University of Pennsylvania Law Review

And American Law Register

FOUNDED 1852

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VOLUME 86

NOVEMBER, 1937

No 1

THE SUPREME COURT ON TAXATION, 1936 TERM

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The annual volume of the Supreme Court's tax business fell off slightly at the last term.¹ Few sessions, however, have raised more critical problems or witnessed more dramatic developments. Seldom has the Court convened against a background of such breathless suspense. In some of the cases literally billions of dollars were at stake. In others searching inquiry had to be made into problems which had already precipitated an open break between the Court and the Chief Executive and had to be decided in the passionate climate of white-hot political debate. Of course, there were cases following familiar patterns, of minor doctrinal or political import. There were cases distinguished by their very insignificance. On the whole, however, the tax cases at the 1936 term compare favorably with their predecessors. They emphasize again the dynamic importance of the Law of Taxation,—the constant fascination of this vital, swiftly-paced body of law.

I

THE SCOPE OF THE FEDERAL TAXING AND SPENDING POWERS

A cardinal tenet in the political creed of the New Dealer involves the justification for national action to meet national problems. Competition between this conception and a nebulous judicial ideology of states' rights fed the feud between the Court and the administration, which finally flared into open warfare at the last term. While the castigation of the Court for its espousal of a "horse and buggy" construction of the fundamental law

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1. Excluding orders, petitions for certiorari and rehearings, and counting as single cases opinions where several cases were consolidated and disposed of simultaneously, there were forty-seven tax cases at the 1936 term, as compared with more than sixty cases at the 1935 term.

was going forward, however, it suddenly erupted a series of streamlined decisions, which mark an enormous extension of the constitutionally permissible area of federal action.

The outstanding cases along this line in the field of Taxation were a triad² sustaining the more debatable points of the social security program. Although one³ of these cases directly involved a state statute, functionally, if not analytically, it belongs with the decisions on the federal law.

The Social Security Act⁴ may be roughly divided into three parts. The first part, which embraces Titles I, III, IV, V, VI and X, involves federal grants-in-aid of a familiar pattern to assist the states in carrying out various humane enterprises, such as the care of aged and blind persons and dependent and crippled children, child and maternal welfare, public health, and the administration of state unemployment compensation laws. To entitle themselves to federal aid, the states must set up plans which meet the criteria prescribed by the federal law, the chief of which is financial participation. Federal payments may be stopped if a state departs from an approved plan to one which fails to meet the prescriptions of the federal statute. The chief constitutional problem in this connection seems to be whether or not these payments are a valid exercise of the national spending power. Apart from the political arena, the question has not been seriously raised. Even if it should be, it does not seem to be judicially cognizable under the decisions of *Massachusetts v. Mellon*⁵ and *Frothingham v. Mellon*,⁶ where the pleas of a state and an individual that a similar grant-in-aid invaded the powers reserved to the states under the Tenth Amendment were held not to be justiciable.⁷

Other provisions of the Act which have evoked bitter litigation are the schemes for unemployment compensation⁸ and old age benefits.⁹ Unemployment compensation under the Social Security Act calls for joint action by the federal and state governments. Compensation will not be paid by the national government. If a state neglects to provide for a system of unemployment compensation, its workers will not receive unemployment benefits. To induce state action, however, there is a federal payroll tax on employers of eight or more persons and a credit for state assessments.¹⁰

2. *Carmichael v. Southern Coal & Coke Co.*, 57 Sup. Ct. 868 (1937); *Steward Machine Co. v. Davis*, 57 Sup. Ct. 883 (1937); *Helvering v. Davis*, 57 Sup. Ct. 904 (1937).

3. *Carmichael v. Southern Coal & Coke Co.*, 57 Sup. Ct. 868 (1937).

4. 49 STAT. 620 (1935), 42 U. S. C. A. § 301 (Supp. 1936).

5. 262 U. S. 447 (1923).

6. *Ibid.*

7. See *Georgia v. Stanton*, 6 Wall. 50 (U. S. 1867); *Texas v. White*, 7 Wall. 700 (U. S. 1868).

8. Title III, 49 STAT. 626 (1935), 42 U. S. C. A. § 501 (Supp. 1936); Title IX, 49 STAT. 639 (1935), 42 U. S. C. A. § 1101 (Supp. 1936).

9. Title II, 49 STAT. 622 (1935), 42 U. S. C. A. § 401 (Supp. 1936); Title VIII, 49 STAT. 636 (1935), 42 U. S. C. A. § 1001 (Supp. 1936).

10. Title IX, 49 STAT. 639 (1935), 42 U. S. C. A. § 1101 (Supp. 1936).

The federal tax hits employers regardless of whether or not they operate in a state having a plan for unemployment compensation. If, however, they are taxed under a state unemployment compensation law, which has been approved by the Federal Social Security Board, the state tax may be credited against the federal tax to the extent of ninety per cent of the federal tax. The plain purpose of the Federal Act is, if not to compel, at least to tempt the states to set up schemes for unemployment compensation, since by doing so they obtain the benefits of unemployment compensation for their workers without increasing the tax load of business. Indeed, a state provision for unemployment compensation may result in a tax saving for employers within the state, since in certain situations the federal law allows a credit of ninety per cent of the federal tax, although a lesser amount is actually paid to the state.¹¹

The money collected by the states for unemployment compensation must be paid into the federal treasury, where it forms part of an "Unemployment Trust Fund". These payments are entered into the accounts of the individual states and may be withdrawn by them to the extent of their respective credits.

In *Steward Machine Co. v. Davis*¹² the constitutionality of Title IX, which provides for the payroll tax for unemployment compensation, was successfully defended. Similar objections having been urged in both cases, it will be convenient to consider along with the *Steward* case *Carmichael v. Southern Coal & Coke Co.*,¹³ where the Court upheld an Alabama statute¹⁴ which set up an unemployment compensation plan pursuant to the Federal Act.

In both cases the argument was urgently pressed upon the Court that the federal statute was designed to coerce the states in a field from which the nation was excluded by the Tenth Amendment. The federal statute was condemned because it was coercive and the state statute because it supinely surrendered to the invasion of state sovereignty. The *Butler* case¹⁵ at the last term illustrated the intellectual fragility of the concept of coercion. The *Social Security* decisions do not go a great way toward clarifying it. The majority of the Court in the *Steward* case felt that the federal statute did not coerce but paved the way for cooperation. Instead of compelling state action, it made it feasible for the states to do what they were already eager to do. The federal payroll tax coupled with the provision for crediting state taxes did not compel the states to adopt an unemployment compensation system. By equalizing the tax burden on employers in states

11. Title IX, § 909, 49 STAT. 643 (1935), 42 U. S. C. A. § 1109 (Supp. 1936).

12. 57 Sup. Ct. 883 (1937).

13. 57 Sup. Ct. 868 (1937).

14. ALA. CODE ANN. (Cum. Supp. 1936) § 7597.

15. *United States v. Butler*, 297 U. S. 1 (1936), 84 U. OF PA. L. REV. 547.

providing unemployment compensation and those lacking such provision, it made it possible for a state to adopt such a scheme without fear of competition from a more backward neighbor. The majority also pointed out that unemployment compensation involved matters of national policy, since the burden of unemployment relief must either be shared by the states or borne almost exclusively by the federal treasury. Cooperation might well become coercion, or inducement shade into duress, in a sphere entirely foreign to national policy or concern.

