

CONGRESSIONAL POWER TO CONTROL COTTON AND TOBACCO PRODUCTION

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An Act of Congress succumbs to a challenge of its constitutionality only if five of the nine justices of the Supreme Court of the United States are persuaded either, first, that it does not constitute an exercise of one of the powers conferred upon Congress by the Constitution or, second, that it violates one of the prohibitions upon Congressional action imposed by the Constitution.

The clauses which enumerate the powers of Congress and those which set forth prohibitions are phrased in broad and general terms. Rarely, if ever, does either the language of a clause or what is known of its historical background spare the justices, as the final authoritative interpreters of the Constitution, the task of choosing between several equally possible interpretations. Their choices are not based solely upon their judgments as to the wisdom of the particular statute before them: their decision will be a precedent tending to establish the validity or invalidity of other statutes already enacted or possible of future enactment; the justices are influenced, therefore, by their judgments as to the wisdom of these other statutes. The need for choosing is not, however, obviated by existing precedents: frequently precedents are lacking or conflicting or announce doctrines which make the validity of statutes depend upon the justices' judgment as to their wisdom or reasonableness; where this is not true the fact that the Court's tradition permits and its practice makes not unusual the overruling of precedents requires the justices to determine the wisdom of following existing precedents. Whether a statute is held valid or invalid depends, therefore, very largely upon what men happen to be on the Supreme Court, upon their social and economic philosophies, upon whether they are influenced more by traditionally accepted ideas or more by the needs of today, upon the extent to which they feel they should subordinate their ideas of policy to those of the legislature.¹

The Bankhead Act² and the Kerr Act³ are sustainable, if at all, only as exercises

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¹ See Maggs, *The Constitution and the Recovery Legislation: The Rôles of Document, Doctrine, and Judges* (1934) 1 U. OF CHICAGO L. REV. 665.

² Act of April 21, 1934, Public, No. 169, 73rd Cong., 2nd Sess. This Act and the Kerr Act are described in Cavers, *Production Control by Taxation*, *supra*, p. 349.

³ Act of June 28, 1934, Public, No. 483, 73rd Cong., 2nd Sess.

of either the taxing power⁴ or the commerce power⁵ conferred upon Congress by the Constitution. The only constitutional prohibition which can be invoked against them with the slightest possibility of success is that which forbids Congress to deprive any person of life, liberty, or property without due process of law.⁶ The language and the known historical background of the relevant clauses are such that interpretations sustaining these Acts are, I believe, at least as possible as interpretations invalidating them. Relevant past decisions do not, in my opinion, clearly call for a decision for or against the Acts; the precedents and the doctrines announced in them are contradictory and confused. The Acts clash with traditionally accepted ideas as to the proper functions of the National Government, but they were enacted, as was the whole of the equally novel recovery legislation, to meet the felt needs of today. If these Acts are held invalid, consistency will compel the Court to invalidate much of the NIRA, the AAA, and other important parts of the recovery program. With the Court constituted as it is at present, such holdings seem improbable. The considerations set forth below tend, it is submitted, to substantiate the prediction that while it is perhaps improbable that the Acts will be held referable to the taxing power of Congress they will be sustained as exercises of the commerce power and as not violative of the due process clause or of any constitutional prohibition upon Congress.

The Acts as Exercises of the Taxing Power

The Acts require no conduct which is not germane to the collection of the taxes which they impose upon the ginning of cotton and the making of the first sales of tobacco.⁷ But that their effect will not be (and that their purpose was not) either solely, primarily, or principally, to raise revenue, is conceded by all, is asserted by Congress in the declarations of policy contained in each Act, and is made apparent by the exemption from the tax of the ginning and selling of the quantities of cotton and tobacco allotted to producers who agree or who have agreed voluntarily to restrict their acreage or production. The less revenue the Acts raise, the more successful they will have been in accomplishing their ends. Both statutes are designed to, and will, reduce production by furnishing producers inducements to agree to produce less and to perform those agreements. Coöperating producers are not only permitted to gin or sell their allotments free of tax, they are assured that non-coöperators, because of

⁴ U. S. CONST. art. 1, §8, cl. 1: "[The Congress shall have Power] To lay and collect Taxes, Duties, Imposts, and Excises, to pay the Debts and provide for the common Defense and general Welfare of the United States. . . ."

⁵ U. S. CONST., art. 1, §8, cl. 3: "[The Congress shall have Power] To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes."

⁶ U. S. CONST., Amend. V.

⁷ The purpose and effect of the Bankhead Act's prohibition of the export of seed cotton harvested during a crop year with respect to which the tax is in effect is to insure that the taxed activity (ginning) with respect to that cotton will occur in the United States. It is arguable that even if the Act as a whole is sustained as an exercise of the taxing power, this provision is referable only to the commerce power. An embargo has long been regarded as sustainable under the latter power. The Brigantine William, 28 Fed. Cas. 614 (No. 16,700) (D. C. Mass. 1808), cited with approval in Board of Trustees of U. of Ill. v. U. S., 289 U. S. 48, 57, 53 Sup. Ct. 509, 510 (1933).

the tax, will be very unlikely to derive an advantage from their refusal to restrict production; moreover the proceeds of the taxes may yield additional benefit payments to coöperating producers. The control of production thus effected is not, however, the ultimate purpose of the Acts. Production control, the declarations of policy in one or the other or both Acts asserts; is a means toward the larger purposes of balancing production and consumption, stabilizing markets and promoting the orderly marketing of cotton and tobacco in interstate and foreign commerce, raising prices and restoring purchasing power to producers and thereby fostering the restoration of the normal exchange of all commodities.⁸ The Acts are part of the program to end the depression.

