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The Federal Social Security Act and Its Constitutional Aspects

DISCUSSION of the Social Security Act should be prefaced by the statement that it is "An Act" only in a purely technical sense. Like the Christmas wooden apple which opens to reveal a whole set of apples, large and small, the Social Security Act on analysis resolved itself into a series of measures. These enactments are of varying degrees of importance. Least significant is the authorization of an appropriation for vocational rehabilitation grants. This merely adds a few dollars to the funds which by an arrangement of nearly sixteen years' standing the federal government gives to the states to promote vocational training of crippled persons.¹ Most significant from both a sociological and a legal standpoint are the unemployment and "contributory" annuity provisions. These titles mark deliberate expansion of the social insurance method of protecting the wage earner which rests upon the theory that workers (with the aid of their employers) when well and at work should be required to contribute regularly toward a common fund or funds which will insure their maintenance when unable to work or to find employment. This security device, while familiar enough abroad, has been confined hitherto in this country^{1a} to the field of workmen's compensation or industrial accident insurance. Further the technical legal arrangements in the social insurance titles involve new uses of both the taxing and spending powers of Congress.

In this article, the provisions of the Social Security Act will be grouped according to subject matter and explained. In addition the arguments which can be advanced both in defense and in challenge of their constitutional propriety will be considered. To this discussion will be appended a special reference to the recent pertinent *A.A.A. Decision*.

The content of the Social Security Act is arranged under eleven titles captioned as follows:

¹ A regular annual appropriation is made under the Federal Rehabilitation Act passed in 1920 and administered by the Office of Education in the Department of the Interior. 41 STAT. (1920) 735, 29 U. S. C. A. (1927) § 31.

^{1a} A conspicuous exception to this generalization is Wisconsin, which passed an Unemployment Reserve Act in 1932. Wis. Stats. 1932, c. 20.

Title I. Grants to States for Old Age Assistance.

Title II. Federal Old Age Benefits.

Title III. Grants to States for Unemployment Compensation Administration.

Title IV. Grants to States for Aid to Dependent Children.

Title V. Grants to States for Maternal and Child Welfare.

Title VI. Public Health Work.

Title VII. Social Security Board.

Title VIII. Taxes with Respect to Employment.

Title IX. Tax on Employers of Eight or More.

Title X. Grants to States for Aid to the Blind.

Title XI. General Provisions.

Survey of these eleven titles show them to possess only one common factor. They all manifest in a variety of ways federal concern for victims of physical calamity or economic disaster, who up to this time have had no consideration from the central government except in periods of specific calamity or "emergency."

They all, moreover, evidence a crystallized conviction long entertained by those familiar with social welfare problems, that the local "parish" unit of assistance to the destitute handed down from the days of Queen Elizabeth is a totally unsuitable area of responsibility for the economic distress of today.

Except for these common factors the titles fall into three groups, the purely administrative titles which create the Social Security Board and set the limits of application of the Act, (Group I), the grant-in-aid titles, (Group II), and the social insurance titles, (Group III).

GROUP I

TITLES VII² AND XI³

The Social Security Board created in Title VII is made an independent Board of three members appointed by the President (with the advice and consent of the Senate) for rotating terms of six years. It has charge of grants-in-aid for administration of the state unemployment compensation schemes, the grants to state assistance for support of dependent aged, blind and children, and the federal old age annuity program. In addition to its administrative functions the Board is directed to undertake research with a view to recommending further legislative steps in the development of a rounded-out social insurance program.

The Act is made applicable to Alaska, Hawaii and the District of

² 49 STAT. (1935) 635, 42 U.S.C.A. (1935 Supp.) §§ 901-904.

³ 49 STAT. (1935) 647, 42 U.S.C.A. (1935 Supp.) §§ 1301-1305.

Columbia, as well as to the states, and the usual separability clause is included in order that all remaining sections may be preserved in the event of the invalidation by the court of any portions of the Act.

The Secretary of Labor and the Secretary of the Treasury as well as the Social Security Board are authorized to make such rules and regulations as will facilitate the performance of the duties which are imposed upon them in the Social Security Act.

GROUP II

TITLES I,⁴ III,⁵ IV,⁶ V,⁷ VI⁸ AND X⁹

The Grant-in-Aid group comprise six titles (I, III, IV, V, VI, and X). These authorize federal grants to the states to assist them in financing stipulated state activities. The grant-in-aid of administration of state unemployment compensation schemes (Title III) is part of the unemployment compensation program, and will be discussed additionally in connection with Title IX. The other grants are in aid of activities which have long been established by tradition as proper functions of the state, to-wit: general and special health services, child welfare activities, and assistance to the needy aged, dependent children and indigent blind persons. No new taxes were planned for the financing of these grants.

In two cases no equivalent state expenditure is required as a condition for the receipt of federal money. These are the grants for improvement of general public health services,¹⁰ and for development of child welfare agencies in rural areas.¹¹ Administration of the former is placed in the hands of the Surgeon General.¹² The federal offer for promotion of child welfare is stated to be for use "on the basis of plans developed jointly by the state agencies and the United States Children's Bureau" and control of the allotments is placed in the hands of the Secretary of Labor.¹³

In addition to the child welfare appropriations two other grants-in-aid are to be administered by the Children's Bureau: the grant-in-aid of maternal and child health,¹⁴ and the grant for use in medical and

⁴ 49 STAT. (1935) 619, 42 U. S. C. A. (1935 Supp.) §§ 301-306.

⁵ 49 STAT. (1935) 626, 42 U. S. C. A. (1935 Supp.) §§ 501-503.

⁶ 49 STAT. (1935) 627, 42 U. S. C. A. (1935 Supp.) §§ 601-606.

⁷ 49 STAT. (1935) 629, 42 U. S. C. A. (1935 Supp.) §§ 701-731.

⁸ 49 STAT. (1935) 634, 42 U. S. C. A. (1935 Supp.) §§ 801-803.

⁹ 49 STAT. (1935) 645, 42 U. S. C. A. (1935 Supp.) §§ 1201-1206.

¹⁰ *Supra* note 8.

¹¹ 49 STAT. (1935) 633, 42 U. S. C. A. (1935 Supp.) § 721.

¹² Approval of the Secretary of the Treasury is also required due to the fact that the federal public health service is a branch of the Department of the Treasury.

¹³ The Children's Bureau is a part of the Department of Labor, and the Bureau is expected to administer the grant.

¹⁴ Similar to that set up by the Sheppard-Towner Act in 1921, 42 STAT. (1921) 224, and discontinued in 1929, 44 STAT. (1929) 1024.

other remedial services for crippled children. Money from these grants is available only to states with "approved" plans and in both cases every federal dollar must be matched by equivalent expenditure from the state treasury in furtherance of the approved plan.

Administration of four grants-in-aid is vested in the newly created Social Security Board. These are the grants for:

- (1) Unemployment Compensation Administration (Title III).
- (2) Old Age Assistance (Title I).
- (3) Assistance to Dependent Children (Title IV).
- (4) Assistance to the Needy Blind (Title X).

Thus, the newly created Security Board is given control of the administrative grant for the state unemployment compensation schemes promoted in Title IX of the Act, and also of all the grants which are directed at economic support of dependent groups.

In recognition of the probability that few state unemployment compensation laws would be operative before the summer of 1936, substantial appropriation for the administration grant was authorized for the year beginning June 30th, 1936, only four million dollars being permitted for the first half of this year.

A relatively small sum was set aside for aid to the blind (three million dollars), while aid to dependent children was empowered to receive approximately twenty-five million dollars. Much the largest immediate expenditures, however, were anticipated in the field of old age assistance, for which there was authorized an initial appropriation which is greater than the sum total of all the other grants-in-aid.