The distinction drawn by the majority was too fine for Justices McReynolds and Butler. Mr. Justice McReynolds felt that "our federate plan of government confronts an enlarged peril"¹⁶ and that "by the sanction of this adventure the door is open for inauguration of others of like kind under which it can hardly be expected that the states will retain genuine independence of action."¹⁷ Mr. Justice Butler shared these forebodings about the enlarged peril confronting our federate plan of government. But to avoid any misunderstanding about his feelings, he wrote a separate dissent in which he indicted the federal statute more specifically as repugnant to the Tenth Amendment. Apparently, however, Mr. Justice Butler did not believe that the "coerced" legislation of Alabama was invalid on this ground, since although he dissented in the *Carmichael* case, he based his disagreement on other considerations. Mr. Justice McReynolds, on the other hand, seemed to carry his objection to the federal statute over to the Alabama legislation, for while he did not explicitly define the reasons for his dissent in the *Carmichael* case, he was careful to record his disagreement apart from that of his dissentient brethren.

Justices Sutherland and Van Devanter also felt that Title IX infringed on state sovereignty, although their objections were addressed to the administrative details of the Act rather than to its intrinsic merits. The standards set up by the federal law to which the state acts must conform seemed to them to establish the nation as a "perpetual overseer"¹⁸ over the states in the administration of their laws. Mr. Justice Cardozo and the majority had a little difficulty with these provisions too, although they defended them by pointing out that the credit provision would be worthless unless the national government exercised some check on the state laws, which do not bind the states irrevocably, but may be repealed by them at any time. To make his disagreement with the majority unanimous, Mr. Justice Butler also concurred in this dissent.

In addition to the argument of coercion, both the federal and the Alabama statutes were attacked upon the ground that they created unreasonable classifications which violated the Fifth and Fourteenth Amendments.

16. 57 Sup. Ct. at 900.

17. *Ibid.*

18. *Id.* at 902.

The majority, however, had little difficulty defending the laws upon this score. The exemptions from tax of employers of less than eight persons and of employers engaged in certain specified occupations were justified by administrative convenience and considerations of policy, which even the minority lacked the temerity or the interest to combat. An interesting point in this connection is whether there is a tacit equal protection clause in the Fifth Amendment. Does due process under the Fifth Amendment require the same attention to classification that equal protection demands under the Fourteenth? The Court did not pass upon this problem. After sustaining the classifications in the Alabama statute against the attack leveled at it in the name of equal protection, it upheld the same exemptions in the federal law by reliance upon the obvious proposition that with respect to classification due process in the Fifth Amendment is certainly no more restrictive than equal protection in the Fourteenth. It seems clear that a classification may be so arbitrary that it offends due process. Awaiting further definition is whether a classification which is unreasonable under the equal protection clause of the Fourteenth Amendment might be reasonable under the due process clause of the Fifth.

There was one provision in the Alabama statute which raised a due process problem sufficiently grave to lead three of the Justices to dissent in the *Carmichael* case. The Alabama law provides for a pooled fund system of unemployment compensation, under which assessments are lumped into a common fund and used indiscriminately to pay unemployment benefits.¹⁹ The possible injustice of this plan is that the employer who contributes least to unemployment may be compelled to pay most for its relief. Justices Sutherland, Butler and Van Devanter were moved by this consideration to condemn the Alabama law as a deprivation of due process, although in other respects they felt that it was constitutional. On the other hand Mr. Justice Stone, writing for the majority, defended the validity of the statute upon two grounds. Viewing it as imposing a general tax, he held that there was no constitutional requirement that the burden of a tax be precisely proportioned to benefit. Then meeting the dissenters sharply on their own ground, he pointed out that the causes of unemployment are obscure. *A*'s employees may lose their jobs because of competition from *B*, who retains all his workers. Consequently the legislature is not unduly arbitrary in putting the burden of unemployment on employers generally, without undertaking nice distinctions as to their respective contributions to this condition.

In both the *Carmichael* and the *Steward* cases as well as in the *Helvering* case,²⁰ involving the constitutionality of old age benefits, the Court was careful to point out that the payroll tax was really a tax. Faced with the

19. ALA. CODE ANN. (Cum. Supp. 1936) § 7597 (3)-7597 (7).

20. *Helvering v. Davis*, 57 Sup. Ct. 904 (1937).

argument that an excise could not be imposed upon "natural rights" as distinguished from "privileges",²¹ the Court chose to reject the argument rather than the distinction. Without undertaking to define "natural rights", the Court held that they could be taxed as freely as "privileges". Apart from some specific constitutional restriction,²² it is clear from the Court's opinion that the taxing power may be extended to all sorts of activities. The decision on this point may encourage bizarre experiments in taxation, but if there are any which have not already been undertaken, practical considerations and popular resentment should prove effective checks.

The Court was not particularly concerned with the artistic label for the federal payroll tax, although it leaned to "excise". As Mr. Justice Cardozo blandly remarked, however, if it was not an excise, it would be an "impost", which served the Court's purposes as well, since either premise led to the conclusion that the tax was an indirect tax which did not require apportionment.

Indirect taxes, however, must be uniform. The Court disposed of this point as cavalierly as it has treated uniformity generally. With little discussion, it held the tax to be uniform, citing a number of cases, the most apposite of which is *Florida v. Mellon*,²³ where a crediting device somewhat similar to the credit for state taxes in connection with the payroll tax imposed by Title IX was upheld in connection with the federal estate tax. Even if uniformity is properly restricted to geographic uniformity, it is difficult to see how a federal tax which exacts three per cent from a taxpayer in one state and one-tenth of that amount from a taxpayer in another is uniform. Add to this the fact that in some cases taxpayers will obtain a ninety per cent credit against the federal tax only by paying at least that amount to a state, while in others they will obtain the same credit, although paying less than ninety per cent of the federal tax to the state.²⁴ In other words, taxpayers in different states will pay a different tax to the Federal Government, and taxpayers in different states will get different credits against the federal tax for what they pay to the states. The verbalization to cover this situation is that the federal law is uniform. Any lack of uniformity is due to the variations in the state laws over which Congress has no control. Obviously the real factor making for lack of uniformity is the credit for state taxes, which is part of the federal law. It seems fantastic to say that Congress is not responsible for the state laws adopted in pursuance of the Social Security Act, when one considers the space which the Act devotes to telling the states what kind of laws they must have. The truth of the matter

21. See 57 Sup. Ct. at 872, 887; Maguire, *Taxing the Exercise of Natural Rights* in HARVARD LEGAL ESSAYS (1934) 273.

22. Cf. *Grosjean v. American Press Co.*, 297 U. S. 233 (1936).

23. 273 U. S. 12 (1927).

24. See *supra* note 11.

seems to be that the payroll tax provided for by Title IX is not a uniform tax, but the uniformity requirement has been so consistently disregarded that the present decision is not greatly out of line with the current of the cases.²⁵

It is settled dogma that taxes must be imposed for public purposes. The Court had little difficulty in deciding that the relief of unemployment is a public purpose, even though compensatory payments are not limited to those who are not only unemployed but indigent. The approach of the Court was sane and wholly admirable. There were no metaphysical vapors about what is public in its "nature", nor any confining historical approach. Public purpose was viewed as something dynamic which develops and changes in the course of national development. Hard facts and solid statistics, rather than aprioristic considerations, guided the Court's deliberations.