Nothing in the Constitution indicates that a tax imposed primarily for non-fiscal purposes is not a tax within the meaning of the clause granting Congress power to impose taxes. Nor does the Constitution itself suggest that the powers it vests in Congress may not be used to secure any end deemed socially desirable by Congress; it is arguable that the contrary is implied by the preamble's declaration that the people of the United States ordained and established the Constitution in order to promote the general welfare. The known relevant historical data does not conclusively determine the scope of Congress's taxing power.⁹ What of past decisions and the doctrines they announce?

Where revenue raising is at least one of the primary purposes and effects of a Congressional tax, it is clear from the decisions that in selecting subjects of taxation, in fixing the rate, and in classifying for graduating the rate or for granting exemptions a purpose and effect of promoting socially desirable ends not related to fiscal needs or to any of the enumerated powers of Congress is permissible.¹⁰ In order to secure such ends—for example the suppression of the practice of including premium coupons in packages of tobacco or cigarettes¹¹—conduct remotely if at all germane to the collection of a revenue-producing tax may be regulated by Congress.¹²

⁸ See Bankhead Act, §1 and Kerr Act, §2.

⁹ See Cushman, *The National Police Power under the Taxing Clause of the Constitution* (1920) 4 MINN. L. REV. 247, 251 ff., 267 ff.

¹⁰ Knowlton v. Moore, 178 U. S. 41, 88, 20 Sup. Ct. 747, 766 (1900); La Belle Iron Works v. U. S., 256 U. S. 377, 41 Sup. Ct. 528 (1921); Hampton & Co. v. U. S., 276 U. S. 394, 411, 48 Sup. Ct. 348, 352 (1928).

¹¹ 30 STAT. 151 (1897), 26 U. S. C. A. §773, upheld in *Felsenheld v. U. S.*, 186 U. S. 126, 22 Sup. Ct. 740 (1902). Congress has also forbidden the inclusion, in packages of excised tobacco or cigarettes, of lottery tickets, obscene pictures or writing. 15 STAT. 160 (1868) (as amended), 26 U. S. C. A. §§773, 838.

¹² Professor Cushman, in a recent article, *Social and Economic Control Through Federal Taxation* (1934) 18 MINN. L. REV. 770, suggests: ". . . it seems clear from the theory of the *Felsenheld Case* [*supra*, n. 11] that Congress, by ancillary regulations attached to its excise power, could accomplish everything in the way of social policy that has been achieved under the Pure Food and Drugs Act and do it more thoroughly." Cf. the provisions of the Oleomargarine Act, 24 STAT. 209 (1886), 26 U. S. C. A. c. 7A, designed to prevent the deception of purchasers of butter substitutes, upheld in *In re Kollock*, 165 U. S. 526, 17 Sup. Ct. 444 (1897).

The provisions of the Harrison Anti-Narcotic Act, 38 STAT. 785 (1914), 26 U. S. C. A. §§211, 691-708, insuring publicity to trafficking in drugs and thus enabling the States to apprehend violators of State anti-narcotic laws, were held in *U. S. v. Doremus*, 249 U. S. 86, 39 Sup. Ct. 214 (1919), by a vote of five to four, to be sustainable under the taxing power as having a reasonable relation to the enforce-

Though revenue raising is no part of the purpose or effect of a taxing statute designed to suppress or regulate conduct, the statute is valid if that effect could be achieved by the exercise of one of the enumerated powers of Congress other than the taxing power.¹³

Congress has frequently imposed taxes not sustainable on any of these grounds. Of these taxes, the Supreme Court has held valid the Oleomargarine Tax of 1902,¹⁴ intended and effective to destroy the practice of selling oleomargarine colored to resemble butter, and the Harrison Anti-Narcotic Act of 1914.¹⁵ The Opium Tax of 1890,¹⁶ the "Phossy-Jaw" Match Tax of 1912,¹⁷ the Cotton Futures Tax of 1914,¹⁸ and the Theatre Ticket Scalper Tax of 1924¹⁹ have not been passed upon by the Court. The Court has held invalid the Child Labor Tax of 1919²⁰ and the Grain Future Trading Act of 1921.²¹

The Harrison Anti-Narcotic Act and the Oleomargarine Tax Act were obviously non-fiscal in purpose and effect. The justices surely knew that the Senators and Congressmen who voted for the Acts did so primarily because they wished to suppress traffic in drugs and the sale of oleomargarine colored to resemble butter, that they did not vote for the Acts in order to raise revenue. No one reading either Act could mistake its true purpose and effect unless he were wholly ignorant of the existence of state anti-narcotic laws and of the nature and uses and relative prices of oleomargarine and of butter. The Harrison Anti-Narcotic Act imposed a tax of but \$1 a year upon persons trafficking in drugs, achieving its purpose and effect of suppressing illegal traffic by imposing minute regulations, sanctioned by a large fine or ment of the fiscal demand. Thomas Reed Powell pronounces this "of course rationally indefensible." *Child Labor, Congress, and the Constitution* (1922) 1 N. C. L. REV. 61, 80. The Court has several times construed the Act narrowly and thus avoided similar questions of constitutionality. *U. S. v. Jin Fuey Moy*, 241 U. S. 394, 36 Sup. Ct. 658 (1916); *Linder v. U. S.*, 268 U. S. 5, 45 Sup. Ct. 446 (1925). *Cf.*, also, *U. S. v. Daugherty*, 269 U. S. 360, 46 Sup. Ct. 156 (1926); *Alston v. U. S.*, 274 U. S. 289, 47 Sup. Ct. 634 (1927); and *Nigro v. U. S.*, 276 U. S. 332, 48 Sup. Ct. 388 (1928). These cases indicate that the Court will draw a line—somewhere. Moreover in *Hill v. Wallace*, 259 U. S. 44, 66, 42 Sup. Ct. 453, 457 (1922), holding the Grain Future Trading Act invalid as primarily a non-revenue raising, regulatory measure (see text and note 25, *infra*), the provisions setting forth regulations for the operation of boards of trade, compliance with which rendered contracts made on those boards exempt from tax, were held to be not reasonably related to the collection of the tax.

