EDITORIAL COMMENT---THE RECENT A. A. A. DECISION

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It would seem rash to say that Justice Stone in his dissenting opinion in the recent case holding invalid the A.A.A. legislation (*U.S.* v. *Butler*, 56 S. Ct. 312), puts a greater limitation upon the spending power of Congress than does Justice Roberts in his majority opinion. Justice Stone certainly did not think so nor does his conclusion that the A.A.A. legislation was valid bear out any such contention. However, he does put a limitation in his opinion upon the spending power of Congress which, one might well argue, would if logically applied have that effect. In discussing the nature of this power he says, "The power to tax and spend is not without constitutional restraints. One restraint is that this power must be truly national. *Another is that it may not be used to coerce action left to state control.*" In saying this he had in mind no doubt the cases which have held such a limitation applies in respect to the power of Congress to tax. The Supreme Court has many times as in the *Child Labor Tax Case* (259 U.S. 20, 42 S. Ct. 449, 66 L. Ed. 817, 1922); *Linder* v. *U. S.* (268 U.S. 5, 45 S. Ct. 446, 69 L. Ed. 819, 1925), and in the recent case *U. S.* v. *Constantine* (56 S. Ct. 223, 80 L. Ed. 195, 1935) held that such a levy is not a tax at all but a penalty. The significance of this distinction disappears, however, when applied to the spending power. You cannot by definition destroy the spending power by calling it a penalty, for every withholding of a grant of money unless certain standards are met is a penalty. Congress has made many appropriations of money with such conditions attached, instances of which are the appropriations for vocational education to land grant colleges; to aid states in the building of roads and in the

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recent enactments in regard to social legislation. When it comes to the spending power, moreover, the distinction between coercion and procurement of voluntary action is illusory. Except for mechanical control every man in the last analysis acts voluntarily. He does what he wants to do. "Money or your life" gives a man the alternative choice. He chooses that which he prefers. The alternative result may be either the withholding of a benefit or the imposition of a penalty. It is all the same for to the extent that the alternative leads one to a choice he would not have made except for the necessary alternative to that extent he is coerced. It has been recently said in Ohio as a justification for not reducing the appropriation for highway construction that this *could not be done* for to do so would mean the loss of the federal grant. In this way is compulsion brought about.

If the withholding of a conditional grant of funds is a form of coercion, then the limitation laid down by Justice Stone that the spending power may not be used "to coerce action left to 'state control' would render void all congressional appropriations which are conditioned upon the doing of things which in themselves are not subject to federal regulation but 'left to state control.' "

Justice Roberts speaking for the majority of the court does not go this far by a long way. In discussing the extent of the spending power he says "We are not here concerned with a conditional appropriation of money nor with a provision that if certain conditions are not complied with the appropriation shall no longer be available. . . . There is an obvious difference between a statute stating the conditions upon which money shall be expended and one effective only upon assumption of a contractual obligation to submit to a regulation which otherwise could not be enforced. Many examples pointing this distinction might be cited."

This then is the reason for suggesting that Justice Stone's test puts a greater limitation upon the spending power of Con-

gress than does the test laid down by Justice Roberts, for if "coercion" be the test then many conditional appropriations by Congress would be void by the former but valid by the latter.

This discussion about the difference between coercion and procurement in the spending power may seem unimportant and it is. It is only made important by the fact that the distinction is insisted upon in the dissenting opinion of Justice Stone.

The important thing is not how a result is obtained but what the obtained result is. If the result obtained be such an exercise of power of regulation by Congress in the field left by the constitution to the control of the states that it cannot be reconciled with our federal system and the 10th amendment then the court has no other alternative but to declare the whole thing, means and all, void.

It becomes then a question of degree and as Justice Cardozo has said, "the law is not indifferent to considerations of degree." The majority opinion holds that some such congressional control is allowed but when it comes to securing a contractual obligation on the part of the individual to a detailed and extensive regulation by Congress of conduct supposed to be the sole concern of the states it has gone too far.