The third part of the social security program, successfully sustained in *Helvering v. Davis*,²⁶ involves the system of old age benefits, which are to be administered by the national government without state intervention. Title II specifies these benefits, whose amounts are conditioned by past earnings of the individual recipients and resemble the payments under a liberal annuity contract. They are to be made from an "Old-Age Reserve Account" in the federal treasury, which is also provided for by Title II, and for which that title authorizes annual appropriations on an actuarial basis. No appropriations are actually made by Title II, although it is the transparent intention of Congress that the old age reserve will be set up at least in part from the proceeds of the taxes imposed by Title VIII. Title VIII imposes two taxes: one, labelled an excise, is a payroll tax imposed on employers; the other, entitled an income tax, is assessed against the wage of the worker, although it is collected from the employer. The proceeds of these taxes are paid into the federal treasury as internal revenue collections and are not specifically appropriated for any purpose.

Helvering v. Davis, which involved the constitutionality of this phase of the social security program, was a suit by a stockholder against a corporation to enjoin the payment of the taxes imposed by Title VIII. Before the Court reached the merits, it broached a preliminary procedural point. Mr. Justice Cardozo, who wrote for the majority, did not feel that the plaintiff had shown irreparable injury unless equitable relief were granted, or that this was an appropriate method of testing the constitutionality of the Act. Although he was fortified in this view by the opinions of Justices

25. For an interesting perversion of the uniformity requirement, see *Continental Illinois Bank & Trust Co. v. United States*, 65 F. (2d) 506 (C. C. A. 7th, 1933), *cert. denied*, 290 U. S. 663 (1933); *Gottlieb v. White*, 69 F. (2d) 792 (C. C. A. 1st, 1934), *cert. denied*, 292 U. S. 657 (1934).

26. 57 Sup. Ct. 904 (1937).

Brandeis, Stone, and Roberts, the other justices were willing to take jurisdiction because of the importance of an early decision upon the constitutionality of the Act and because the Government, which had intervened in the suit, had waived its right to object to the form of action. Consequently, Mr. Justice Cardozo passed over the remedial difficulty into the merits.

The principal problem confronting the Court was whether Title II was a valid exercise of the federal spending power. The majority felt that it was. This holding involved two propositions: the major premise, of substantial doctrinal significance, was that Congress may spend for the general welfare and is not limited to spending within the range of its specifically enumerated powers. Curiously enough, there was solid support for this position in the *Butler* case.²⁷ The minor premise was that spending for old age benefits is spending for the general welfare. The majority argument upon this head made three points: what is involved in the general welfare is a matter of primary judgment for Congress, whose decision may be revised judicially only where it involves a gross abuse of discretion. General welfare is not a static conception, but expands with the development of the nation. Viewed realistically from a factual and statistical angle, so many old people are either totally or partially dependent that provision for them is a national problem involving the general welfare.

There is a nice question with respect to the relation between Titles II and VIII. Could one stand without the other? Mr. Justice Cardozo said that since Title II was valid it was not necessary to consider whether Title VIII could stand if Title II were unconstitutional. He then proceeded to examine and sustain the payroll tax imposed by Title VIII. Since much the same problems had been dealt with in connection with the tax imposed by Title IX, the Court disposed summarily of the attack upon the payroll tax under Title VIII by saying that the tax upon employers was a valid excise or duty upon the relation of employment and it did not fail because of the exemptions granted employers engaged in certain occupations. The Court did not pass upon the validity of the "income tax" on wages imposed by Title IX, presumably because it did not feel that this was legitimately in issue.

The only objection which it would seem possible to urge against the income tax on wages, which was not rejected in sustaining the payroll tax, would appear to be the frankly tenuous argument that this is an unapportioned direct tax. The proponents of this thesis would have to sustain the following propositions: (1) That an income tax on wages is a direct tax which must be apportioned, unless relieved from the necessity of apportionment by the Sixteenth Amendment; (2) That income in the Sixteenth Amendment means net income, so that the amendment does not apply to the

27. *United States v. Butler*, 297 U. S. 1 (1936), 84 U. OF PA. L. REV. 547.

tax on wages which, since no deductions are provided, is a tax on gross income. Both of these propositions are highly vulnerable. It was intimated in the *Pollock* case²⁸ that a tax on income from services, as distinguished from a tax upon income from property, might be an indirect tax which did not require apportionment. It is by no means clear, moreover, that income in the Sixteenth Amendment does not mean gross income, or at least gross income from services.²⁹

Apart from these considerations, however, it might well be that in scrutinizing the tax imposed on wages by Title IX the Court would not feel bound by the Congressional label of an income tax. It could easily view the tax as an excise on the privilege of being employed and, like the payroll tax, an indirect tax, without opening up the income tax discussion.³⁰

The importance of the *Social Security* decisions can scarcely be over-rated. Before leaving them, it will be well to scan briefly their doctrinal implications, as well as their immediate incidence in connection with the social security program.

From the viewpoint of procedure, it seems possible to get swift decision upon a constitutional issue by the bogus stockholder's suit, if the government waives its objections and the Court deems the question one of sufficiently pressing significance. Standing alone, the first qualification would operate automatically. If both requirements need to coexist, however, then by its judgment as to what issues are sufficiently pressing to demand immediate action the Court has retained substantial control over the cases which it will allow to reach it by this route.

The balance of power between state and nation may be radically shifted as the result of these decisions. Regardless of nice distinctions between inducement and duress, Congress seems to have been given almost unlimited power to guide the action of the states, at least in spheres which touch matters of national policy.

Although there is no equal protection clause in the Fifth Amendment, a classification which is sufficiently arbitrary to amount to confiscation violates the due process provision of that amendment. It is possible that equal protection adds nothing to due process, although it seems more probable that there is some distinction in degree and that due process is less restrictive than equal protection with respect to classification.

28. *Pollock v. Farmers' Loan & Trust Co.*, 157 U. S. 429, 158 U. S. 601 (1895).

29. It is possible to draw conflicting inferences from the Supreme Court decisions as to whether income in the Sixteenth Amendment means gross or net income. See MAGILL, *TAXABLE INCOME* (1936) 293-329. Conceivably the Court might make a distinction between gross receipts from the sale of property, the taxation of which would involve a tax on capital, and gross income from services, where it is difficult to perceive anything in the nature of a capital levy.

30. In the *Helvering* case two justices dissented. Mr. Justice Butler and Mr. Justice McReynolds were of the opinion that the scheme for old-age benefits invaded a field reserved to the states under the Tenth Amendment. See 57 Sup. Ct. 904, 911 (1937).

Taxes may be laid upon "natural rights" as well as upon "privileges". Taxes must be levied for public purposes, but public purpose is a dynamic concept to be tested by pragmatic reality rather than metaphysical abstraction. Indirect federal taxes must be uniform—but lack of uniformity, which does not involve obvious geographic discrimination, will scarcely be questioned.