¹³ The theory in such cases is that the "taxing statute" is referable not to the taxing power but to the other power of Congress. *Board of Trustees of U. of Ill. v. U. S.*, 289 U. S. 48, 53 Sup. Ct. 509 (1933). The cases are collected and discussed in Cushman, *supra* note 9, 257 ff.

¹⁴ 32 STAT. 193 (1902), 26 U. S. C. A. §546, amending 24 STAT. 209 (1886).

¹⁵ *Supra*, note 12. The Act was amended and the rates of taxation increased by the Act of Feb. 24, 1919, 40 STAT. 1130.

¹⁶ The Act of Oct. 1, 1890, 26 STAT. 567, imposed a tax of ten dollars a pound upon the sale of smoking opium; the tax was made \$300 a pound by the Act of Jan. 17, 1914, 38 STAT. 277, 26 U. S. C. A. §721.

¹⁷ 37 STAT. 81 (1912), 26 U. S. C. A. c. 10.

¹⁸ 38 STAT. 693 (1914), re-enacted as Act of Aug. 11, 1916, 39 STAT. 476, 26 U. S. C. A. c. 13.

¹⁹ 43 STAT. 320 (1914) (as amended), 26 U. S. C. A. §871. Sustained in *Alexander Theatre Ticket Office v. U. S.*, 23 F. (2d) 44 (C. C. A. 2d, 1927) and in *F. Couthoui, Inc. v. U. S.*, 54 F. (2d) 158 (Ct. Claims, 1913).

²⁰ 40 STAT. 1138 (1919).

²¹ 42 STAT. 187 (1921).

imprisonment, designed to give publicity to the traffic and thus enable the states to apprehend violators of state anti-narcotic laws. The Oleomargarine Act imposed a prohibitive tax of ten cents per pound upon sales of oleomargarine colored to resemble butter, a tax of but a quarter of a cent per pound upon sales of other oleomargarine.

It would seem that Acts of Congress such as these could be sustained only if the justices believed that a tax imposed primarily for non-fiscal purposes is a tax within the meaning of the clause granting Congress power to tax and that Congress may exercise its taxing power to achieve socially desirable ends unrelated to any of its enumerated powers. But the Court did not base the validity of the statutes on these grounds. In the Oleomargarine Case,²² it was held that the Court must accept at face value a statute which on its face levies a tax. The motives of Congress, the opinion states, must be disregarded. The opinion disregards, also, the inferences as to the statute's primarily non-fiscal purpose and effect which obviously could be drawn from the provisions of the statute in the light of facts susceptible of judicial notice. The Court, thus, concedes to Congress the ability to exercise in substance the power it would have in theory if the taxing power were admitted to embrace non-fiscal taxes designed and effective to secure ends unrelated to any of its enumerated powers. The Anti-Narcotic Act was also sustained as a revenue measure.²³

The Child Labor Tax Case²⁴ purports not to overrule the Oleomargarine Case. It repeats the latter's disclaimer of power in the Court to inquire into the motives of Congress. But it does not disregard the inferences as to the nature of the statute which can be drawn from its provisions. It stresses the fact that the statute sets forth a detailed regulation of conduct and imposes the tax only upon those who knowingly fail to comply with that regulation. It concedes that an incidental motive to discourage the conduct taxed does not conclusively show that a statute in form a tax is in substance not a tax. But it concludes that the tax on enterprises employing child labor is in reality a penalty imposed for the purpose and with the effect of achieving a non-fiscal end which Congress lacks power to achieve directly. The case invalidating the Grain Future Trading Act,²⁵ which taxed grain future contracts but exempted those made on boards of trade operating under the detailed regulations set forth in the Act, applies the same test and reaches the same conclusion—that the "tax" exacted by the Act is in reality a non-fiscal burden imposed with the purpose and effect of regulating conduct which Congress lacked power to regulate directly.²⁶

If five or more of the justices deem it wise to adhere to the doctrines of the Child

²² *McCray v. U. S.*, 195 U. S. 27, 24 Sup. Ct. 769 (1904). Fuller, C. J., Brown and Peckman, JJ., dissented without opinion.

²³ The cases sustaining it are cited, note 12 *supra*.

²⁴ *Bailey v. Drexel Furniture Co.*, 259 U. S. 20, 42 Sup. Ct. 449 (1922). Clarke, J., dissented without opinion.

²⁵ *Hill v. Wallace*, 259 U. S. 44, 42 Sup. Ct. 453 (1922).

²⁶ These decisions are acutely and exhaustively analyzed and compared with the Oleomargarine Case in Powell, *supra* note 12, 68 ff, and Cushman, *supra* note 12, 774 ff. See also Corwin, *Constitutional Law in 1921-1922* (1922) 16 AM. POL. SCI. REV. 612.

Labor Tax Case, it seems fairly certain that the Bankhead and the Kerr Acts will be held not referable to the taxing power of Congress. Although they do not set forth a detailed regulation of conduct and exact a penalty in the form of a tax for failure to comply therewith, their declarations of purpose, their exemptions, and their obviously probable effects would seem to stamp them as taxing statutes in form only, as regulatory statutes in substance.

A majority of the Court might apply to these statutes the Oleomargarine Case doctrine, either ignoring the Child Labor Case doctrine—as was done in a case involving a state statute decided during the past year²⁷—or repudiating it. Like the Oleomargarine Act, each of these Acts imposes, “on its face,” an excise tax. Their exemptions show that they were intended to be regulatory, non-revenue-raising measures; but this was equally shown by the Oleomargarine Act’s imposition of a tax on oleomargarine colored to resemble butter forty times the tax it imposed on other oleomargarine. The Oleomargarine Act did not contain, however, as do these Acts, an explicit declaration of non-fiscal purposes; such a declaration was held in the case involving the Grain Future Trading Tax Act, in connection with other provisions, to show that that Act was “on its face” a regulation and not a tax.²⁸ It therefore seems extremely probable that the Oleomargarine Case doctrine forbidding the drawing of palpable inferences from other provisions of a statute which on its face levies an excise tax would not be held to forbid the justices to take cognizance of an express declaration of non-fiscal purposes. Yet it could perhaps be argued that without the aid of facts which, though ordinarily susceptible of judicial notice, are not apparent on the face of the statute, the Acts themselves, despite their declarations of non-fiscal purposes, do not compel the inference that their regulatory effects are more than incidental to the raising of revenue.