Since the first authorized appropriations¹⁵ were defeated by the Huey Long filibuster in the last days of the 1935 Congressional session, the functioning of the whole grant-in-aid program has of course been delayed. Moreover, as it is contemplated that the grant from Title III shall suffice to cover *all* administrative expenses,¹⁶ this failure to appropriate has greatly handicapped the states¹⁷ which already have operative unemployment compensation laws.

The Federal Old Age Assistance Grant is available to states which have secured approval from the Social Security Board of their old age relief plans. The federal offer is payment of one-half the amount which the state expends in maintaining its needy aged (other than those who are provided for in public institutions) with the limitation that any-

¹⁵ There must be two enactments for Congressional appropriation, one an authorizing statute, one an "appropriation" statute.

¹⁶ Since it is provided under Title IX that *all* moneys received by an unemployment compensation scheme shall be used exclusively for unemployment benefits.

¹⁷ Nine states (including California) and the District of Columbia, have enacted Unemployment Compensation Laws.

thing paid out by the state for any one "pensioner" in excess of thirty dollars a month will not be counted in computing the federal grant.

In deference to the wide regional variations both in costs and in standards of living, the minimum amount of assistance is not set at any definite figure. Each state is left free to determine the actual amount the individual "pensioner" shall receive. A series of conditions are listed, however, which must be met by a state plan in order to qualify for approval. The more important of these conditions are:

1. Financial participation by the state.
2. Establishment of a state supervisory administrative authority.
3. Right of appeal of applicants for assistance to this state authority.
4. An administrative plan which is deemed satisfactory by the federal administrator.
5. The granting of assistance at least to all citizens of qualifying age (seventy years until 1940, sixty-five years thereafter) who have resided in the state for five years or more within the nine years immediately preceding application and who are without reasonable subsistence income.

The same discretion in determining the actual amount of aid to be granted in the individual case, as is allowed in the Old Age Assistance arrangements, is permitted any state which decides to draw on the grants-in-aid of dependent children and needy blind persons. Similar conditions, moreover, must be met.¹⁸ As in the grant for the aged, the federal government will match dollar for dollar state expenditures for the indigent blind. More, however, is asked of the state in the case of the dependent children grant, for the government here will supply only one-third of the state's total outlay.

No constitutional problem other than that involved in *Massachusetts v. Mellon* and *Frothingham v. Mellon*¹⁹ is presented by the grants-in-aid program. In both of these cases, one of which was brought by a taxpayer and one by a state, it was sought to enjoin the enforcement of the Shepard-Towner Maternity Act.²⁰ By that enactment the federal government for the admitted purpose of reducing maternal and infant mortality, offered grants of money to such of the states as should choose to comply with stipulated conditions. The Supreme Court refused in each case to entertain the suits on the ground that neither a state nor a taxpayer had any standing to ask for a judicial review of a federal appropriation statute. The Court reminded the petitioners that under the

¹⁸ In the case of dependent children, however, the state may not refuse aid if there has been a year's residence in contrast to the "five years out of the preceding nine" requirement permitted in assistance plan for the aged and blind.

¹⁹ (1922) 262 U.S. 447.

²⁰ *Supra* note 14. Similar to Title V, part 1, of the Social Security Act.

Constitution judicial power to review Congressional legislation arises only at the solicitation of parties whose rights are invaded by such legislation.

The citizen petitioner complaining as a taxpayer of what she claimed was an unconstitutional use of federal funds was held to have an interest in the general funds of the treasury which was too minute and indeterminable to furnish a basis for a challenge of the use of such funds.

The state, which alleged that the federal government was intruding in a field of purely local concern reserved to the states under our constitutional system, was told that, being under no obligation to accept the federal offer, it had suffered no violation of right; if the Congressional Act complained of became effective in any state, it was clearly because the state voluntarily chose to have it so.

A second contention of the state, that as *parens patriae* it was entitled to complain of the federal expenditures on behalf of all of its citizens, was answered by the statement that the *federal government*, not the state, properly filled the role of *parens patriae* in all relations between the federal government and the citizen.

GROUP III

TITLES II,²¹ III,²² VIII,²³ AND IX²⁴

A different type of provision from that involved in most of the grants-in-aid, is contemplated under Titles II, III, VIII, and IX. These titles are concerned with unemployment insurance and "contributory" retirement annuities which are directed at the *prevention* of destitution rather than its relief.

RETIREMENT ANNUITY PROGRAM

The annuity program is complementary to the program of federal assistance to state old age relief plans discussed in the foregoing paragraphs. The relief plans are intended primarily for the already accumulated problem of workers who are now superannuated or will be so in the near future and are without sufficient savings for self support. The annuity program on the other hand is directed primarily at the future. It will enable employed workers of younger age groups to build up their right to definite income in their retirement period, thus reducing the old age relief burden to minor proportions.

Title II directs that a special "Old Age Account" be set up in the United States Treasury. This account is to be fed year by year by

²¹ 49 STAT. (1935) 622, 42 U. S. C. A. (1935 Supp.) §§ 401-410a.

²² 49 STAT. (1935) 626, 42 U. S. C. A. (1935 Supp.) §§ 501-503.

²³ 49 STAT. (1935) 636, 42 U. S. C. A. (1935 Supp.) §§ 1001-1011.

²⁴ 49 STAT. (1935) 639, 42 U. S. C. A. (1935 Supp.) §§ 1101-1110.

appropriations which actuarial computations indicate will build a fund capable of bearing a stipulated annuity burden.

The stipulations indicate that the annuities are intended for wage earners and that they will vary both with the number of years of employment and with the amount of wages paid.²⁵

The following table shows the practical operation of the annuity scheme for five selected wage groups:

ILLUSTRATIVE ANNUITY AMOUNTS
(Under Title II)

Average Monthly Salary	Years of Employment			
	10	20	30	40
\$ 50	\$17.50	\$22.50	\$27.50	\$32.50
100	22.50	32.50	42.50	51.25
150	27.50	42.50	53.75	61.25
200	32.50	51.25	61.25	71.25
250	37.50	56.25	68.75	81.25

Minimum monthly benefit, \$10; maximum, \$85.

Annuities are payable at the age of sixty-five or thereafter. It is clearly desired that the annuitant shall withdraw from the labor market, as he is penalized a full month's fraction of his annuity for each month *in any* part of which he is regularly employed. This obviously is a reflection of the view that with the scarcity of employment the way should be cleared as far as possible for workers of younger age groups.

The "contributory" aspect of the annuity program which makes it a rough approximation of an "old age insurance" plan supported by equal contributions from workers and their employers, lies in special taxes, that are imposed in Title VIII. These taxes, it is planned, will bring to the treasury funds substantially sufficient to compensate for what will be drained out by the annual appropriations to the Old Age Account under Title II.

Under Title VIII, January 1st, 1937, a tax will be imposed of one per cent upon the worker for wages earned and an equal tax upon the employer for corresponding payrolls.

This rate will be increased every three years by the addition of one half per cent—until the maximum is reached in 1949. At that date and thereafter the combined tax will be *six* per cent (*i.e.*, three per cent on the employee and three per cent on the employer). Wages paid to an employee in excess of \$3,000 in any calendar year are disregarded in computing both the workers' and the employers' tax.

The employer must pay both taxes(*i.e.*, both the employer's tax and

²⁵ Annuities are not increased, however, by employment after the age of sixty-five. The size of annuity is "weighted" in favor of the low paid worker, *i.e.*, he gets a larger percentage of his average wage than does the better paid man.

the worker's tax) and is authorized to collect the tax due from his workers by deducting it when paying their wages.

A certain degree of protection for the surviving dependents of the worker who dies before enjoying his accrued annuity rights, is added by the provision that a lump sum, roughly equivalent to the amount of special taxes due from the worker with three per cent interest, be paid under such circumstances to his estate.²⁶

Due to administrative problems that collection of the special taxes would involve in the case of agricultural labor, household domestic service and casual labor, workers in these employments have been excepted from the annuity scheme. Employees of states, counties, municipalities, etc., are also excepted because of constitutional limitations on the federal taxing power. Most maritime employees,²⁷ as well as employees of the United States or an "instrumentality of the United States," have been excepted on the ground of federal preference for special treatment of these groups. Because of a later special enactment^{27a} for railway employees in interstate commerce, they are no longer included.