The general welfare clause confers on Congress a substantive power to spend for objects outside the specifically enumerated powers of the Federal Government. The *Butler* case, however, is still on the books and presumably Congress must "spend" rather than "regulate",—which means probably what the Court will want it to mean in a concrete case.

More specifically, the social security program is constitutional. Although the Court's decisions do not answer every problem, it is improbable that any successful attack can be made against the aspects of the Act which were not in issue. For example, the grants-in-aid to the states, which have here been called the first part of the social security program, seem justified under the substantive power of Congress to spend for the general welfare. At any rate, unless the Court reverses its position in *Massachusetts v. Mellon*³¹ and *Frothingham v. Mellon*,³² their constitutionality will not be examined judicially. The income tax on wages under Title VIII has not been passed upon, but it is scarcely conceivable that the Court will hold it bad without reversing its position with regard to the payroll tax imposed by that Title. The judicial mind, which would find the technical argument against the constitutionality of the income tax on wages appealing, would almost inevitably be swayed even more strongly by the practical consideration that the worker should shoulder part of the cost of the annuity designed for his benefit. Since the Court sustained a pooled fund state system of unemployment insurance in the *Carmichael* case, it would certainly approve a system where separate accounts were kept for individual employers or individual industries. The Alabama statute which was upheld in the *Carmichael* case provided for merit-rating.³³ The Court's failure to attach any significance to this feature of the Alabama law leads one to suspect strongly that a pooled fund without merit-rating would also be sustained, despite an earlier equal division upon the point.³⁴

There was a possibility at the last term that the Court might pass not only upon the social security program but upon the public works and power policies of the administration as well. However, the *Duke Power Company*

31. 262 U. S. 447 (1923).

32. *Ibid.*

33. ALA. CODE ANN. (Cum. Supp. 1936) § 7597 (4).

34. *Chamberlin, Inc. v. Andrews*, 299 U. S. 515 (1936). The New York statute, which provides for a straight pooled fund plan, was affirmed without opinion by an equally divided court. Mr. Justice Stone was the missing justice.

case,³⁵ which involves the power of the Federal Government to lend money to a county to erect a public power plant to compete with a private enterprise, was remanded for procedural deficiencies after finally reaching the Court.

Under the Federal Constitution, Congress is empowered to tax "to pay the debts and provide for the common defense and general welfare of the United States."³⁶ The *Social Security* decisions involved the exercise of the federal taxing and spending powers to effectuate the general welfare. A helpful precedent in those cases, *Cincinnati Soap Co. v. United States*,³⁷ raised somewhat similar problems in connection with a debt of the United States. The Revenue Act of 1934 imposes a tax of three cents a pound upon the first domestic processing of Philippine coconut oil.³⁸ A further proviso directs that all such taxes, collected with respect to coconut oil wholly of Philippine production, shall "be held as a separate fund and paid to the Treasury of the Philippine Islands, but that if at any time, the Philippine Government provides for any subsidy to be paid the producers of copra, coconut oil, or allied products, no further payment shall be made under this subsection."³⁹ The constitutionality of this legislation was attacked in the *Cincinnati Soap Co.* case upon the grounds that the tax was not imposed for any of the purposes specified in the Constitution, but for a purely local purpose in violation of the Tenth Amendment; that it violated due process, because it was an arbitrary exaction from one group of persons for the exclusive benefit of another; that it violated the requirement of the Constitution that "No money shall be drawn from the Treasury, but in consequence of appropriations made by law",⁴⁰ and that by directing the payment of the proceeds of the tax to the Philippine treasury without specifying their particular expenditure, it involved an unlawful delegation of legislative power. None of these objections prevailed, however, and the Court held that the statute was constitutional.

Writing for an unanimous court, Mr. Justice Sutherland started with the propositions that the tax was really a tax because "it is purely an excise tax upon a manufacturing process for revenue purposes, and in no sense a regulation of the process itself,"⁴¹ and that the Tenth Amendment did not apply because a dependency rather than a state was involved. Mr. Justice Sutherland seemed to conclude that a pecuniary exaction will be a tax, if it is not a regulation. Although he observes that the statute in *United States v. Butler*⁴² was unconstitutional because it "amounted to a naked taking of the

35. *Duke Power Co. v. Greenwood Co.*, 299 U. S. 259 (1936).

36. U. S. CONST. Art. I, § 8.

37. 301 U. S. 308 (1937).

38. 48 STAT. 763 (1934), 26 U. S. C. A. § 999 (a) (1935).

39. *Ibid.*

40. U. S. CONST. Art. I, § 9, cl. 7.

41. 301 U. S. at 312.

42. 297 U. S. 1 (1936), 84 U. OF PA. L. REV. 547.

property of one group of persons for bestowal upon another group,"⁴³ he does not discuss Mr. Justice Roberts' suggestion in that case that the word tax "has never been thought to connote the expropriation of money from one group for the benefit of another."⁴⁴ Nor does he mention the objection urged against the statute in the instant case, that it violated due process because it was an arbitrary exaction from one group of persons for the exclusive benefit of another. The processing tax in *Cincinnati Soap Co. v. United States*, unlike the "expropriation" in the *Butler* case, was a tax. Whether this was because the tax on the processing of Philippine coconut oil, as distinguished from domestic cotton, was not a "naked taking" of property from one group for the benefit of another, or whether it was due to the Court's reluctance to follow Mr. Justice Roberts' suggestions about the connotations of the word "tax", is left to conjecture.

At any rate, the Court held that the tax on processing Philippine coconut oil was a tax, and then proceeded to hold that it was not invalidated by the fact that the proceeds were earmarked for a specific purpose, since this was a purpose for which a subsequent appropriation could constitutionally be made from general funds in the treasury. The nation owes its dependencies—even one which has achieved a status of partial independence, like the Philippine Islands—a moral obligation, which is a debt of the United States. The payment of the proceeds of the tax to the Philippine treasury went to discharge this obligation and was a legitimate exercise of Congressional power.

Mr. Justice Sutherland then addressed himself to the problem of whether the intention of Congress in passing the tax to exclude imports from the Philippines, which might injuriously affect domestic industries, invalidated the tax. Declaring that "Congress has power to levy a tax with the collateral purpose of thereby protecting the industries of the United States",⁴⁵ he found the statute immune from attack on this ground. Nor could he perceive any objection to making the payment of the proceeds from the tax to the Philippine treasury conditional upon the Philippine government's granting no subsidies to Philippine producers of coconut oil or other products specified by the statute, since this furthered the protective effect of the tax. While the result reached here may be entirely legitimate, the reasoning is somewhat surprising. The justification for the protective operation of the tax would seem to be not that it is a legitimate end in itself but rather that it is a casual by-product, which does not invalidate an otherwise valid exercise of the taxing power. The independent restriction on the action of the Philippine government against granting subsidies to producers of coconut oil is sustained, however, not on the theory that it is directly

43. 301 U. S. at 312.

44. 297 U. S. 1, 61 (1936).

45. 301 U. S. at 320.

related to the exercise of Congress' fiscal powers, but that it is a legitimate method of effectuating the collateral purpose of the tax,—namely the protection of domestic industry.