It is within the realm of possibility that the Court will uphold the Bankhead Act and the Kerr Act by repudiating both of these doctrines and adopting the view that the grant to Congress of power to tax is a grant of power to regulate any conduct by the imposition of non-revenue-producing taxes. Such a power, if recognized, could be used, it seems certain, for any purpose without its exercise being held invalid as a violation of the Tenth Amendment or of an alleged doctrine of “dual federalism.”²⁹ But since such a holding would mean that Congress could indirectly regulate all conduct and affairs outside the reach of its enumerated powers, it is probable that the Court will sustain the Acts, if it does sustain them, upon a narrower ground. It may be, however, that a majority of the present Court is convinced that the welfare of the nation today requires that Congress have that broad power; if they are, it

²⁷ *Magnano Co. v. Hamilton*, 54 Sup. Ct. 599 (1934).

²⁸ See *Hill v. Wallace*, *supra* note 25, at 66, 42 Sup. Ct. at 457. The Bankhead Act’s declaration of policy occurs in Section 1; the Kerr Act’s, in Section 2.

²⁹ The Child Labor Tax decision, *supra* note 24, is not based, as is the earlier Child Labor Commerce decision, *Hammer v. Dagenhart*, 247 U. S. 251, 38 Sup. Ct. 529 (1918), upon the Tenth Amendment and the doctrine of “dual federalism.” These alleged limitations upon the powers of Congress are considered *infra*, notes 40 and 44.

would not be spurious interpretation, in the light of known historical data, were they to adopt such a construction of the taxing clause.³⁰

The Acts as Exercises of the Commerce Power

The Kerr Act, like the Bankhead Act, imposes upon a transaction subsequent to production and prior to whatever interstate transportation may take place, a tax designed, as is made clear by the exemptions granted, to reduce production rather than to yield revenue. From the standpoint of this discussion, no significant difference between the two Acts is perceivable so far as their probable effects are concerned; none is indicated by their declarations of policy.³¹ The Kerr Act, then, is sustainable as an exercise of the commerce power if, and only if, the Bankhead Act is. Consequently the discussion which follows is limited to the latter Act.

The title and the declaration of policy of the Bankhead Act make clear Congress's invocation of the commerce power as an authorization for its enactment. Significant with respect to the question whether the Act will be sustained as an exercise of that power are, under existing doctrine, the relationship to interstate commerce of, first the conduct directly affected by the Act's provisions—the ginning of cotton, second, the conduct for the sake of influencing which the Act affects ginning—the reducing of production, and, third, the purposes and effects of the Act—stated in its title and declaration of policy to be the raising of prices paid to producers and marketers of cotton and thus their purchasing power “so that the restoration of the normal exchange in interstate and foreign commerce may be fostered.”

Neither the language of the commerce clause—empowering Congress “to regulate Commerce with foreign nations and among the several States”—nor past decisions and the doctrines announced in them reveal just what activities are denoted by the term “interstate commerce,” now used as the equivalent of “Commerce among the States.” The Court has frequently spoken as if only transportation across state lines were interstate commerce. But many decisions indicate that this is not so. Adopting a phrase of Chief Justice Marshall, the present Chief Justice, then Mr. Justice Hughes, declared in 1913 that “The words ‘among the several States’ distinguished between the commerce which concerns more States than one and that commerce which is confined within one State and does not affect other States.”³² A brilliant recent study³³ concludes that the historical background of the commerce clause, existing doctrines and past decisions not only do not oppose but furnish strong support for the propo-

³⁰ See Cushman, *supra* note 9. See also second paragraph of note 39, *infra*.

³¹ For the Bankhead Act's declaration of policy, see Cavers, *Production Control by Taxation*, *supra* at p. 350; for the Kerr Act's, see *ibid.* at p. 359, note 57. The Bankhead Act, §5 (b), contains a provision, not found in the Kerr Act, that “it is prima facie presumed that all cotton and its processed products will move in interstate commerce.” But no legal consequences are attached to a rebuttal of this presumption with respect to any particular cotton. Consequently the provision would seem to be without legal effect other than as an additional invocation of the commerce clause and its absence from the Kerr Act of no significance.

³² *Minnesota Rate Cases*, 230 U. S. 352, 398, 33 Sup. Ct. 729, 739 (1913).

³³ Stern, *That Commerce Which Concerns More States Than One* (1934) 47 HARV. L. REV. 1335.

sition that interstate commerce includes "all transactions which occur in and concern more states than one and which the states are incompetent to control."

If a majority of the justices conceive interstate commerce thus broadly,³⁴ it seems certain that they will hold the Bankhead Act to be a valid exercise of the commerce power. The declared purposes of the Act would seem to be clearly relevant to the fostering of interstate commerce thus conceived. Both the ginning and the production of cotton would seem clearly to form part of it. A statute directly affecting an interstate commerce activity, for the sake of influencing indirectly another interstate commerce activity, in order to foster interstate commerce, is obviously referable to the commerce clause.