Employees of "charitable, religious, education or scientific institutions," no part of the earnings of which enures to the benefit of any private shareholder or individual, have been omitted, due not to any tenable theory, but to an effective lobby from certain interested organizations. Employees who have reached the age of sixty-five are exempt from the tax.

The worker (and his employer) will by reason of the federal tax in Title VIII be "contributing" toward his annuity (*i.e.*, paying special taxes into the United States Treasury) during all his years of employment, without regard to his movements from state to state.

It may be true in the individual case of course, that because of extremely irregular employment, sweated wages or late entry into industrial life, the annuity payable will not furnish a decent subsistence. In such an event, the annuitant will have to receive supplementary old age assistance financed by his state with the help of the federal grant-in-aid provided in Title I of the Social Security Act. It is anticipated, however, that these instances will be exceptions rather than the rule, and that the "contributory" annuity will become a standard old age security device, by which in the course of time most of the working population will be assured a comfortable existence in their retirement period.

²⁶ Less the amount of any annuity benefits drawn.

²⁷ Not harbor worker, only officers and crew.

^{27a} 49 STAT. (1935) c. 813, § 13. This is the second "Railroad Retirement Act." The first was declared unconstitutional in *Railroad Retirement Board v. Alton* (1935) 295 U. S. 330.

This venture is a straight national affair rather than an enterprise involving partnership between the federal government and the states. In fact, organization of such a program on a state unit basis would be scientifically impossible. In other words, even an approach to an actuarial foundation would be out of the question for an individual state contributory scheme. This is related to the fact that in computing "contribution" rates in relation to annuities, it is necessary to predict the future distribution of age groups. Such prediction, although roughly determinable for the country as a whole, is impossible to make for population in individual states. This is caused by the periodic shifting of centers of industrial activity, which cannot be foreseen and which result in the movement of the younger employable age groups from one state to another. This migration of workers leaves an undue proportion of old people in the states in which industries are declining.

UNEMPLOYMENT COMPENSATION
TITLES IX AND III

The unemployment compensation plan embodied in Title IX and Title III, while contemplating that the state shall be the unit for the insurance, is a federal program in the sense that Congress uses its taxing and spending power to encourage the enactment of state laws and to a certain extent sets a pattern to which those laws must conform. A payroll tax of one per cent must be paid by employers of eight or more on all payrolls for wages earned after January 1st, 1936.²⁸ This tax will be raised to two per cent in 1937 and will be three per cent in 1938 and thereafter. Against this tax to the extent of ninety per cent of its total, may be credited what is paid by employers to support "suitable" unemployment compensation plans adopted by the state in which they operate. To be suitable the plan must include certain specified provisions. These requirements are directed at: (1) safeguarding the investment of the moneys collected for unemployment compensation and making certain that at least two years' reserve is accumulated before any benefits are paid; (2) protecting the insured worker from being compelled either to join a company union or to refrain from joining an organization of his own choosing and from being forced on pain of loss of benefits to do strikebreaking work or work which will deprive him of his union standing; (3) protecting the community from breakdown of labor standards by forbidding the insured worker to be forced to accept work at sweated wages; (4) insuring that all the money raised by the "contributions" will be used for payment of unemployment com-

²⁸ For exceptions see 49 STAT. (1935) 642, 42 U.S.C.A. (1935 Supp.) § 1107; Huntington, *The California Unemployment Insurance Law* (1936) 24 CALIF. L. REV. 288.

pensation benefits; and (5) insuring the administration of benefits through public employment agencies (or approved substitute bodies) in order that the moneys will not be expended on benefits if jobs are readily obtainable.

All other matters are left to the discretion of the states. Thus, the amount of weekly benefits to be paid, the length of time for which they shall be paid, whether or not employees also shall contribute, the type of compensation plan to be adopted, *i.e.*, whether a single pooled state fund, a series of industrial funds, an individual plant reserve system, a guaranteed employment scheme, or a combination of the above arrangements, are all major details as to which the states have complete freedom of choice.

In addition to permitting this credit against the payroll tax to employers who do business in states which enact "suitable" laws, the Social Security Act in Title III promises the states which arrange acceptable administration of such "suitable" laws, a grant of federal money to finance their administrative set-up.²⁹ The tax which in all events will be collected under Title IX, is counted upon to bring the Treasury sufficient funds to cover this grant.

Obviously this unemployment insurance plan does not guarantee that workers in all states will get some sort of unemployment compensation. It simply makes such protection through state action more likely. As, through the tax imposed, it costs the employer just as much whether or not his state accepts the Social Security Act, this removes objections to state legislation which the employer might otherwise raise on financial grounds. Furthermore, the money paid by employers, if an unemployment compensation plan be adopted, will be spent on unemployed workers in the state in which it is collected rather than sent to Washington to be spent for federal purposes in the country at large. As the employer in the state that does not act to protect its workers must pay just as much as the employer in the legislating state, the Social Security Act removes the competitive advantage which the employer in the non-legislating state otherwise would have.

As the state will receive under Title III of the Social Security Act a federal grant to cover administrative costs only so long as it "acceptably" administers a "suitable" scheme, maintenance of such acceptable administrative standards is more probable.

It is clear, from sections 909 and 910 of the Social Security Act, that after several years of operation of a state scheme the employer with a stable payroll, if his state chooses to permit it, may, after ac-

²⁹ Payable so long as they maintain administrative standards deemed acceptable by the Social Security Board.

cumulating a certain reserve, escape payment of all but ten per cent of the tax. The additional crediting provisions allow the employer (up to ninety per cent of the federal tax) to credit against the annual federal tax payable, not only the amount which he actually contributes during the year to an unemployment compensation scheme, but also the additional amount paid by or potentially due from *any* employer in the state.

Thus the employer who has had no labor turnover during the year and in consequence has kept his reserve intact, may, if his state law permits "individual reserves," credit toward his federal tax the maximum amount payable under the state law by any employer. The same rule applies to the employer who, with permission of his state enactment, provides a guaranteed employment plan as a substitute for compliance with the ordinary unemployment compensation obligations.³⁰

Again in a "pooled fund" state if the local act permits contributions to be varied on an "experience rating" basis, the employer with a stable payroll and in consequence a low contributing rate may credit the amount of the maximum rate of contribution to the fund.

The justification for this "additional crediting" privilege lies in the theory that it will encourage employers to stabilize their employment conditions and thus reduce unemployment. This assumes of course that unemployment is substantially controllable by the individual employer—an assumption which is denied by many economists as in defiance of established fact.

These same economists, among whom are numbered most of the social insurance specialists, believe that the additional crediting arrangements tend to defeat the very purpose of unemployment compensation schemes, *i.e.*, the protection of the worker against destitution through lack of employment, and are, moreover, on principle unjustified.

They rest this belief upon the conviction (which they maintain to be supported by overwhelming evidence) that (1) most unemployment is related to conditions out of control of the individual employer, the individual industry and often even of the individual country; (2) unless constant contributions be made from all employers during times of "good" employment, adequate funds will not be available for tiding employees over "bad" employment periods; (3) most "stable" industries are in this preferred position not through special constructive effort on the part of their managers, but by fortuitous advantage of the type of article produced or special monopoly privileges enjoyed by the producer; and (4) that such industries, due to their "preferred" posi-

³⁰ Of course in all cases the amount of credit may not exceed ninety per cent of the total federal tax imposed. Under all circumstances ten per cent must be paid to the federal authorities.

tion already have an advantage over other industries dealing in commodities with less stable demand or producing under less privileged conditions, and should not be given increased advantage but should, rather, be required to help carry the general unemployment load.