In doing this the Supreme Court is but doing what it has been doing all along for over half a century and that is trying to give to the plenary powers granted to Congress an interpretation that will recognize the complete plenary character of these powers and at the same time preserve the federal system and the reserved power of the states. John Marshall saw this problem when in *McCullough* v. *Md.* he said, "If any proposition could command the universal assent of mankind we might expect it would be that the government of the Union though limited in its powers is supreme within its sphere of action" and in the same case said, "Should Congress under the pretext of executing its power pass laws for the accomplishment of objects not entrusted to the government it would be the painful duty of this tribunal . . . to say that such an act was not the law of the land."

The problem arises from the fact that great plenary powers like taxation, appropriation and regulation of commerce among the states, are given to the federal government without limitation unless it be the due process clause of the 5th amendment. Any one of these powers, it can be readily seen, if given full meaning, can easily be used by Congress to take over most, if not all, of the reserved power of the states. If Congress under its power to regulate interstate commerce may keep out of interstate commerce all goods unless the owner meets any condition which Congress may exact, or if it condition the spending of money in the same way, then the distinction between the granted and reserved power is gone, and the federal system which is implicit in the constitution is no more.

Shortly after the Civil War this dilemma was presented to the Supreme Court in another form. The 14th amendment for the first time defined national citizenship. The amendment was passed primarily to protect the negro against state aggression. It was claimed, and very logically, that this amendment made national citizenship the primary citizenship and that all those rights which belong to citizenship were now a part of national instead of state citizenship. The amendment provided also that no state should "make or enforce any law which shall abridge the privileges and immunities of citizens of the United States" and gave Congress power to enforce the amendment. In this way the negro was to be protected in his civil rights. It was pointed out that any other interpretation would make the amendment meaningless. The Supreme Court admitted that this might be so but steadfastly refused to accept such an interpretation, because they saw that to do so would take away from the states and transfer to Congress that vast area of police regulation involved in the protection of all a man's civil rights. The result was the great opinion of Justice Miller in the *Slaughter House Cases.*

The same question arose later in *Hammer* v. *Dagenhart.* Here Congress attempted to control the use of child labor by

forbidding goods made with such labor entrance into interstate commerce. The court again refused to uphold such an exercise of power, feeling that to admit that Congress could refuse, for any reason it pleased (subject possibly to "due process"), the right to ship goods in interstate commerce would give to Congress the power to take over most of the police powers of the states.

In the recent Schecter case the court again saw the danger of the reserved powers of the states being swallowed up in the granted powers of the federal government. The Supreme Court has by construction given to Congress extensive powers in the field of interstate commerce. It has borne in mind the statement of Marshall in *Gibbons* v. *Ogden* that, "This power like all others vested in Congress is complete in itself, may be exercised to its utmost extent and acknowledges no limitations other than are prescribed in the constitution." It has decided that under this power Congress may regulate purely intrastate matters if they directly affect interstate commerce. It is these decisions and this doctrine upon which reliance is made to justify the Guffey Coal Bill and the Labor Relations Board Act. But here again the court recognizes the question of degree and that a line must somewhere be drawn. Said Justice Hughes in this case: "If the commerce clause were construed to reach all enterprises and transactions which could be said to have an indirect effect upon interstate commerce, the federal authority would embrace practically all the activities of the people and the authority of the state over its domestic concerns would exist only by sufferance of the federal government," and Justice Cardozo in the same case said, "There is a view of causation that would obliterate the distinction between what is national and what is local in the activities of commerce. Motion at the outer rim is communicated perceptibly though minutely to recorded instruments at the center . . . activities local in their immediacy do not become interstate and national because of distant repercussions."