It is possible, although unlikely, that the Court may conceive interstate commerce broadly enough to render the ginning and production of cotton part thereof, but at the same time regard the declared purposes of the Bankhead Act as transcending interstate commerce—as related to nothing narrower than the "general welfare." May interstate commerce be controlled to achieve such purposes? Decisions have established that Congress, under its commerce power, may foster interstate commerce, protect persons engaged in it, and prevent interstate commerce from being a cause of harm to persons not engaged therein.³⁵ Implicit, though not expressed in the opinion in *Hammer v. Dagenhart*,³⁶ is the proposition that Congress may exercise its commerce power only for ends such as these—ends having an appropriate relevance to the commerce power. This proposition, which compels a negative answer to the question posed, is distinct from and independent of the other doctrines and holdings of *Hammer v. Dagenhart*³⁷ (all of which are of questionable authority and fairly certain to be overruled³⁸). But even this proposition is not certain to be adhered to by the Court in the future. Since the Constitution declares, in its preamble, that one of the purposes for which it was established was the securing of the general welfare, Congress might be regarded as authorized to exercise its commerce power (and each of its other delegated powers) to achieve any end it deems socially desirable.³⁹

³⁴Mr. Stern's paper seems to call for an even broader concept of interstate commerce—one which would include an economic activity confined to a single state (by reason, for example, of the location of the natural resources involved) but affected by and affecting in important ways economic activities in other states.

³⁵See Cushman, *The National Police Power Under the Commerce Clause of the Constitution* (1919) 3 MINN. L. REV. 289, 381, 452.

³⁶247 U. S. 251, 38 Sup. Ct. 529 (1918). Holmes, McKenna, Brandeis, and Clarke, JJ. dissented.

³⁷The distinction between the proposition and the doctrines explicitly announced in *Hammer v. Dagenhart*, *supra* note 36 (as to which, see note 40, *infra*) is indicated by Powell, *The Child Labor Law, The Tenth Amendment, and the Commerce Clause* (1918) 3 So. L. Q. 175, 201, and *Child Labor, Congress, and the Constitution* (1922) 1 N. C. L. REV. 61, 63; Cf. Cushman, *supra* note 35, 297; Corwin, *Congress's Power to Prohibit Commerce* (1933) 18 CORN. L. Q. 477, 502-3.

³⁸As to these doctrines and holdings, see note 40 *infra*.

³⁹Cf. Holmes, J., speaking for the four dissenters in *Hammer v. Dagenhart*, *supra* note 36 at 279: ". . . the Sherman Act has been made an instrument for the breaking up of combinations in restraint of trade and monopolies, using the power to regulate commerce as a foothold, but not proceeding because that commerce [or harm caused by it?] was the end actually in mind."

Even under the view suggested in the text, only Acts of Congress which impose "taxes" would be sustainable as exercises of the taxing power. Unless an imposition in form a tax but in substance a regulatory penalty or burden were held to be a "tax" within the meaning of the taxing clause, it would still not be sustainable under it.

If the limitation of "appropriate relevance" were discarded for this latter view, the Bankhead Act would be sustained, provided cotton ginning were regarded as part of interstate commerce. It would be immaterial, in that event, whether or not the production of cotton (for the sake of influencing which the Act affects ginning) were regarded as part of interstate commerce. With the only activity directly affected—ginning—viewed as an interstate commerce activity and with the purposes of the Act held to be immaterial, the Act would clearly be an exercise of the commerce power. Doubt would be created only if the Court determined to follow the discredited Tenth Amendment and "dual federalism" doctrines⁴⁰ of *Hammer v. Dagenhart*—and it is nearly unthinkable that these doctrines would not fall with the broader doctrine that Congress may exercise its commerce power only for ends having an appropriate relevance to that power.

Let us assume once more that a majority of the justices will regard the declared purposes of the Bankhead Act as appropriately relevant to interstate commerce. Upon that assumption, we have seen, the Act will be held valid if the justices regard both the ginning and the production of cotton as part of interstate commerce. But suppose that they conclude that the ginning of cotton or its production or both are not part of interstate commerce. It does not at all follow that they will hold the Bankhead Act not a valid exercise of the commerce power. Congress may sometimes control, under the commerce power, non-interstate commerce activities. Thus it has been held that the operation of an intrastate train unequipped with safety appliances may be forbidden by Act of Congress if interstate trains travel on the same tracks, because of the danger to them.⁴¹ This and other decisions establish that where Congress is seeking to foster interstate commerce⁴² it may control directly, or indi-

⁴⁰ *Hammer v. Dagenhart*, *supra* note 36, invalidated, by a vote of five to four, an Act of Congress excluding from interstate transportation the products of mines and factories employing child labor. The majority held that the transportation forbidden was a cause neither of the evil of child labor in the state of origin nor of harm to competing producers in states of destination. That this holding is unsupportable, see the articles cited *supra* note 37. Had they rested their decision upon a holding that the Act's purpose and effect was neither to prevent interstate commerce from being a cause of evil nor to achieve any other end appropriately relevant to the commerce clause, the decision would stand only for the proposition stated in the text to be implicit in it—that from its own nature the commerce power may be exercised only to achieve ends appropriately relevant to it. Actually, however, the majority rested the decision on a different ground. They held the Act not a valid exercise of the commerce power because, in their opinion, it in effect regulated an activity (the employment of children) reserved by the Tenth Amendment to state control. In so holding the majority transformed the Tenth Amendment ("The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the State respectively, or to the people") from a mere declaration that the national government possesses only the powers conferred upon it by the Constitution into a substantive limitation upon the powers of Congress. They announced a doctrine called "dual federalism" by Professor Corwin who states it as follows: "the coexistence of the States and their powers is of itself a limitation upon national power." That such limitations are illogical, unsupported by the language of the Constitution, relevant historical data, or past commerce clause decisions would seem to be demonstrated in the articles by Powell, Cushman, and Corwin, cited in note 37 *supra*. It seems a reasonable prediction that the doctrine of "dual federalism" will be confined, in the future, to the field of intergovernmental taxation in which it was first announced. See *Collector v. Day*, 11 Wall. (78 U. S.) 113 (1870).

⁴¹ *Southern R. Co. v. U. S.*, 222 U. S. 20, 32 Sup. Ct. 2 (1911).