Nine states (Alabama, California, Massachusetts, New Hampshire, New York, Oregon, Utah, Washington, and Wisconsin) and the District of Columbia have already adopted unemployment compensation laws. All but two³¹ provide a pooled fund rather than a straight individual reserve system. The right to substitute private "individual reserve" plans and "guaranteed employment" however, is permitted under several laws and every state but New York makes provision for "merit rating" after a period of years.

CONSTITUTIONAL BASIS FOR TAXES LEVIED IN ACT
(TITLES VIII AND IX)

There are three taxes levied in the Social Security Act, a tax upon selected classes of employers with respect to employment (Title VIII), a tax upon selected classes of employers with respect to employment "of eight or more" (Title IX) and a tax upon selected classes of employees (Title VIII). There are thus two taxes levied upon the employment of workers (the employer's taxes) and one tax levied upon wages (the worker's tax). Considered apart from their setting, *i.e.*, merely as *taxes*, these three impositions would seem to present no constitutional problem. The employer's taxes are clearly excises on the act of employing workers. They are not to be distinguished in principle from previous taxes which have been imposed by Congress and sustained by the courts. Examples of such previous taxes are: the tax on using carriages,³² taxes on selling,³³ taxes on manufacturing and selling,³⁴ taxes on making gifts *inter vivos*,³⁵ the tax on using a foreign-built yacht,³⁶ the tax on dealing on boards of exchange,³⁷ and the tax on doing of business as a corporation or joint stock association.³⁸

Since the employer's tax is an excise, it is a tax that is not considered "direct" and in consequence it is not subject to the constitutional rule applicable to direct taxes, *i.e.*, that they be apportioned among the several states in proportion to their population.³⁹

³¹ Utah and Wisconsin.

³² Approved in *Hylton v. United States* (1796) 3 Dall. (3. U.S.) 171.

³³ *Thomas v. United States* (1904) 192 U.S. 363.

³⁴ Examples: manufacturing and selling tobaccos, sustained in *Patton v. Brady* (1902) 184 U.S. 608; on the manufacture and sale of "oleomargarine," sustained in *McCray v. United States* (1904) 195 U.S. 27.

³⁵ *Bromley v. McCaughn* (1929) 280 U.S. 124.

³⁶ *Billings v. United States* (1914) 232 U.S. 261.

³⁷ *Nicol v. Ames* (1899) 173 U.S. 509.

³⁸ *Flint v. Stone Tracy Co.* (1911) 220 U.S. 107.

³⁹ U. S. CONST. Art. I, Sec. 9, cl. 4. For authority that excises are not direct and therefore, not subject to the apportionment rule, see *Flint v. Stone Tracy Co.*, *supra* note 38.

The tax upon the worker is of course an income tax and by the Sixteenth Amendment to the Constitution is specifically freed from the apportionment rule. Aside from this amendment, moreover, the worker's tax, being levied only upon earnings from personal services, is and always has been regarded as an excise in contrast to the tax upon income derived from property which has been judicially adjudged a direct tax.⁴⁰ All the taxes, therefore, are excises. As such they are subject to only one constitutional requirement, that of "uniformity."⁴¹ "Uniformity" has by a long line of interpretative decisions been given a definite and limited significance, that of mere "geographical uniformity."

To quote from the *Head Money Cases*: "The tax is uniform when it operates with the same force and effect in every place where the subject is found."⁴²

And in a later case: ". . . what the Constitution commands is the imposition of a tax by the rule of geographical uniformity, not that in order to levy such a tax objects must be selected which exist uniformly in the several states."⁴³

The cases indeed, suggest no limits on Congressional discretion in the selection of subject matters upon which to levy excises. Taxpayers have been classified at will, moreover, for purposes of varying the rates of the excises levied and for the purpose of granting exemptions from the taxes.⁴⁴ The only tax measures that have been judicially invalidated by the United States Supreme Court on the grounds of "arbitrary classification" have been state enactments. The decisions invalidating them have rested, moreover, on the equal protection clause of

⁴⁰ In this connection, see *Springer v. United States* (1880) 102 U. S. 586; *Pollock v. Farmers' Loan & Trust Co.* (1895) 157 U. S. 429, 158 U. S. 601. In holding the income tax of 1894 unconstitutional as violating the apportionment requirement, the Court did so on the ground that the act was invalid as to part, from which the remainder of the act was not separable. This invalid part was the tax on income derived from real and personal property which the Court held to be a "direct" tax. The Court clearly indicated that it was not overruling *Springer v. United States*, *supra*, so far as that case held that a tax on income received from personal services was an excise tax, and, therefore valid without apportionment. This view has been reiterated by the Court since the adoption of the Sixteenth Amendment. *Brushaber v. Union Pacific R. R.* (1916) 240 U. S. 1; *Bowers v. Kerbaugh-Empire Co.* (1926) 271 U. S. 170, 174.

⁴¹ U. S. CONST. Art I, Sec. 8, cl. 3, "All duties, imposts and excises shall be uniform throughout the United States."

⁴² (1884) 112 U. S. 580, 594.

⁴³ *Knowlton v. Moore* (1900) 178 U. S. 41, 108.

⁴⁴ See cases referred to in notes 34-38 *supra*; also for carrying rates and exemptions, see *Knowlton v. Moore*, *supra* note 43; *Brushaber v. Union Pac. R. R. Co.* (1916) 240 U. S. 1; see also *Bromley v. McCaughrin*, *supra* note 35; *Van Oster v. Kansas* (1927) 272 U. S. 465, 458; *McCray v. United States*, *supra* note 34, special tax of ten cents on a pound of yellow oleomargarine and one-fourth cent a pound on white oleomargarine.

the Fourteenth Amendment, which is a limitation upon state legislation that is not repeated in the Fifth Amendment which controls Congressional action. No federal tax measure ever has been invalidated on the ground of unreasonable or arbitrary classification of subject matter, and it may be remarked that the list of products upon which high tariff rates are imposed, for example, would be difficult to justify on any theory of classification.⁴⁵

Further, even should Congress be held to reasonable classification in the taxation field it is unlikely that this would affect the exemptions in the Social Security Act. They are the customary exemptions found in workmen's compensation acts and other remedial measures, and as such have been challenged and uniformly sustained by our highest court.⁴⁶

UNEMPLOYMENT COMPENSATION TAX (TITLE IX)

So far discussion has been confined to the taxes considered apart from related provisions. In this position, they would appear to be conventional excises, which present no problem. Returning the tax on "employers of eight or more" to its context, however, raises a major constitutional question. Will the United States Supreme Court deem Title IX to savor so largely of a scheme to promote specified unemployment compensation measures, that it will adjudge it a regulatory rather than a taxing measure?

There can be no assured answer to this question on authority of previous cases. Title IX sets up a procedure that differs from any that has been judicially reviewed. Analysis, however, of the principles involved in this procedure, and of decisions that have concerned these or allied principles, will indicate the arguments which the court will have to consider in passing upon Title IX.

⁴⁵ However, there are implications in some opinions that the court might find the classification in a federal tax law so extremely arbitrary as to be a violation of the due process of law clause of Amendment V. Thus the Court said of the excise tax on gifts inter vivos, "It is suggested that the schemes of graduation and exemption in the present statute, by which the tax levied upon donors of the same total amounts may be affected by the size of the gifts to individual donees, are so arbitrary and unreasonable as to deprive the taxpayer of property without due process. But similar features of state death taxes have been held not to infringe the Fourteenth Amendment, since they bear such a relation to the subject of the tax as not to 'preclude the assumption that the legislature, in enacting the statute, did not act arbitrarily or without the exercise of judgment or discretion which rightfully belong to it.' *Stebbins v. Riley*, 268 U. S. 137. No more can they be a basis for holding that the graduation and exemption features of the present statute violate the Fifth Amendment." *Bromley v. McCaughn*, *supra* note 35, at 139.