Finally the Court defended the statute against the objection that the "particular uses to which the appropriated money are to be put have not been specified."⁴⁶ This did not violate the constitutional provision forbidding the withdrawal of money from the treasury except "in consequence of appropriations made by law".⁴⁷ This is a restriction upon the disbursing power of the executive and means simply that no money can be paid out of the treasury unless appropriated by an Act of Congress. Either there was such an appropriation here, or since no money had actually been paid to the Philippine treasury, there was still time for a Congressional appropriation and the objection was premature. Moreover, in directing the proceeds of the tax to be paid to the Philippine treasury without specifying the particular uses to which they were to be put, Congress was not delegating its legislative power. In the case of a dependency Congress has power to set up a local government and to appropriate money for it without specifically designating the purposes for which it is to be spent. "It would result in a strange anomaly now to hold that Congress has power to devolve upon the Philippine Government the authority to appropriate revenue derived from local taxation as the government saw fit, but that Congress was without power to confer similar authority in respect of moneys which lawfully will come into the Philippine Treasury from the Treasury of the United States or from other sources apart from taxation."⁴⁸

In dealing with federal taxes motivated by objectives ulterior to the fisc, it is important to distinguish limitations on the taxing power from those on the spending power. A tax may be challenged as an attempt to regulate matters beyond the constitutional powers of Congress because the tax itself is a repressive rather than a revenue measure. Or a tax may be attacked because, although not abnormally repressive, it is coupled with an exercise of the spending power to achieve objectives which Congress cannot constitutionally seek. The cases discussed up to this point involve the power of Congress to spend. Any invalidity in the questioned tax was due not to the fact that it was a regulatory rather than a revenue measure, but rather to the fact that the revenue to be raised was devoted to constitutionally prohibited ends.

There was one case at the last term, however, *Sonzinsky v. United States*,⁴⁹ where Congress was obviously trying to regulate through the repressive effect of a prohibitive tax, rather than by the more subtle diversion

46. *Ibid.*

47. U. S. CONST. Art. I, § 9, cl. 7.

48. 301 U. S. at 323.

49. 300 U. S. 506 (1937).

of the proceeds. In line with the prevailing temper of the Court, it was sustained. The issue involved the constitutionality of the National Firearms Act, Section 2 of which imposes a tax of \$200 on dealers in firearms and of \$500 on manufacturers of firearms; and Section 3, a tax of \$200 upon the sale of a firearm.⁵⁰ A "firearm" is defined as a shotgun or rifle having a barrel less than eighteen inches in length, or any other weapon, except a pistol or revolver, from which a shot is discharged, capable of being concealed on the person, or a machine gun, or a muffler or silencer for any weapon.⁵¹ Sonzinsky was convicted of violating Section 2 of the statute. He appealed on the ground that the purpose of the legislation was to suppress traffic in certain classes of weapons rather than to raise revenue and that it represented an unconstitutional attempt on the part of Congress to regulate matters within the exclusive province of the states. The analytical distinction between a valid tax and an unconstitutional effort to regulate in a prohibited field is as simple as it is futile. If the purpose of the legislation is fiscal, it is a tax. If instead of being designed to raise revenue, its object is to coerce or to repress, it is a regulation. Like most analytical distinctions this oversimplifies the problem and lays down an ideal standard which cannot be applied to concrete cases. As Mr. Justice Stone pointed out in delivering the opinion for a strangely unanimous court, every tax is to a certain extent regulatory: "It interposes an economic impediment to the activity taxed as compared with others not taxed."⁵² The ultimate answer to the problem of whether there is a tax or a regulation depends on judicial reactions too tenuous and variant for generalization. Since every tax is regulatory, the distinction is one of emphasis rather than any difference in kind. In some cases the Supreme Court exhibits a myopia about the motives of Congress which stands out in startling relief against blinding flashes of insight in others. This was one of the myopic decisions. In the words of Mr. Justice Stone: "a tax is not any the less a tax because it has a regulatory effect, . . . and it has long been established that an Act of Congress which on its face purports to be an exercise of the taxing power is not any the less so because the tax is burdensome or tends to restrict or suppress the thing taxed."⁵³ A point to be remembered in these cases is that even if the Court is limited to the "face" of a statute, the different justices may discover conflicting characteristics there. The face of the statute in the *Constantine* case⁵⁴ at the preceding term, which overturned a prohibitive federal excise on dealers in illicit liquor, appeared quite differently to the majority and the minority. These verbalizations do not mean that

50. 48 STAT. 1237, 26 U. S. C. A. § 1132 a, b (1934).

51. 48 STAT. 1236, 26 U. S. C. A. § 1132 (1934).

52. 300 U. S. at 513.

53. *Ibid.*

54. *United States v. Constantine*, 296 U. S. 287 (1935), 84 U. OF PA. L. REV. 663 (1936).

there is any real objectivity in judicial distinctions between a valid tax and an invalid regulation.

II

FEDERAL AND STATE IMMUNITY FROM STATE AND FEDERAL TAXES

The invasion by government of the fields previously preempted by the private entrepreneur has increased not only the range but the cost of government. Paradoxically the trend, which has multiplied the pressure for new and sustained revenues, blocks many of the avenues formerly available to the tax collector. Activities taxable in private hands are insulated behind the walls of governmental immunity. Since the need for revenue seems paramount, one might expect to find the Supreme Court ruthlessly endeavoring to confine the doctrine of intergovernmental immunities as narrowly as possible. The umbrageous boundaries of the doctrine make it difficult to tell whether a concrete case represents contraction or expansion. Viewing the cases at the last term as a whole, however, it is difficult to find any discernible tendency to limit these immunities. Change, if any there be, seems rather in the direction of expansion.

This was manifest in *Brush v. Commissioner of Internal Revenue*,⁵⁵ where the Court held that the New York City Bureau of Water Supply was fulfilling a governmental function and that the salary of its chief engineer was immune from federal income taxation. Although the Court approached the problem from the traditional metaphysical and historical tests of what is governmental in nature and what government has done in the past, its opinion was characterized by a disquieting sensitivity to modern conditions. Obviously few things are more vital to the health and welfare of a community like New York than a safe and adequate water supply. Few agencies are so satisfactorily adapted to secure this supply as the public authorities. Viewed pragmatically, from the angle of the relative importance of what government is doing for the governed, the New York City Bureau of Water Supply is clearly engaged in an essentially governmental undertaking. It is not clear, however, that this is the desirable angle from which to view this particular problem. If it is wise to restrict intergovernmental immunities, it may be better to try "governmental" against the background of pioneer days, rather than the exigencies of the modern situation. A more forthright analysis directed toward the same end lies in the distinction suggested in his dissent by Mr. Justice Roberts, who would allow a tax on "salaries or compensation received by those rendering to a municipality services of the same kind as are rendered to private employers".⁵⁶ Although seven justices concurred in the decision in *Brush v. Commissioner of Internal Revenue*, Mr Justice

55. 300 U. S. 352 (1937).

56. *Id.* at 377.