⁴² Or to protect persons engaged therein, or to prevent interstate commerce from being a cause of harm to persons not engaged therein, or to achieve any other end having an appropriate relevance to the commerce power.

rectly, to the extent necessary to achieve its end, non-interstate commerce activities which have a "direct" or "undue" effect upon interstate commerce inimical to the end to achieve which Congress is imposing its control.⁴³ Obviously, under cover of the vague terms "direct" and "undue" the justices determine whether or not they deem it wise to recognize the possession by Congress of the power exemplified by the legislation in question. Under this doctrine, the Bankhead Act may be held a valid exercise of the commerce power even though either or both of the activities it controls—the ginning and, indirectly, the production of cotton—are regarded as not part of interstate commerce.⁴⁴

It is apparent, then, that whether or not the Bankhead Act is sustainable under the commerce power does not depend solely upon whether or not the conduct controlled by it is interstate commerce. Judicial statements that production is not commerce do not indicate that Congressional control of production, where the purpose and effect of that control are the achieving of ends having an appropriate relevance to the commerce power, is not authorized by the commerce clause. Nor are decisions that the regulation of production lies within the competence of the states decisive of the competence of Congress. For not only may Congress sometimes control non-

⁴³ Decisions based upon this doctrine include the case cited *supra* note 41; the cases upholding federal regulation of intrastate rates to prevent discrimination against or burdening of interstate commerce—*e.g.*, *R. Com. v. C. B. & Q. Ry.*, 257 U. S. 563, 42 Sup. Ct. 232 (1922); and many of the Sherman Act cases—*e.g.*, *Swift & Co. v. U. S.*, 196 U. S. 375, 25 Sup. Ct. 276 (1905). *Cf.* the doctrine that where intrastate commerce activities are so intermingled with interstate commerce activities that the latter can be regulated effectively only if the former are subjected to the same regulation, Congress may regulate both. See, *e.g.*, *U. S. v. N. Y. Cent. R. Co.*, 272 U. S. 457, 464, 47 Sup. Ct. 130 (1926). The concept of a "stream" or "current" of interstate commerce, including many activities once thought of as purely local, may be explained upon this theory, or upon the theory that the local incidents of the stream are themselves part of interstate commerce. See *Stafford v. Wallace*, 258 U. S. 495, 42 Sup. Ct. 397 (1922); *Board of Trade v. Olsen*, 262 U. S. 1, 43 Sup. Ct. 470 (1923); *Tagg Bros. & Moorhead v. U. S.*, 280 U. S. 420, 50 Sup. Ct. 220 (1930).

⁴⁴ The questionable *Hammer v. Dagenhart* Tenth Amendment and "dual federalism" doctrines (see note 40 *supra*) relate solely to Acts of Congress which directly control interstate commerce activity for the sake of influencing non-interstate commerce activity in ways in which Congress could not influence the latter directly. If the purposes of the Bankhead Act are regarded as appropriately relevant to interstate commerce and if cotton production is viewed as affecting interstate commerce "directly" or "unduly" in ways inimical to those ends, Congress will be held to be authorized under its commerce power to impose relevant control upon cotton production directly. Consequently, upon that assumption, not only is it immaterial whether either ginning or the production of cotton or both are or are not regarded as part of interstate commerce, but the Tenth Amendment and the "dual federalism" doctrines cannot be invoked against the Act.

Only in the unlikely event that ginning is regarded as part of interstate commerce but cotton production is viewed neither as part of interstate commerce nor as affecting it "directly" or "unduly" could these doctrines be successfully invoked against the Act. And, it is to be remembered, they are likely to be overruled.

If both the ginning of cotton and its production are regarded as not part of interstate commerce, it is worthy of note that the Act's claim to validity under the commerce power would not be strengthened by the repudiation of the proposition implicit in *Hammer v. Dagenhart*—that Congress may exercise its commerce power only for ends appropriately relevant thereto. If that proposition is repudiated, Congress will be able to control interstate commerce activities directly for the achievement of any ends it deems socially desirable. But it will still be true that an Act of Congress not controlling interstate commerce activities can be regarded as exercise of the commerce power only if the end it seeks to achieve is appropriately relevant thereto.

interstate commerce activities, the states may sometimes control activities which form part of interstate commerce. A state statute which controls or affects interstate commerce activities is valid if the Court determines that it does not constitute a "direct" or "undue" burden upon those activities⁴⁵—*i.e.*, if the Court deems it wise to recognize the possession by the states of the power exemplified by the statute.

Under present economic conditions it may well be that production for the interstate market is itself an interstate commerce activity.⁴⁶ A corner on the New York Cotton Exchange has been held to be an unreasonable restriction of interstate commerce violative of the Sherman Act because, according to Mr. Justice Van Devanter, its effect upon the country-wide price of cotton would be such that it would "directly and materially impede and burden the due course of trade and commerce among the States."⁴⁷ The Sherman Act could be applied with equal constitutional propriety, it would seem, to a conspiracy by private individuals to control the production of cotton in order to enable them to raise its price in the interstate market. If Congressional power under the commerce clause can penalize control of the products of cotton by individuals seeking to raise its price, no reason is apparent why, when its policies have changed, Congress may not itself exercise such control for the same purpose. Under existing conditions, at least five of the justices are nearly certain, I believe, to view the activities directly controlled by the Act as either themselves interstate commerce activities⁴⁸ or as activities which "directly" or "unduly" affect interstate commerce in ways germane to the Act's declared purposes.⁴⁹ Similarly, they will, I think, conceive interstate commerce broadly enough to render appropriately relevant to the commerce power the declared purposes of the Act.

A narrow interpretation of "Commerce among the several States" would render of doubtful constitutionality not only the Bankhead Act and the Kerr Act but also

⁴⁵ The Court, in holding a state statute valid, is often uncertain whether its validity is due to the fact that the activities it affects are non-interstate commerce activities or to the fact that while the statute affects interstate commerce activities its effect upon them is not "direct" or "undue." See *e.g.*, *East Ohio Gas Co. v. Tax Com.*, 283 U. S. 465, 471 ff., 51 Sup. Ct. 499, 501 (1931), explaining upon the one ground an earlier case decided upon the other—*Pa. Gas Co. v. Pub. Serv. Com.*, 252 U. S. 23, 40 Sup. Ct. 279 (1920).