⁴⁶ See *Jeffrey Mfg. Co. v. Blagg* (1915) 235 U. S. 571, and cases therein cited (employers with less than five employees excepted from act); *N. Y. Central Ry. Co. v. White* (1917) 243 U. S. 188 (exceptions of domestics, farm labor, casuals, etc.); also see cases cited in *HONNOLD, WORKMEN'S COMPENSATION* (1917) § 17.

ARGUMENT AGAINST CONSTITUTIONALITY

The two principal cases upon which it may be expected that argument against the tax imposed in Title IX will be rested are the *Child Labor Tax Case*,⁴⁷ and the *Grain Exchange Tax Case*.⁴⁸ The "tax" imposed in each case was held to be in reality a *penalty* exacted for nonconformity to regulations emanating improperly from a federal authority in a field constitutionally reserved to the states.

In the *Child Labor Tax Case* a Congressional statute was challenged which levied an excise upon owners of mines, quarries, and mills in which either children of a certain age group were employed or children of another older age group were subjected to certain undesirable conditions of labor. Proof of bona fide mistake as to the age of the children entitled the owner to remission of the tax. The Court in holding the measure invalid stated that the "so-called tax is a penalty to coerce people of a state to act as Congress wishes them to act in respect of a matter completely the business of the state government under the federal Constitution."⁴⁹

In the course of the opinion, stress was repeatedly laid upon the fact that the regulatory object was apparent "on the face of" the measure. In proof of this, specific reference was made to the clause permitting the employer, who made a mistake as to the children's age, to secure a revision of the tax, and to the clause empowering the Secretary of Labor "whose normal function is the advancement and protection of the welfare of the workers" to inspect the establishment subject to the tax.⁵⁰ The Court felt that the statute clearly in its very terms and not by implication indicated that its object was not to secure revenue but to coerce conformity to certain child labor standards.

The *Grain Exchange Case*⁵¹ concerned a tax imposed upon contracts for future delivery of grain payable by those who did not deal through a standardized exchange, which had complied with conditions laid down by the Secretary of Agriculture.

As in the *Child Labor Tax Case*,⁵² the Court in holding the statute unconstitutional emphasized the fact that the regulatory character of the enactment appeared upon its very face. To quote from the opinion:

"The act is in its essence and on its face a complete regulation of Boards of Trade, with a penalty of twenty cents a bushel on all

⁴⁷ (1922) 259 U. S. 20.

⁴⁸ *Hill v. Wallace* (1922) 259 U. S. 44.

⁴⁹ *Child Labor Tax Case*, *supra* note 47, at 39.

⁵⁰ Said the Court, "Scientists are associated with penalties, not with taxes."
Ibid. at 37.

⁵¹ *Supra* note 48.

⁵² *Supra* note 47.

'futures' to coerce Boards of Trade and their members into compliance. When this purpose is declared in the title to the bill, and is so clear from the effect of the provisions of the bill itself, it leaves no ground upon which the provisions we have been considering can be sustained as a valid exercise of the taxing power."⁵³

Again the fact that the statute showed in its terms that if it functioned successfully it would bring nothing to the treasury, was held to prove that it was not a true taxing measure.

Leaning upon these authorities, those who challenge Title IX will undoubtedly contend that (1) Title IX reveals "on its face" its regulatory nature; (2) the obvious objective is the promotion of state unemployment insurance laws of a stipulated character rather than the raising of revenue; and (3) it is, as a regulatory measure, an unwarranted interference in a field of local police power which by virtue of the Tenth Amendment is reserved to the states.

In support of these general contentions reference undoubtedly will be made *inter alia* to the following specific details:

(1) Up to ninety per cent of the total "tax," there need be no payment to the federal government in a state which has a plan "approved" by a federal welfare agency called the Social Security Board;

(2) The conditions required for "approval" of state unemployment compensation plans, listed in Section 983 of the Act, are obviously of a "police power" character for they standardize: (1) qualifying accumulation period which must ensue before benefits will be payable; (2) method of handling reserve funds; (3) types of and conditions of work which an unemployment compensation scheme may not force an employee to accept on pain of losing his benefit; (4) methods of payment of unemployment compensation (*i.e.*, through a public employment agency or other agency approved by the Social Security Board). Thus, they establish the inherent regulatory nature of Title IX.

ARGUMENT IN DEFENSE OF CONSTITUTIONALITY

In answer to such a challenge as the foregoing, it can reasonably be argued on the other hand, that neither the authorities quoted nor the provisions of the act referred to, establish the contention that this is not a bona fide tax.

In the first place, the tax imposed by Title IX is under all circumstances a revenue producing measure. The so-called regulatory conditions do not determine whether or not a tax shall be payable, but, by defining the classes into which merely the employees are grouped, determine the *rate* which shall be paid.

⁵³ *Supra* note 48, at 66, 67.

As has been previously indicated,⁵⁴ it is well settled that dividing taxpayers into classes upon whom progressive rates of taxes are imposed is not constitutionally objectionable. The additional fact, moreover, that the ultimate control of the classes which there will be for taxation purposes, lies with the individual state,⁵⁵ likewise is not constitutionally objectionable. Congress was held capacitated in the *License Tax Cases*⁵⁶ to impose an excise upon subject matter to which the states could deny even the legal right of existence. The statute at issue in this case imposed a tax upon vendors of lottery tickets and alcoholic liquors. Such enterprises could of course be legally abolished at the discretion of the state and successful "abolition" would mean that there would be no federal revenue from the tax in that state.

Congress further was held constitutionally authorized in levying a tax upon legacies and distributive shares, to exempt the shares allotted to a spouse by the state law, thus leaving the actual amount of tax due from identical estates to be determined at the will of the individual states.⁵⁷

The principles involved in the operation of the unemployment compensation tax in Title IX are not to be distinguished from the principles at issue in the foregoing cases. Whether under Title IX the tax paid to the federal government by the employer of "eight or more" shall this year be one per cent of his payroll or something less than that amount down to a minimum of one-tenth of one per cent, will be determined by the state in which he lives. If his state has adopted an "approved" unemployment compensation plan to which he must contribute at least nine-tenths of one per cent of his payroll, the rate of federal tax which he will be obligated to pay will be only one-tenth of one per cent. Employers in California, as well as in seven other states and the District of Columbia, are in that very position.⁵⁸

If his state has enacted either no unemployment insurance measure or one which is not "approved," the employer must pay a tax of a full one per cent on his payroll to the federal tax authorities. In this situation are the employers in forty of the states.

⁵⁴ See *supra* note 44 and text to which it refers.

⁵⁵ In that if the state adopts a "state pooled fund measure," the tax will be one rate; if the state permits an individual reserve account, it may be another rate; and if the state does not legislate it will be a third rate.

⁵⁶ (1867) 5 Wall. (72 U. S.) 462.

⁵⁷ *Knowlton v. Moore*, *supra* note 43.

⁵⁸ California, Massachusetts, New York, New Hampshire, Alabama, Oregon, Washington, Utah, Wisconsin, and the District of Columbia have adopted unemployment compensation schemes. All laws but that of Utah have been "approved" by the Social Security Board. Utah has not presented its law for approval due, no doubt, to the fact that it does not meet all the conditions laid down for "approval" in Section 903 of the Social Security Act.