The reverse of this problem is seen in the conflict between the exercise by the states of their police power and the power of Congress over interstate commerce, though curiously but naturally enough the sympathies in this controversy, of those who strongly favor the exercise of governmental power for general welfare, is in favor of the states as against the power of the federal government. Here their interest is not in a wide interpretation of the federal power over interstate commerce as claimed in the A.A.A. case but in a narrow interpretation as against the power of the states. Marshall in *Gibbons* v. *Ogden* intimated that so long as the states acted under their police power their acts would be valid, but in this he was clearly wrong, for the court soon saw that the states in so acting might very seriously interfere with the power of Congress over interstate commerce and might even put a stop to such commerce altogether. The U. S. Supreme Court sitting as the traditional umpire in such controversies found itself at the same old job of trying to maintain the plenary power of Congress and at the same time the equally important power of the states to legislate for the welfare of their people.

The functioning of the court in this problem is seen in the recent case of *Baldwin et al* vs. *Seely, Inc.* (294 U.S. 511, 55 S. Ct. 497, 79 L. Ed. 1032, 1935). Here the state of New York in trying to make effective its Milk Control Act found it necessary to forbid the sale in New York of milk imported from another state unless the price paid to the producer was one that would be lawful upon a like transaction within the state. One's sympathies are all with the State of New York in this matter and yet the U. S. Supreme Court speaking through Justice Cardozo held such legislation invalid. Said Justice Cardozo, "On that assumption we are asked to say that intervention will be upheld as a valid exercise by the state of its internal police power though there is an incidental obstruction to commerce between one state and another. This would eat up the rule under the guise of an exception. Let such an exception

be admitted and all that a state would have to do in times of stress and strain is to say that its farmers and merchants and workmen must be protected from competition from without lest they go upon the poor relief list or perish altogether. To give entrance to that excuse would be to invite a speedy end of our national solidarity."

The same problem in another form is seen in the development in recent years of the doctrine of "unconstitutional conditions." A state has, it is said, the absolute power to keep foreign corporations from coming into the state and doing intrastate business as a corporation. Having this absolute power it may grant it upon any condition it pleases to make even though the condition be the submission to an otherwise unconstitutional tax or the agreement that it will not take its cases to the federal courts. For a long time the Supreme Court accepted this reasoning but finally it began to see where it would lead and laid down the wholesome doctrine that a government even in the exercise of an absolute power may not condition it upon the yielding of a constitutional right. The application of this doctrine to the plenary power of taxation and appropriation can be readily seen though it has not been mentioned in the discussion of the A.A.A. decision.

The real question then in all these cases including the recent decision under discussion is how far the fundamental principle of the reserved power of the states and our federal system, implicit in the constitution, and reaffirmed in the 10th amendment is to be preserved. If it is to be preserved then it must constitute a check upon the unlimited exercise of the powers granted to Congress as well as those reserved to the states. Since neither one should be pushed to the point where it seriously impairs the other, it becomes, as it so often does in the law, a question of degree.

There is always the danger in forming one's judgment that irritation over a greatly desired immediate objective being thwarted will lead one to overlook the more ultimate and

fundamental issues involved. The Supreme Court no doubt was as desirous as anyone that the negro's civil rights should be protected, that child labor should be abolished and that the farmer should be given greatly needed help, but the Supreme Court also saw under the constitution the necessity of preserving the reserved power of the state and our federal system.

There is no doubt a real and difficult problem before us. The constitution was drafted at a time when both politically and industrially we were separated into units called states. We are trying today to apply that constitution in a time when industrially at least we are largely national and many questions call for a national rule. The U. S. Supreme Court has in its statesmanship gone a long way by construction in making it possible for that constitution to endure. As Marshall said, "It was intended to endure for ages to come and consequently to be adapted to the various crises of human affairs," but there is a limit to its power of construction, particularly when it comes to the fundamental question of the federal system. If it is desired now to change that system and centralize at Washington much if not all of the power reserved to the states, it should be done frankly and openly by an amendment and not by insistence upon court decision. Whether when the real issue is shifted from the question of the immediate objective to the fundamental question of centralized power, the people will approve the latter no one knows.

