and obtaining a credit of many millions in favor of her citizens out of the Treasury of the nation. Nowhere in our scheme of government—in the limitations express or implied of our federal constitution—do we find that she is prohibited from assenting to conditions that will assure a fair and just requital for benefits received. But we will not labor the point further. An unreal prohibition directed to an unreal agreement will not vitiate an act of Congress, and cause it to collapse in ruin.

Fifth. Title III of the act is separable from Title IX, and its validity is not at issue.

The essential provisions of that title have been stated in the opinion. As already pointed out, the title does not appropriate a dollar of the public moneys. It does no more than authorize appropriations to be made in the future for the purpose of assisting states in the administration of their laws, if Congress shall decide that appropriations are desirable. The title might be expunged, and Title IX would stand intact. Without a severability clause we should still be led to that conclusion. The presence of such a clause (§ 1103) makes the conclusion even clearer. . . .

The judgment is

Affirmed.

[Separate dissenting opinions were filed by JUSTICES McREYNOLDS, BUTLER and SUTHERLAND. J. VAN DEVANTER concurred with J. SUTHERLAND.]