The objection that might be raised, that different rates are not actually levied but rather a uniform rate against which "set-offs" are permitted, is clearly an objection that goes not to substance but to form. Further, in the light of the case of *Florida v. Mellon*,⁵⁹ the objection would seem to be without weight. In that case, the very tax procedure in question, *i.e.*, a uniform federal tax against which payment to the state up to eighty per cent of the total federal tax could be credited, was challenged. While rendering a decision denying the petition on purely jurisdictional grounds, the Court indulged in a forceful *dictum* sustaining the propriety of the measure. To quote:

"The Act assailed . . . must be held to be constitutional . . . The contention that the federal tax is not uniform because other states impose inheritance taxes while Florida does not, is without merit. Congress cannot accommodate its legislation to the conflicting or dissimilar laws of the several states nor control the diverse conditions to be found in the various states which necessarily work unlike results from the enforcement of the same tax. All that the Constitution requires is that the law shall be uniform in the sense that by its provisions the rule of liability shall be alike in all parts of the United States."⁶⁰

Much of the force of the *Child Labor Tax Case*⁶¹ and the *Grain Exchange Tax Case*⁶² as precedent for declaring Title IX unconstitutional is lost on more careful analysis of the "taxes" at issue in those cases as compared with the tax imposed in Title IX. In both those cases, the federal government was attempting to deal directly with the purported taxpayer by giving him a choice between paying a "tax" and conforming to certain conditions or regulations of federal origin. In both cases the Court in declaring the statute void was moved most strongly by the ouster of state authority and attempted direct federal regulation by the individual in a field which properly belongs to the states. In Title IX, however, there is no such ouster of state authority, nor is there any attempt at direct dealing between the federal government and the citizen. It does not lie in the power of the individual employer to affect his tax responsibilities under Title IX in any way. He cannot escape the tax in whole or in part by any arrangement over which he has control. Only through state legislation in proper expression of its police power may the rate of taxation vary just as was the case in the federal inheritance tax situation.⁶³

Moreover, any "pressure" upon the state implied in the conditions

⁵⁹ (1926) 273 U. S. 12.

⁶⁰ *Ibid.* at 17.

⁶¹ *Supra* note 47.

⁶² *Supra* note 48.

⁶³ *Florida v. Mellon*, *supra* note 59.

imposed in Title IX is no more objectionable on constitutional grounds than was that which was approved in *Massachusetts v. Mellon*.⁶⁴ In that case involving the grants-in-aid under the Sheppard-Towner situation previously discussed, it will be recalled the state was held to have suffered no violation of right by federal regulatory intrusion, because only at the will of the state in voluntarily accepting the federal offer, could the federal regulations become effective in any state.

Likewise, only if the state chooses to enact an unemployment compensation law in conformity with the standards listed in Section 903, in order to take advantage of the federal offer of "credit" for its citizens against the tax imposed in Title IX, and to receive the "grant" of Title III, will these standards become effective in the state.

Finally, it should be stated in further contrast to the *Child Labor Tax Case*⁶⁵ and the *Grain Exchange Tax Case*⁶⁶ that in every instance, regardless of state action, a tax is due and will be collected in every state under Title IX, indicating that the imposition is a bona fide revenue measure. The importance in a statute purporting to be a taxation measure of at least the outward manifestation of a revenue producing limit has been frequently emphasized. It is made especially clear in the case of *Nigro v. United States*⁶⁷ involving the Narcotics Tax Act, after an amendment that substantially increased the nominal rate of tax in the original measure. Said the then Chief Justice:⁶⁸

"Four members of the Court dissented in the Doremus case,⁶⁹ because of opinion that the court below had correctly held the Act of Congress, in so far as it embraced the matters complained of, to be beyond its constitutional power, and that the statute, in § 2, was a mere pretext as a tax measure and was in fact an attempt by Congress to exercise the police power reserved to the States and to regulate and restrict the sale and distribution of dangerous and noxious narcotic drugs. Since that time, this Court has held that Congress by merely calling an Act a taxing act can not make it a legitimate exercise of taxing power under § 8 of Article I of the Federal Constitution, if in fact the words of the act show clearly its real purpose is otherwise. Child Labor Tax case, 259 U. S. 20, 38. By the Revenue Act of 1918, the Anti-Narcotic Act was amended so as to increase the taxes under § 1, making an occupation tax for a producer of narcotic drugs of \$24 a year, for a wholesale dealer, \$12, for a retail dealer, \$6.00, and for a physician ad-

⁶⁴ (1922) 262 U. S. 447.

⁶⁵ *Supra* note 47.

⁶⁶ *Supra* note 48.

⁶⁷ (1927) 276 U. S. 322.

⁶⁸ *Ibid.* at 352, 353.

⁶⁹ (1919) 249 U. S. 86.

ministering the narcotic, \$3.00. The amendment also imposes an excise tax of one cent an ounce on the sale of the drug. Thus the income from the tax for the Government becomes substantial. Under the Narcotic Act, as now amended, the tax amounts to about one million dollars a year, and since the amendment in 1919 it has benefited the Treasury to the extent of nearly nine million dollars. If there was doubt as to the character of this Act—that it is not, as alleged, a subterfuge—it has been removed by the change whereby what was a nominal tax before was made a substantial one. It is certainly a taxing act now as we held in the *Alston* case.”

CONSTITUTIONAL ASPECTS OF THE ANNUITY PROGRAM

The taxes imposed in Title VIII, considered as taxes, already have been discussed. Challenge of the benefits conferred in Title II, considering this title alone, would be precluded by the reasoning in *Frothingham v. Mellon*⁷⁰ which already has been fully considered. Even could the challenge be permitted, it is anything but certain that providing retirement annuities for the workers of the nation is not within the “welfare clause” of the federal constitution.

The only possible method of challenging these two titles would seem to be by the contention that they should be read together as parts of a regulatory program; the “taxes” thus being not real taxes but insurance premiums or compulsory contributions for workers and their employers.

Substantial difficulties stand in the way of justifying such a contention. These are related both to authority and to the inherent facts of the program itself. Considering the latter first as more important takes us back to a reëxamination of the contents of these titles. As stated earlier the government in Title II has pledged itself to a policy of providing retirement annuities for employees in industry, commerce and trade. Pursuant to this commitment it plans to set up a special Old Age Fund, for which permanent annual appropriation is authorized, the amount of which is to be the necessary annual premium determinable on actuarial principles. This permanent appropriation is to be drawn from the general treasury and is made neither dependent upon, nor the equivalent of, specified tax proceeds from any source.

Although the framers of the Act planned these taxes imposed in Title VII with the hope that they would bring in at least the rough equivalent of the Treasury’s needs in making the required appropriation to the Old Age Account, the obligation of the Treasury is in no measure limited to the amount of such revenue. Whether the forecast of employment and wages used in planning the measure proves to be an understatement or an exaggeration of future facts, with the result that the

⁷⁰ *Supra* note 64.

taxes under Title VIII are more than, or less than, the amount counted upon in the actuarial computations, the obligation to the Old Age Account remains fixed.

The annuities and allied benefits of Title II, moreover, are not related in either availability or amount, to the taxes payable under Title VIII. Even should no taxes ever be paid by a worker or his employer through either ignorance or deliberate evasion, the government is none the less obligated to provide the annuity due. There is, in short, neither a legal nor actual tie-up between the provisions of Title II and the taxes of Title VIII. The government has taken upon itself the responsibility of building up a retirement fund for the wage earners in this country and has also with commendable forethought, something conspicuously absent, for example, in the recent provision for the veterans, made provision for obtaining the additional revenue to support this new obligation by imposing taxes which would seem particularly appropriate.

The difficulties of justifying on authority the contention that Title II and Title VIII should be read together, are quite as formidable as those encountered in careful analysis of the provisions themselves. In the decisions rendered in all the cases in which the petitioner claimed that a purported tax was really something else, the Supreme Court has adhered to the policy of judging a measure by its own terms. In fact the Court's insistence that all these decisions reflect a common consistent theory can be justified only by the thesis that by the provisions of the statute itself and by those only, is its character to be determined.