Justice Learned Hand, who is not only one of our greatest judges but one of our greatest liberals as well, has put the issue clearly in his opinion in the Schecter case in the U. S. Court of Appeals, when he said, "It might or might not be a good thing if Congress were supreme in all respects and the states merely political divisions without more autonomy than it choose to accord them; but that is not the skeleton or basic framework of our system. To protect that framework there must be some tribunal which can authoritatively apportion the powers of government and traditionally this is the duty of courts. It may

indeed follow that the nation cannot as a unit meet any of the great crises of its existence except war and that it must obtain the concurrence of the separate states; but that to some extent at any rate is implicit in the federation and the resulting weaknesses have not hitherto been thought to outweigh the dangers of a completely centralized government. If the American people have come to believe otherwise, Congress is not the accredited organ to express their will to change."

There is one other point of this opinion in the A.A.A. decision that needs comment and that is the part that declares that the taxing and spending power of Congress is not limited as Madison so strongly claimed it was, to the field of the other granted powers but extends as claimed by Hamilton and Story to the whole field of general welfare. In this position the minority concurs so it is now, for better or for worse, the unanimous opinion of the court; an opinion long anticipated but now for the first time made authoritative. This is an immense concession to federal power for it means that Congress has an almost unlimited power of appropriation. So great is this power and so capable is it of abuse that there are those who think it may yet be the undoing of our democracy. Dean Inge has said that the advent of universal suffrance means the end of truly representative government. The so-called "gloomy dean" no doubt was expressing the fear, alas borne out too much by example, that representatives dependent upon this electorate for their continuance in office would readily yield to pressure groups and strive to win their favor by constantly increasing gifts of public funds, the ultimate end of which would be ruin.

In a recent book entitled "The Twilight of the Supreme Court," by Prof. Corwin of Princeton, is brought out the interesting suggestion that the failure of the Supreme Court to put any limits on the spending powers of Congress; its refusal, as he expresses it, "to thrust its sickle into this dread field," is in large part the explanation of the "twilight" of that court. "The success," he says, "of the spending power in eluding all consti-

tutional snares goes far to envelop the entire institution of judicial review as well as its product constitutional law in an atmosphere of unreality even of futility."

It is very possible that this case, so criticized today by those who favor stronger federal power, will come to be, because of this part of its decision, the most frequently cited case in support of that power as exercised in the vast field of appropriation. It is also very possible that the Supreme Court by daring as it has in this case "to thrust its sickle into this dread field" will disprove the suggestion of the twilight of that court, and it is also very possible that the limitation laid down by Justice Stone that the taxing and spending power of Congress "may not be used to coerce action left to state control" is potentially the keenest sickle of them all.

It may be said by some that, admitting all this to be true, it is still possible to justify the A.A.A. legislation as being within the framework of the federal system. The same thing was said, and ably said, in regard to the other legislation mentioned. No attempt is made here to argue that question but only to make clear, what it is feared is oftentimes overlooked, that back of all these acts of legislation, desirable as they may be in their immediate objective, lies a broader and deeper problem and that is the keeping in balance the powers of the federal government and the powers of the states. Either one in the exercise of powers admittedly possessed may, if no limit is drawn, completely swamp the other. There must be an umpire.

True, Thomas Jefferson in the celebrated Kentucky Resolutions declared there was no common umpire and in the absence of such an umpire "each party has equal right to pledge for itself as well of infraction as of the mode and manner of redress." This is another name for the doctrine of nullification, a doctrine long since repudiated. The only other alternative is the Supreme Court which now for over a century has been performing the delicate task, to use the words of Thomas Reed Powell, of "Umpiring the Federal System." A realization of

this fact will not, of course, necessarily lead to an agreement in all cases with the decision rendered but it will temper one's emotional outbursts when some particular act of legislation is declared invalid.