Stone and Mr. Justice Cardozo limited their concurrence to the ground that the petitioner had brought himself within the exemption prescribed by the Treasury Regulations,⁵⁷ whose validity had not been challenged by the Government, and refused to express any opinion as to the need for revision of the doctrine of implied immunities declared in the earlier decisions. Mr. Justice Brandeis, who apparently favors a revision restricting the scope of these immunities, concurred in Mr. Justice Roberts' dissent.⁵⁸

The distinction between governmental functions, which are tax-exempt, and proprietary functions, which are not, raises an interesting question in connection with state taxes on federal instrumentalities. A possible argument which would exclude the distinction here is that the Federal Government being a sovereign which can act only within the specified powers granted to it by the Constitution can necessarily engage only in governmental enterprises. The problem has not been passed upon by the Supreme Court. A case at the last term which might have raised it, *New York ex rel. Rogers v. Graves*,⁵⁹ was decided on the basis that the activities against which the tax was directed were really governmental. The Panama Railroad Company was originally incorporated in New York under private auspices. In 1904, however, the Federal Government acquired all of its stock in connection with the construction of the Panama Canal. The corporation conducts a railroad across the Isthmus in connection with which it operates several hotels. It also runs a line of steamships to Panama. The company carries freight and passengers for the United States at rates below the regular tariffs, and serves the military forces and personnel of the Canal in various ways, even conducting a commissary for their benefit. It carries freight and passengers which are not connected with the Government, however, and its hotels are used by the general public. In the *Rogers* case the question arose whether Rogers, who was employed by the corporation as its general counsel at a fixed annual salary, could constitutionally be subjected to a New York income tax upon this compensation. The Supreme Court held that he could not be. Reasoning that the Panama Canal was a governmental project and that the operations of the corporation in connection with it shared this immunity, the Court said that the fact that these operations were conducted by a private corporation did not deprive them of the character of governmental functions. Rogers was an employe or officer of the corporation, not a mere independent contractor, and his salary was therefore immune from a state income tax.

57. U. S. Treas. Reg. 74, Art. 643, which recognizes the immunity from federal taxation of the compensation paid to its officers and employees by a state or political subdivision thereof for services rendered in connection with the exercise of an essential governmental function. See the decision of the Circuit Court of Appeals, 85 F. (2d) 32, at 33.

58. Cf. *Helvering v. Powers*, 293 U. S. 214 (1935).

59. 299 U. S. 401 (1937). For discussion of lower New York court's decision, 245 App. Div. 452, 283 N. Y. Supp. 538 (3d Dep't, 1935), see (1936) 84 U. OF PA. L. REV. 664.

The discussion in the *Rogers* case as to whether or not the functions of the corporation were governmental may carry a faint implication of a distinction between proprietary and governmental functions, when a state tax directed at some undertaking of the Federal Government is in issue. In view of the range of activity upon which the Federal Government has embarked under the present administration, some such distinction seems vital for the protection of the state revenues. The question, however, must be fairly regarded as still open.

One escape from the doctrine of intergovernmental immunities lies in the distinction between governmental and proprietary functions. Another is the doctrine of subject and measure or direct and indirect burdens. In *Liggett & Myers Tobacco Co. v. United States*⁶⁰ the Court held that a federal tax⁶¹ upon the manufacture of tobacco sold to a state for free distribution in a state hospital was constitutional. The tax was eighteen cents per pound and was collected when the tobacco was sold or removed from the factory, whichever occurred earlier.⁶² Without inquiring into whether the state was discharging an essential governmental function in the purchase of the tobacco, the Court said that the tax was imposed upon manufacture rather than sale, and was therefore valid. It is not easy to reconcile the *Liggett & Myers* case with *Graves v. Texas Co.*,⁶³ decided at the preceding term, where a tax upon the storage, or withdrawal from storage, of gasoline sold to the Federal Government was held to be imposed on something so essential to sale that it was tantamount to a tax on the sale itself and unconstitutional. Manufacturing the tobacco might seem to the lay mind to have been an essential preliminary of the sale to the Commonwealth of Massachusetts in *Liggett & Myers Tobacco Co. v. United States*. This same ignorant layman might also have difficulty in seeing that a tax of this type which is undoubtedly shifted to the purchaser is not a burden on government, while the tax upon the income of a government employe, which is borne in the first instance by the employe, whose ability to shift it ultimately to his employer in the form of a successful demand for higher wages is purely problematical, is such a burden.

*Taber v. Indian Territory Illuminating Co.*⁶⁴ applied a distinction similar to that evoked by the *Liggett & Myers* case to an easier factual setup. The lessee of an oil lease of restricted Indian lands contended that a nondiscriminatory Oklahoma ad valorem tax upon the machinery and equipment used in connection with the lease was an unconstitutional burden upon a federal instrumentality. Unhappily the Court did not repudiate the rule

60. 299 U. S. 383 (1937).

61. 44 STAT. (PT. 2) 87 (1926), 26 U. S. C. A. § 700 (1928).

62. U. S. Treas. Reg. 8, Art. 43.

63. 298 U. S. 393 (1936).

64. 300 U. S. 1.

of the earlier cases that the lessees of these leases are discharging a federal function. Happily, however, it did deny that a nondiscriminatory tax upon the property of an agent of the Government, even though employed in its operations in that capacity, was a direct burden upon the exertion of governmental powers, and it sustained the Oklahoma legislation.

An interesting uncertainty in connection with governmental immunities involves the power of the legislature to affect them. Could Congress, for example, pass a statute which would subject interest from federal securities to state income taxes? At the other extreme, could it provide that such securities should be exempt from state death taxation, or that the income from this source could not be included in the measure of a state tax on corporate franchises? Legislative power to affect these exemptions involves possibilities not only of abuse but of reform. If the power is plenary, they can be wiped out entirely by reciprocal compacts between state and nation without resort to the tedious uncertainties of constitutional amendment. In *Lawrence v. Shaw*⁶⁵ the Supreme Court construed a Congressional statute which granted a liberal immunity to compensation paid to war veterans, without inquiring, however, into the power of Congress to grant the immunity. There is clearly some margin of Congressional discretion in these matters. How broad that margin is awaits further delineation.

The War Veterans' Act of 1935 provides that "payments of benefits" to veterans "shall be exempt from taxation . . . before or after receipt by the beneficiary."⁶⁶ In *Lawrence v. Shaw* the question arose whether payments made to the guardian of an incompetent veteran were exempt from a North Carolina property tax after they had been received by the guardian and deposited in a bank. Reversing a decision of the state court, the Supreme Court held that the statutory immunity was broad enough to cover the payments to a veteran, not only in their original form, but after conversion into choses in action represented by bank deposits. Under the explicit wording of the statute the immunity does not extend to subsequent investment. The deposit in a bank, however, is simply a method of custody. To deny the immunity here would mean that the veteran could not use a bank for safekeeping without losing his exemption.

An interesting procedural problem growing out of the exemptions of state and federal instrumentalities from federal and state taxes was raised in *Gully v. First National Bank*.⁶⁷ A state tax collector sued a national bank, which had taken over the assets of another national bank under a contract to assume its liabilities, for delinquent taxes assessed against the latter. The

65. 300 U. S. 245 (1937).

66. 49 STAT. 609 (1935), 38 U. S. C. A. § 454a (Supp. 1936). This provision was passed in substitution for Section 22 of a corresponding act of 1924, 43 STAT. 613 (1924, 38 U. S. C. A. § 454 (1934)).