Common knowledge of Congressional motives, not to mention the burdens of Congressional debates, were not brought to bear when the tax on yellow oleomargarine was before the court.⁷¹ Although it would be idle to contend that the Court was in reality unaware of the fact that the tax was intended to suppress butter substitutes rather than to produce revenue, the court refused to look behind the statute's terms. Similarly, in the *Veazie Case*⁷² in which the tax directed at suppression of state bank notes was at issue, the court refused to investigate the motive of Congress except as the statute itself revealed it.

In the *Dagenhart Case*,⁷³ the *Child Labor Tax Case*,⁷⁴ and the *Grain Exchange Case*,⁷⁵ on the other hand, as in the recent *A.A.A. Decision*,⁷⁶ stress was laid by the court upon the regulatory character being patent upon the face of the statutes in question.

⁷¹ *McCray v. United States* (1904) 195 U. S. 27.

⁷² *Veazie Bank v. Fenno* (1869) 8 Wall. (75 U. S.) 533.

⁷³ *Hammer v. Dagenhart* (1918) 247 U. S. 251.

⁷⁴ *Supra* note 47.

⁷⁵ *Supra* note 48.

⁷⁶ *United States v. Butler* (1935) 56 Sup. Ct. 312.

Even such approximate connection between Titles II and VIII as existed in the plan that produced this part of the Social Security Act, is not to be found "upon the face of" the statute, but must be unearthed from the reports of the planning committee and legislative discussion that preceded the passage of the measure.⁷⁷ For the court to consider Congressional motive in levying a purported tax by search into such sources would mean a departure from a policy established in a long series of precedents, and is therefore unlikely. Moreover, even should such a departure be embarked upon, it seems even less probable that the court would find enough relation between Title VIII, and Title II to justify a holding that Title VIII does not impose bona fide taxes.⁷⁸

In concluding the discussion of constitutional problems raised by the Social Security Act, brief reference to the recent *A.A.A. Decision*⁷⁹ seems in order. Concerning as it does a "taxing and spending" measure, the discussion in this opinion is of special importance despite the fact that many important factors distinguish the Social Security Act from the Agricultural Adjustment Act.

The Agricultural Adjustment Act,⁸⁰ *inter alia*, declared a state of economic emergency because of a depressed condition of agriculture, and for the specific purpose of "establishing and maintaining such balance between production and consumption of agricultural commodities . . . as would give agricultural commodities a normal⁸¹ purchasing power with respect to articles that farmers buy," set up a system of crop control directed toward reducing crops to quantities that could be marketed profitably by the producers. This control was to be (and in fact was) obtained by agreements entered into by the Secretary of Agriculture with individual agriculturalists, who in return for their cooperation in crop reduction were to receive money payments to compensate them for sales they might have made, had they planted to capacity.⁸² These payments were, of course, less than certain of the producers might have made, but, as they were fixed and certain, and as in addition the crop

⁷⁷ Indeed it would be quite impossible for anyone acquainted with such background to know for what purposes the taxes in Title VIII are levied. Many new expenditures are included in the Social Security Bill by any of which this tax might be prompted.

⁷⁸ Similarly, of course, although it is *planned* that the moneys collected under Title IX will compensate the treasury for the grants made under Title III, this "plan" is not written into the act. The same difficulties as are met in attempting to link II and VIII are confronted in attempting to link III with IX.

⁷⁹ This decision, *supra* note 76, is the first of the "New Deal" decisions which concerns a statute in which Congress drew upon its taxing and spending powers for the achievement of its ameliorating objectives.

⁸⁰ 48 STAT. (1933) 34.

⁸¹ Literally "equivalent to the purchasing power of agricultural commodities in the base period" (See § 2).

⁸² 48 STAT. (1933) 34, § 8.

reduction safeguarded the market of the commodities actually produced, the whole scheme gave security to the agriculturalist. This, of course, in turn brought "security" to the industrialist whose manufactured products the "secure" agriculturalist would buy. To finance these payments taxes were levied upon the processing of the agricultural products which were the subject of agreements and one of the sections of the act specifically appropriated the proceeds from such taxes for this purpose.⁸³

The case before the court was brought by the United States against a cotton manufacturing corporation for tax payments alleged by the government to be due and not paid. The Federal District Court found the taxes valid and ordered them paid. The order was reversed by the Circuit Court of Appeals and the Supreme Court in a six to three decision affirmed the opinion of the Circuit Court.⁸⁴

The argument of the majority is not followed without difficulty, and, in consequence, is not easily reduced to digest form. What the court deems, however, to be the fundamental issue is made clear. In definite words the majority states that the crucial question on the answer to which depends the whole validity of the Agricultural Adjustment Act, is whether Article I, Section 8 of the United States Constitution authorized the contemplated expenditure of the funds to be raised by the processing taxes. The government's contention that it did, to quote the Court verbatim: "presents the great and controlling question of the case."⁸⁵ The Court further remarks that the clause in Article I, Section 8, "thought to authorize the legislation is the *first*,"⁸⁶ *i.e.*, the welfare clause. The meaning of this welfare clause, a question which has never been settled, the Court then proceeds to discuss.

It is clear from this discussion that the majority deems the power to tax and the power to spend to be coextensive and to include the right to tax and to spend for the "general welfare of the United States." It is further clear that the majority hold this phrase to be neither a meaningless phrase nor a mere catch-all description of the specifically detailed powers granted to Congress in Section 8, but rather a specific grant of authority to legislate which is in addition and supplemental to the power to act in the legislative fields enumerated in Section 8.

The next step in the opinion is logically so unexpected as to persuade the reader that he has somehow misread the paragraphs. The Court states⁸⁷ that it is unnecessary to decide whether the power to

⁸³ *Ibid.* §§ 9, 12.

⁸⁴ The case actually concerned only the original Act and not the Amending Act of August, 1935.

⁸⁵ *United States v. Butler*, *supra* note 76, at 317.

⁸⁶ *Ibid.* at 318.

⁸⁷ *Ibid.*

spend in aid of agricultural adjustment is within the welfare clause of the Constitution, because "wholly apart from that question" the Agricultural Adjustment Act is unconstitutional as invading the reserved right of the states. It also refers for authority to the Tenth Amendment, which reserves to the states the powers not granted to Congress. But, if the power to spend in aid of agriculture is within the "welfare clause," then such power (and the equal power to tax to raise money for the same purpose) obviously is granted to Congress and equally obviously is *not* under the Tenth Amendment reserved to the states. How then can it be "unnecessary to decide" whether the power to spend (and, of course, to tax) in aid of agriculture falls within the constitutional authority of Congress to provide for the general welfare?

The answer which the majority opinion makes to this is briefly:⁸⁸ "This act does not present a conditional grant of money, . . . nor even . . . a provision that if certain conditions are not complied with, the appropriation shall no longer be available. . . . 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 which otherwise could not be enforced." This would seem to suggest then if the Agricultural Adjustment Act had stated, for example, that all farmers who cut crops fifty per cent would receive *at the end of each year* of such crop control a bonus of five hundred dollars per acre affected, this obviously would be quite a different thing (and presumably unobjectionable) from offering farmers the same amount of money *in advance* for agreeing to do this same crop reduction year by year. One is minded by such reasoning of those two quaint boys Tweedledee and Tweedledum. It is to be deduced that in the opinion of the majority of the court they would be obviously quite different fellows.

In the opinion of the majority, then, spending money by grants to farmers, who enter into contracts to reduce crops in the interests of a program of agricultural rehabilitation, is an intrusion upon states' rights and constitutionally beyond Congressional power. The attempt to levy taxes for such unconstitutional use is equally unconstitutional because a true tax must be for the support of government and this purported "tax" is a mere step toward an unconstitutional activity of the federal government.

The argument in support of its conclusion that the contracts with the farmer contemplated in the Agricultural Adjustment Act are unwarranted usurpation by the federal government of state authority includes the following special items:

⁸⁸ *Ibid.* at 322.

(1) The federal government's "contract" offer is not a "voluntary" scheme in reality. It is coercive,⁸⁹ because refusal means loss of benefits offered to acceptors. Being coercive, it is improper interference in a field of state activity.