⁴⁶ See Corwin, *supra* note 37; Stern, *supra* note 33.

⁴⁷ *U. S. v. Patten*, 226 U. S. 525, 543, 33 Sup. Ct. 141, 156 (1913).

⁴⁸ In *Chassaniol v. City of Greenwood*, 291 U. S. 584, 54 Sup. Ct. 541 (1934), a case upholding a municipal occupation tax on persons buying and selling cotton, Brandeis, J., speaking for the Court, said: "Ginning cotton, transporting it to Greenwood, and warehousing, buying and compressing it there, are each, like the growing of it, steps in preparation for the sale and shipment in interstate or foreign commerce. But each step prior to the sale and shipment is a transaction in intrastate commerce." The decision might have been rested upon the ground that the activity taxed was part of interstate commerce but that the tax was not a "direct" or "undue" burden upon it. It may be explained on that ground in subsequent cases. See notes 45 and 49, *infra*.

⁴⁹ *Federal Compress & Warehouse Co. v. McLean*, 291 U. S. 17, 54 Sup. Ct. 267 (1934), upholding a state excise tax on the operation of cotton warehouses, recognizes that the operation of such warehouses may be controlled by Congressional legislation. That case and *Minnesota v. Blasius*, 290 U. S. 1, 54 Sup. Ct. 34 (1933), which also recognizes that liability to non-discriminatory state taxation is not incompatible with liability to control by Congress exerted to achieve ends appropriately relevant to the commerce power, should be borne in mind by anyone viewing *Chassaniol v. City of Greenwood*, *supra* note 48, as fatal to the Bankhead Act's validity as an exercise of the commerce power.

the NIRA, the AAA, and other important parts of the recovery program. In view of the language of the clause, of its known historical background, of past decisions upholding wider and ever wider exercises of Congressional power, it seems more than likely that a majority of the justices will define "interstate commerce" broadly enough to permit Congress to attempt to remedy the evils of national scope which Congress, by these statutes, is seeking to combat—evils which the Court itself is powerless to attack.

Do the Acts Violate Constitutional Prohibitions?

The Constitution contains three provisions specifically limiting the taxing power of Congress. Direct taxes must be apportioned among the states in accordance with population,⁵⁰ other taxes must be uniform throughout the United States,⁵¹ and no tax may be laid on articles exported from any state.⁵² The Bankhead and Kerr Acts, it is clear from the language of the Constitution, relevant historical data, and past decisions and the doctrines announced in them, violate none of these provisions. They tax not cotton and tobacco, but transactions with respect to these commodities; they are therefore excises, not direct taxes. The ginning of cotton and the first selling of tobacco are taxed at the same rate in whatever state these transactions occur; the provisions relating to the allocation of quotas, and therefore of exemptions from the taxes, to states, counties, and farms seem to favor no state or region unduly at the expense of other states or regions;^{52a} a tax does not offend the uniformity clause merely because more of the transactions taxed occur in one state or region than in another. The Acts do not impose taxes on "articles"; they do not indirectly tax articles exported from any state by singling out and taxing transactions with respect to such articles without taxing similar transactions with respect to non-exported articles.⁵³

If the Acts are sustained as exercises of Congress's commerce power, these limitations upon the taxing power are, it would seem from a recent decision, inapplicable.⁵⁴

The due process clause of the Fifth Amendment is now viewed by the justices as

⁵⁰ U. S. CONST., art. I, §9, cl. 4; art. I, §2, cl. 3.

⁵¹ U. S. CONST., art. I, §8, cl. 1.

⁵² U. S. CONST., art. I, §9, cl. 5.

^{52a} The extremely slight discrimination which may result from the provision of Bankhead Act, §5 (a), assuring to a state whose annual production for any one of the past five years was 250,000 or more bales a minimum quota of 200,000 bales, seems unlikely to be regarded by the Court as offending against the uniformity clause. Cf. *Florida v. Mellon*, 273 U. S. 12, 47 Sup. Ct. 265 (1927) where the contention that the uniformity clause was violated by a variation in exemptions from the federal estate tax, intended to make the tax bear more heavily in the case of decedents domiciled in states having no state inheritance taxes, was said to be without merit.

The provision in Bankhead Act, §7 (a), authorizing the Secretary of Agriculture in apportioning the allotment of a county to farms located therein upon either of two specified bases or upon such basis as he "deems fair and just," though permitting the use of different bases in different counties, obviously authorizes merely departures from formal uniformity in order that uniformity in substance may be achieved.

⁵³ That the Acts, therefore, do not violate the export clause, see *Pace v. Burgess*, 92 U. S. 372 (1876); *Turpin v. Burgess*, 117 U. S. 504, 6 Sup. Ct. 835 (1886); *Cornell v. Coyne*, 192 U. S. 418, 24 Sup. Ct. 383 (1904); *Peck & Co. v. Lowe*, 247 U. S. 165, 38 Sup. Ct. 432 (1918).

⁵⁴ *Board of Trustees of U. of Ill. v. U. S.*, 289 U. S. 48, 53 Sup. Ct. 509 (1933).

authorizing them to hold invalid statutes which they regard as arbitrary, unreasonable, and capricious. Under it, and the similar clause in the Fourteenth Amendment applicable to state statutes, the Court occasionally in the past has invalidated statutes interfering in economic affairs as unreasonable because of their inconsistency with the *laissez faire* attitudes of the justices then on the bench. Recent decisions⁵⁵ rendered by the Court as it is now constituted would seem to justify the statement that there is not the slightest possibility that the Bankhead and Kerr Acts will be invalidated upon this ground. At least a majority of the Court is, I think, certain to be unwilling to invalidate the Acts upon the ground that they impose restrictions upon the liberty and property rights of individuals not outweighed by the socially desirable ends they seek to obtain. In the light of the Acts' purposes, their discrimination in favor of participants in the acreage and production reduction program against non-participants will be regarded by the justices, it seems certain, as reasonable, not arbitrary and capricious.