67. 299 U. S. 109 (1936).

suit was initiated in a state court but later removed to a federal court on the ground that state taxes could only be imposed upon national banks pursuant to the Congressional permission, and that this was therefore a suit arising under the Constitution or laws of the United States. The federal court refused to remand the case to the state court and dismissed the complaint after a trial upon the merits. The Circuit Court of Appeals affirmed⁶⁸ the decision of the District Court, but was reversed by the Supreme Court, which sent the case back with directions to remand it to the state tribunal. The Court pointed out that the question directly in issue was the validity of the tax assessment under the state law. The fact that a possible federal question lurked in the background as to whether or not the state tax conformed to the Congressional authorization for taxing national banks, did not convert the case into one involving a federal law.

III

STATE TAXATION OF INTERSTATE COMMERCE

Probably the most significant decision in connection with the immunity of interstate commerce from state taxation at the last term was *Henneford v. Silas Mason Co.*,⁶⁹ which raised the question of the constitutionality of the Washington "use" tax. A serious objection to a state sales tax has been its tendency to drive business out of the state. To escape the incidence of the tax, residents of the taxing state will journey across state lines to make their purchases or will order goods from another state. The inability of the ordinary sales tax to reach these extra and interstate transactions not only affects the revenue from the tax but operates as well to the prejudice of the local merchant. An expedient to combat this situation, which has been adopted in a number of states,⁷⁰ is the so-called compensating or use tax. This takes the form of a tax upon the local use of chattels purchased at retail sale. Credit is allowed against the use tax for the sales tax, however, so that the use tax is in substance simply a thinly disguised tax on sales which the state would otherwise be powerless to reach. Usually only the local sales tax can be credited against the use tax. The Washington statute is peculiar in allowing a credit for sales taxes (or for that matter, for use taxes) paid to Washington or to any other state.⁷¹

In *Henneford v. Silas Mason Co.* the plaintiffs were contractors engaged in the construction of the Grand Coulee Dam on the Columbia River. In connection with this undertaking they brought into Washington ma-

68. 81 F. (2d) 506 (C. C. A. 5th, 1936).

69. 300 U. S. 577 (1937).

70. According to a chart, *Sales Taxes in the States* (1937) 15 TAX DIG. 232, ten states had adopted use taxes on June 1, 1937. North Carolina, which is not listed, also has a use tax limited to motor vehicles. N. C. CODE (1935) § 7880 (1956) e 13.

71. Wash. Laws 1935, c. 180, tit. 4.

chinery and equipment purchased at retail in other states. Contending that the Washington use tax violated the commerce clause, they sought an injunction against its imposition upon the use of these chattels. The injunction was granted by the lower court,⁷² but the Supreme Court reversed its decree and held that the statute was constitutional. Mr. Justice McReynolds and Mr. Justice Butler dissented.

It is obvious that the Washington statute is a defensive measure designed to place the local merchant on an equal footing with his foreign competitor and to abolish what is tantamount to a subsidy to extra and interstate sales. This was the basic consideration which led the Court to sustain it. As far as doctrinal considerations were involved, it would have been a simple matter to have found the requisite verbal formulae to decide the case either way. The Court could have regarded the tax as a sinister attempt on the part of the state to do indirectly what it could not do directly. They could have said that the tax was a prohibited impost upon interstate commerce. Or they could have said that, although the tax was imposed upon a local incident, it unconstitutionally restricted or burdened interstate commerce. On the other hand, the Court could have done what it actually did do, i. e., say that the tax was not upon interstate commerce but upon the local use of a chattel, and that it was not a burden or unconstitutional restriction of interstate commerce because it did not in any way discriminate against such commerce.⁷³

Another problem, about which there had been considerable diversity of opinion, was finally settled by the Supreme Court when the Twenty-first Amendment collided with the commerce clause in *State Board of Equalization v. Young's Market Co.*⁷⁴ A California statute⁷⁵ imposed a license fee of \$500 for the privilege of importing beer. The plaintiffs, who were citizens and domestic corporations of California, had wholesale licenses for the sale of beer, but they refused to pay the importer's license and sought to enjoin enforcement of the statute on the ground that it violated the commerce clause and the equal protection provision of the Fourteenth Amendment. The gravamen of their complaint was that the Twenty-first Amendment, which forbids the "transportation or importation into any State . . . of intoxicating liquors, in violation of the laws thereof", simply protects dry states against the seepage from their damper neighbors, and does not allow a state which tolerates the sale of liquor to discriminate against foreign importation. The Court, however, construed the Twenty-first Amendment up to the limit of its letter. The Amendment not only empowers dry states to ban foreign

72. 15 F. Supp. 958 (E. D. Wash. 1936).

73. Although the court upheld the abatement which the Washington statute allowed for taxes paid to other states, it carefully refrained from passing upon the problem of whether or not this is a necessary condition for the constitutional validity of a use tax.

74. 299 U. S. 59 (1936), 85 U. OF PA. L. REV. 322 (1937).

75. Cal. Stat. 1935, c. 330, § 5.

liquor, but allows wet states to admit such importations on whatever terms they choose, regardless of the commerce clause. As far as the equal protection clause is concerned, it also seems repealed pro tanto by the Twenty-first Amendment, since the Court sustained the validity of the California classification on the ground that it was one tolerated by the Twenty-first Amendment and therefore could not violate the equal protection provision of the Fourteenth. It is possible, however, that such a generalization may prove too broad, because the Court also pointed out that there was nothing unreasonably discriminatory about the \$500 license on importers of foreign beer, since manufacturers of the domestic article paid a tax of \$750 for that privilege.

Of the four remaining cases in this field, three dealt with fees and one with a franchise tax. One of the fee cases may well have been decided on the basis of the Fourteenth Amendment rather than the commerce clause, but it will be convenient to consider it here.

In *Great Northern Railway Co. v. Washington*⁷⁶ a Washington statute⁷⁷ exacted a fee of one-tenth of one per cent of the gross revenues from intrastate operations of public utilities subject to regulation by the Department of Public Works. The purpose of the fee, which was explicitly stipulated in the statute, was to defray the expense of regulating the utilities. However, all the fees were lumped into a common fund and used indiscriminately to pay these expenses, without any attempt to allocate the fees collected from certain classes of utilities to the expense of their supervision. The plaintiff railroad attacked the constitutionality of the statute on the theory that the fees exacted from the railroads exceeded the reasonable cost of their regulation and that the statute violated both the commerce clause and the Fourteenth Amendment. There was no definite evidence as to the exact relation between the amount collected from the railroads and the cost of their regulation. An unofficial computation by the department auditor showed that the sums expended in connection with the railroads exceeded the fees exacted from them by \$37,833. However, part of these expenses apparently went for purposes other than regulation. There was no evidence of the exact proportion spent for regulation and that expended for other purposes. Against the dissent of four justices, the Supreme Court held that the state law was unconstitutional. The principal source of disagreement related to the question of proof. The Court agreed that the fact that the fees were to be lumped into a common fund to defray the expenses of regulating a number of different classes of utilities did not establish that the fee exacted from a particular utility was more than a reasonable compensation for the pro rata cost of regulating and supervising utilities of that

76. 300 U. S. 154 (1937), 85 U. OF PA. L. REV. 639.