(2) Even assuming the contract offer to be non-coercive, it is equally improper. The admitted inability of Congress to command such contracts as those involved in the Act carries with it inability to "bribe" farmers into such contracts.

The forceful dissent which is written by Mr. Justice Stone and concurred in by Justices Cardozo and Brandeis, makes clear that it sees no difference between Tweedledee and Tweedledum. Payment to farmers on condition that they agree to reduce crops is to the dissenters not *obviously different from*, but *obviously the same as*, payment to farmers who have reduced crops.

"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."⁹⁰

It is pointed out that the limitation on the taxing and spending power subscribed to by the majority logically amounts to saying that Congress in exercising such powers must not influence action which it cannot command.⁹¹

This limitation is then shown to be in opposition to well established constitutional doctrine with reference to other Congressional powers. Stress is laid upon the fact that with judicial approval other Congressional powers have been permitted exercise that violently interfered with intrastate matters.⁹² Thus intrastate railroad rates have been set aside by the federal government's Interstate Commerce Commission. Intrastate industries have been destroyed and created by the lowering or raising of tariffs.

In terse illustrations the dissent then makes clear that such limitation, *i.e.*, that Congress must not influence action which it cannot command because within the sphere of state authority, is contradictory and destructive of the whole power to appropriate for the public welfare which the majority concedes to exist. To quote:

"... It is a contradiction in terms to say that there is power to spend for the national welfare, while rejecting any power to impose

⁸⁹ The dissent specifically challenges this doctrine of coercion, contending that the essence of coercion is threat of loss, not offer of gain.

⁹⁰ *Ibid.* at 328.

⁹¹ *I.e.*, because such commanding has been left to the states.

⁹² The dissent cites *Minnesota Rate Case* (1913) 230 U. S. 352; *Houston, E. & W.T.R. Co. v. United States* (1914) 234 U. S. 342; *Board of Trustees of University of Illinois v. United States* (1933) 289 U. S. 48.

conditions reasonably adapted to the attainment of the end which alone would justify the expenditure."

"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."

"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."⁹³

It is then bluntly pointed out that the majority opinion reflects the belief that it is the business of the courts to sit in judgment on the wisdom of legislative action, blind to the fact that courts, no less than Congress, may err; and that, quoting Mr. Justice Holmes, "legislatures are ultimate guardians of the liberties and welfare of the people in quite as great a degree as the courts."⁹⁴ The construction put upon the Constitution in the majority opinion is described as "tortured" and the dissent closes with the refreshing suggestion that language "even of a Constitution, may mean what it says" and that "the power to tax and spend includes the power to relieve a nation-wide economic maladjustment by conditional gifts of money."⁹⁵

Reliance by the majority upon the *Child Labor Tax Case* and the *Grain Exchange Case* as controlling the Agricultural Adjustment Act situation seems unjustified. To be sure the taxes in all three of the statutes in question have in common a too frank avowal in their provisions of their real objectives. There, however, their mutual resemblance ends. In the first two cases, as has been previously remarked in this article, the Supreme Court held that the terms of the statute clearly revealed that the so-called taxes were not *real* taxes intended to pro-

⁹³ *United States v. Butler*, *supra* note 76, at 327, 328.

⁹⁴ *Missouri, Kansas & Texas R. R. Co. v. May* (1904) 194 U. S. 267, 270.

⁹⁵ *Supra* note 76, at 329.

duce revenue, but penalties for nonconformance to federal regulation in a field reserved to the states. The "conforming" employer was obligated to pay no "tax," the nonconforming employer was required to pay a "tax." The *A.A.A. Case* concerned a tax on the other hand which was a bona fide tax for the raising of moneys needed for the adjustment program. The processor upon whom the tax levied was like every other bona fide taxpayer required to pay his tax and given no option to escape it. As the dissent in the *A.A.A. Case* pointed out in denying that the *Child Labor Tax Case* was pertinent, "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."⁹⁶

The theory adopted by the majority in the *A.A.A. Case* would seem to find no substantial supporting authority in previous Supreme Court decisions, but to be, rather, a pioneer in its theory that a conventional tax ceases to be a tax because the use, (as evidenced by the statute) contemplated by Congress for the revenue thereby derived, is deemed offensive. Equally is it a pioneer in its addendum to logic as well as to law, that Congress even if it may pay moneys to those who comply with certain prescribed conditions may not offer this money to those who bind themselves by contract in advance to maintain these same conditions.

The assistance grants in the Social Security Act unsupported as they are by special taxes are of course unaffected by the *A.A.A. Decision*. No doubt was cast in the latter opinion upon *Massachusetts v. Mellon* or *Frothingham v. Mellon*.⁹⁷

Argument in challenge of the Unemployment Insurance Tax is probably strengthened by the Court's broad use in the *A.A.A. Decision* of the *Child Labor Tax Case* as controlling such a different situation as that involved in the *A.A.A.* The regulatory objective of the unemployment compensation tax is written all "over the face" of Title IX. The force of the Inheritance Tax precedent, however,⁹⁸ would seem to be still a dominant one in considering the constitutional propriety of Title IX.

Argument in challenge of the taxes levied in Title VIII does not find support in even the expanded significance given in the *A.A.A. Decision* to the *Child Labor Tax Case*. No regulatory objective, if such there be, is apparent in the terms of the statute in the levying of these Title VIII taxes. To the extent that this objective be deemed to be unrevealed in

⁹⁶ *Ibid.*

⁹⁷ *Supra* note 64.

⁹⁸ *Florida v. Mellon*, *supra* note 59.

the plan back of the tax imposition, the situation still is governed by the *McCray*,⁹⁹ *Veazie*,¹⁰⁰ *Doremus*¹⁰¹ and *Nigro*¹⁰² cases.

Title VIII in this respect is in marked contrast with the Agricultural Adjustment Act in which the proceeds of the taxes levied were directly dedicated in one of the sections of the act to an avowed amelioratory use.

The very narrowness of the specific grounds upon which is rested the actual *decision* in *United States v. Butler* in contrast to its many generalized remarks, combined with the majority's definite *dictum* about Congressional power under the Constitution's welfare clause, makes it easy for the court if it chooses to do so, to limit the *A.A.A. Decision* strictly to its own facts by a series of differentiating and distinguishing decisions.¹⁰³ The surprising statement of the majority in the *A.A.A. Case* that "Congress may not indirectly accomplish through taxing and spending what it could not achieve by more direct means,"¹⁰⁴ may give place in future cases to the long established sentiment reexpressed by the unanimous court only eighteen months earlier in the case of *Magnano v. Hamilton*,¹⁰⁵ which concluded with the statement:

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

If the latter traditional attitude of the Supreme Court be resumed, the Social Security Act will probably be able to look forward to a long and serviceable career. That this may eventuate is widely desired. To most students of current economic and social problems, seriously concerned, on the one hand, by the futility and waste of the dole or "bread line" system and alarmed, on the other, by the strength of such fantastic organizations as the Townsend Planners, the preservation of the orderly sane social insurance provisions of the Social Security Act seems of paramount importance.

Barbara Nachtrieb Armstrong.

SCHOOL OF JURISPRUDENCE,
UNIVERSITY OF CALIFORNIA.

⁹⁹ *Supra* note 34.

¹⁰⁰ *Supra* note 72.

¹⁰¹ *Supra* note 69.

¹⁰² *Supra* note 67.

¹⁰³ Even labeled and earmarked taxes for avowed use in grants to those who actually pursued an outlined course of conduct designed to promote a national remedial program, but who were *not* asked to "bind themselves under contracts" whereby they agreed to comply with certain standards, could be sustained within the opinion proper under the welfare clause.

¹⁰⁴ *United States v. Butler*, *supra* note 76, at 321.

¹⁰⁵ (1934) 292 U. S. 40.