Decisions involving state statutes have announced a doctrine that a tax deprives the taxpayer of property without due process of law if the proceeds are to be expended for a non-public purpose.⁵⁶ To take A's money from him by taxation and give it to B would, under this doctrine, be unconstitutional. But if, in view of their purposes and effects, the Acts are reasonable, the device they employ to achieve those purposes and effects is surely also reasonable. It seems certain that the expenditure of the proceeds of the Bankhead and Kerr Acts to carry out the purposes of the agricultural adjustment program will not be regarded as an expenditure for a non-public purpose, even though it may involve, to some extent, the payment to coöperating producers of sums exacted from non-coöperators.

The Acts may be attacked upon the ground that they unconstitutionally delegate legislative power. The Constitution does not expressly forbid Congress to delegate legislative power, but the Court has frequently asserted that such delegation is impliedly forbidden by the provision that "All legislative Powers herein granted shall be vested in a Congress of the United States."⁵⁷ Although asserting this doctrine, the Court has never held an Act of Congress invalid because of it. Yet delegated or subordinate legislation has become a commonplace; it has proved here and abroad an inevitable concomitant of the growing complexity of government and government's concerns.⁵⁸ Numerous Acts of Congress have been attacked as delegating

⁵⁵ *Home Bldg. & Loan Assn. v. Blaisdell*, 290 U. S. 398, 54 Sup. Ct. 231 (1934); *Nebbia v. N. Y.*, 291 U. S. 502, 54 Sup. Ct. 505 (1934). Speaking for the majority of the Court in the latter case, Roberts, J., said: "So far as the requirement of due process is concerned, and in the absence of other constitutional restriction, a state is free to adopt whatever economic policy may reasonably be deemed to promote public welfare, and to enforce that policy by legislation adapted to its purpose. The courts are without authority either to declare such policy, or, when it is declared by the legislative arm, to override it." 291 U. S. at 537, 54 Sup. Ct. at 516.

⁵⁶ The cases are collected in McAllister, *Public Purpose in Taxation* (1930) 18 CAL. L. REV. 137, 241.

⁵⁷ U. S. CONST., art. I, §1.

⁵⁸ See, reviewing several recent studies, Carr, *Delegated Legislation in England as Seen from Abroad* (1934) 16 J. COMP. LEGIS. & INT. L. 96.

legislative power; the Court has upheld them all by labeling the power they delegate "quasi legislative."⁵⁹ The Bankhead and Kerr Acts vest in the Secretary of Agriculture and other administrative officers vast powers. The Secretary is to determine whether and what taxes shall be imposed and for how long; he is to allocate quotas. For 1935-36 he is to impose a tax under the Bankhead Act only if two-thirds of the producers are in favor of a tax.⁶⁰ The Acts themselves, however, set forth policies to guide the Secretary. The Court will doubtless give weight to the exigencies and reasons of necessity and convenience which induced Congress to leave so much to the process of subordinate legislation; it will also be influenced by the fact that, in this respect, the NIRA, the AAA, and other important parts of the recovery program will stand or fall with the Bankhead and Kerr Acts. In view of these considerations and of the upholding by past decisions of all Acts of Congress questioned on this ground, it seems fairly certain that neither Act will be held to involve an unconstitutional delegation of legislative power.

Comment upon the constitutionality of Acts of Congress necessarily takes the form of a prediction. The prediction sought to be supported by what has been written is that the Bankhead and Kerr Acts will be held by the Supreme Court of the United States to be valid exercises by Congress of its commerce power (and perhaps also of its taxing power, though this is doubtful) and not violative of any constitutional prohibitions.

⁵⁹ The President empowered to lower tariff rates, *Field v. Clark*, 143 U. S. 649, 12 Sup. Ct. 495 (1892); Secretary of Treasury, to define and exclude impure tea, *Buttfield v. Stranahan*, 192 U. S. 470, 24 Sup. Ct. 349 (1904); Secretary of War, to order removal of obstructing bridges, *Union Bridge Co. v. United States*, 204 U. S. 364, 27 Sup. Ct. 367 (1907); Secretary of Agriculture, to prescribe regulations (violations of which to be criminal offenses) for use of national forests, *United States v. Grimaud*, 220 U. S. 506, 31 Sup. Ct. 480 (1911); Interstate Commerce Commission, to specify accounting methods required to be followed by carriers, *I. C. C. v. Goodrich Transit Co.*, 224 U. S. 194, 32 Sup. Ct. 436 (1912); President, to change tariff rates, *J. W. Hampton, Jr., & Co. v. United States*, 276 U. S. 394, 72 L. Ed. 624, 48 Sup. Ct. 348 (1928). There are other cases. See Note (1933) 31 MICH. L. REV. 786.

⁶⁰ Cf. Taft, C. J., speaking for a unanimous Court in *Hampton v. U. S.*, *supra* note 10, at 407: "Congress may feel itself unable conveniently to determine exactly when its exercise of the legislative power should become effective, because dependent on future conditions, and it may leave the determination of such time to the decision of an Executive, or, as often happens in matters of state legislation, it may be left to a popular vote of the residents of a district to be effected by the legislation. While in a sense one may say that such residents are exercising legislative power, it is not an exact statement, because the power has already been exercised legislatively by the body vested with that power under the Constitution, the condition of its legislation going into effect being made dependent by the legislature on the expression of the voters of a certain district." This would seem to present a closer analogy than the zoning cases, discussed in Havighurst, *Property Owners' Consent Provisions in Zoning Ordinances* (1930) 36 W. VA. L. Q. 175.