77. 11 WASH. REV. STAT. (Remington, 1933) §§ 10417, 10418.

class, so that the statute was not invalid on its face. It divided, however, on the question of whether the fact that the statute showed that the fees were paid into a common fund shifted to the state the burden of proving that the fees exacted from a particular class of utilities did not exceed a reasonable compensation for their regulation. The majority of the Court felt that this negated the ordinary presumption of constitutionality and cast upon the state the affirmative task of proving the validity of the statute,—a burden which it had failed to discharge. Specifically the disagreement between the justices turned upon the interpretation of *Foote & Co. v. Stanley*,⁷⁸ where Maryland was held to have the burden of proving that an inspection fee upon oysters imported from neighboring states to defray the cost of inspection “and the other expenses of the State Fishery Force”⁷⁹ was not an unreasonable fee for the service of inspection. Mr. Justice Roberts and the majority felt that although “There are factual distinctions between the cited case and the instant one . . . they do not affect the binding authority of the former.”⁸⁰ Mr. Justice Cardozo and the other dissenting justices, on the contrary, sought to limit the *Foote* case to an impost upon interstate commerce which “being generally prohibited, and being lawful only when ‘absolutely necessary’ . . . must collapse in its entirety unless the state is in a position to break it up into its elements.” “A very different situation”, continued Mr. Justice Cardozo (who later points out that the Washington fee was limited to a percentage of revenues from intrastate operations), “confronts us in the case at hand. Here the statute of the state does not trespass upon a field of legislation where entry is forbidden without the license of the nation. What has been done is well within the field of general legislative power, with every presumption of validity back of it.”⁸¹

*Bourjois, Inc. v. Chapman*⁸² should be compared with the *Great Northern Railway* case. The State of Maine had passed a statute⁸³ which forbade the sale in intrastate commerce within the state of cosmetic preparations unless such preparations had been registered with, and a certificate of registration procured from, the Department of Health and Welfare. The fee for registering a preparation was fifty cents. The plaintiff, a manufacturer of cosmetics in New York, sold its products to retailers in Maine. Orders were taken in Maine through salesmen there, subject to confirmation at the New York office. The articles were then shipped to the purchasers in Maine, who broke the original packages and resold them. No

78. 232 U. S. 494 (1914).

79. Md. Laws 1910, c. 413, § 69.

80. 300 U. S. at 164.

81. *Id.* at 169.

82. 301 U. S. 183 (1937).

83. Me. Laws 1935, c. 109, §§ 1, 2.

resales were made in Maine in the original packages. Without applying for a certificate of registration for any of its products, the plaintiff sought to enjoin the enforcement of the statute on the theory that it was unconstitutional. The Court, however, found that the Maine legislation was valid. It was not an invalid regulation of interstate commerce, because it only applied to intrastate sales and was a reasonable police measure to protect the health of the people in the state. Nor was interstate commerce directly burdened because registration, which was indispensable to the maintenance of the plaintiff's trade in Maine, required the payment of a fee. Even conceding that under the *Foot* and *Great Northern Railway* cases the state has the burden of proving that the fee was not excessive, it had discharged this burden. The amount of the fee suggests inadequacy rather than excessiveness. Moreover, the statute has not been in operation long enough to determine whether the fee is excessive or not. Under these circumstances it is sufficient if the fee is not unreasonable upon its face, since if later experience shows that the fee is excessive, presumably the state will moderate its charges.

The last fee case was *Ingels v. Morf*,⁸⁴ which invalidated a California statute requiring a fee of fifteen dollars for every motor vehicle transported into the state "on its own wheels, or in tow of another motor vehicle" from without the state "for the purpose of selling or offering the same for sale" within or without the state.⁸⁵ Fees were to be paid into the general fund of the state treasury, although this direction was coupled with the statutory declaration that they were intended to reimburse the state for the purpose of administering the act and policing these vehicles upon the highways. Morf sought to enjoin the enforcement of the statute and introduced evidence in the lower court from which that body concluded that the fees imposed by the act were far in excess of the cost of administering it and policing the vehicles in connection with which the fees were exacted, and unconstitutionally burdened interstate commerce.⁸⁶ Upon the appeal by the state from the injunction granted by the lower court, the Supreme Court unanimously upheld its decision. Since the payment exacted by the state directly burdened interstate commerce, Mr. Justice Stone said that "it must affirmatively appear that it is demanded as reimbursement for the expense of providing facilities, or of enforcing regulations of the commerce which are within its constitutional power."⁸⁷ Unlike *Morf v. Bingaman*,⁸⁸ a case decided at the preceding term where a somewhat similar statute of New Mexico was sustained by the Court, it was not shown in the instant case

84. 300 U. S. 290 (1937).

85. CAL. CODES, LAWS AND CONST. AMEND. (Deering, Supp. 1935) Act 5136, § 1.

86. 14 F. Supp. 922 (S. D. Cal. 1936).

87. 300 U. S. at 294.

88. 298 U. S. 407 (1936).

that the fees were devoted in part to highway purposes. The only thing that the Court could find to make the affirmative showing that the fee was reasonable was the legislative declaration that the charges imposed by the statute were to be used to defray the cost of administering the act and policing the vehicles in connection with which the fees were exacted. This saved the statute from invalidity upon its face and thrust the burden of showing that the fees were excessive upon the one attacking it. That burden had been discharged, however, by the introduction of the evidence in the lower court, which the Supreme Court found justified its judgment.

In *Southern Natural Gas Corporation v. Alabama*⁸⁹ the Court upheld the same statute that it had previously found unconstitutional in *Anglo-Chilean Nitrate Sales Corporation v. Alabama*.⁹⁰ The Alabama law provided that "every corporation organized under the laws of any other state . . . and doing business in this state . . . shall pay annually to the State an annual franchise tax of Two Dollars (\$2.00) on each One Thousand Dollars of the actual amount of the capital employed in this State."⁹¹ The Southern Natural Gas Corporation was a Delaware entity with its office and chief place of business in Birmingham, where management and control of the corporate affairs were centered. The company was engaged in the transmission and distribution of gas and had constructed pipelines running from Louisiana to Georgia. It sold gas to only four customers in Alabama, three of which were public service companies engaged in further distribution of gas to consumers, and one of which was an industrial concern which consumed the gas itself. The gas was delivered by the company to meter houses, where it was measured. In the case of the sales to the industrial concern prior to delivery, the pressure in the pipelines was reduced in conformity to its needs. It was admitted that the Southern Natural Gas Corporation had property in Alabama valued at five and one-half million dollars, and a tax was assessed against it on this basis. The Supreme Court found that the tax was constitutional. The corporation had its "commercial domicile" in Alabama and was doing intrastate business there. It could therefore be taxed upon the privilege of doing a local business, and this tax could be measured by the capital within the state. The *Anglo-Chilean* case was distinguished upon the somewhat tenuous ground that in the instant case, unlike the earlier decision, the Alabama Supreme Court had construed the Alabama law as a tax upon the privilege of doing business within the state, rather than upon the actual doing of business.⁹²

[To be concluded]

89. 301 U. S. 148 (1937).

90. 288 U. S. 218 (1933).

91. ALA. CODE ANN. (1928) § 7214.

92. *Ozark Pipe Line Corp. v. Monier*, 266 U. S. 555 (1925), was distinguished on the ground that the corporation in that case was not doing any intrastate business.