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CONSTITUTIONALITY OF THE UNEMPLOYMENT COMPENSATION FEATURES OF THE FEDERAL SOCIAL SECURITY ACT

THIS article is limited to discussion of the constitutionality of Titles III and IX of the Federal Social Security Act,[1] which provide briefly as follows:

1. Title III [2] provides for grants to states to help cover the expenses of administering their unemployment compensation laws.

2. Title IX imposes a tax on certain employers based on payrolls, with credits for payments made by such employers to state unemployment compensation funds.

The taxing power of Congress was granted by the Constitution in the following language:

"The Congress shall have the 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; but all duties, imposts, and excises shall be uniform throughout the United States." [3]

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1 August 14, 1935, c. 531, Title I, § 1, 49 STAT.

2 "The Federal Social Security Act is an omnibus measure comprising a miscellaneous group of enactments arranged under eleven 'Titles.'" Armstrong, *The Federal Social Security Act*, 21 AM. BAR ASS'N JOUR. 786.

3 U. S. CONST. ART. I, § 8.

It is well-settled that the right of Congress to tax within its delegated power is unrestrained, except as limited by the Constitution itself. There is no limitation as to either amount or subject. Direct taxes must be apportioned, and excises must be uniform. The classification of taxpayers may be so clearly arbitrary and capricious as to amount to confiscation, and hence be a taking of property without due process of law in violation of the Fifth Amendment of the Constitution,[4] but such cases are rare and their circumstances unusual.[5] All taxes must be really taxes, that is, they must be laid for a fiscal purpose. But a tax for such a purpose may be laid by Congress in any amount on any subject within the territorial limits of its jurisdiction. In this sense the power of Congress to tax is absolute.[6]

The United States Supreme Court in the recently decided AAA case[7] has clearly indicated the bases for testing the constitutionality of the measure here under discussion, namely:

1. What is the *nature* of the tax? Is it a *direct* tax requiring apportionment, or is it a *duty*, *impost* or *excise*, requiring uniformity?

2. What is the *purpose* of the tax? Is it a tax to pay the debts or provide for the common defense or general welfare of the United States?

3. Do the means adopted for levying and collecting the tax bear any reasonable relation to the ostensible

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4 Brushaber v. Union P. R. Co., 240 U. S. 1 (1916); Barclay & Co. v. Edwards, 267 U. S. 442 (1924).

5 Classification held not arbitrary: La Belle Iron Works v. United States, 256 U. S. 377 (1921); Lee Mow Lin v. United States, 250 Fed. 694 (C. C. A. 8th, 1918), *certiorari denied*, 247 U. S. 518 (1918). Classification held arbitrary: Nichols v. Coolidge, 274 U. S. 531 (1927).

6 McCray v. United States, 195 U. S. 27 (1904); Billings v. United States, 232 U. S. 261 (1914).

7 United States v. Butler, 56 S. Ct. 312 (1935).

exercise of the power to tax (as distinguished from the attempted exercise of some power not possessed by the Congress).

Analysis of the decision in the AAA case discloses that the Court reached its conclusion by answering each of these questions in turn. The first one was answered by a finding that the processing tax was an excise tax, uniform in its application. Apparently the second question was not definitely answered, although the Court gave an extensive exposition of the meaning of the famous "general welfare" clause, an exposition which would have gained in clarity had an example been cited. In the end, however, the Court stated that even if the purpose of the tax was to provide for the general welfare, the measure was invalid because it failed to meet the third test, that is, so many features of the measure bore no reasonable relation to the ostensible exercise of the taxing power that its primary purpose was obviously not to raise revenue, but to regulate agricultural production,—a matter exclusively reserved to the states.

The theses of this article are:

I. The tax provided by Title IX of the Social Security Act is in form an excise tax which meets the test of uniformity.

II. The primary purpose of the measure (as shown on the face of the Act, even if Titles III and IX be considered together as constituting the measure) is to provide a tax to raise revenues for proper purposes.

1. Substantial revenues will flow into the treasury available for payment of general government expenditures, even after giving effect to the provisions for offset and appropriation.

2. Aside from any incidental effect which the appropriation (under Title III) may have of *inducing* the establishment of state unemployment compensation

plans, such appropriation is *per se* for the general welfare in that it encourages the establishment and aids in the maintenance of state unemployment compensation plans, which will provide an effective method for accumulating funds for existing or future *emergency* unemployment relief.

III. All features of the measure (appropriation, offset, and criteria) are reasonably related to the proper purpose of the measure as an exercise of the taxing power, and are not regulatory or coercive of the states in a matter reserved solely to the states.

1. The offset is given for payments made by taxpayers to states on the same subject (payrolls) and for the same general object (providing for unemployment relief) as the federal tax. Thus the offset is properly related to the tax as a fiscal measure in that it (1) avoids double taxation, and (2) encourages (but does not coerce) the states to endeavor to provide for unemployment relief (which is constitutionally *their* problem) and thus to relieve the Federal Government, in substantial amount, at least, of the necessity for raising funds for emergency unemployment relief.

2. The conditions of the offset (the "criteria" in Section 903 (a)) are reasonably necessary to make certain that the amounts allowed as credits against the tax are substantially as effective in providing for emergency unemployment relief as if they had been actually collected and appropriated by the government for that purpose.

3. The appropriation (proper in itself) may have the incidental effect of encouraging the establishment of state unemployment compensation plans, and as such is a legitimate part of the inducement plan.

4. A tax measure may properly have an incidental purpose, so long as the means adopted to effect that purpose do not have the effect of interfering with rights reserved exclusively to the states. Thus, assuming a secondary purpose in the present case to induce the establishment of state unemployment compensation plans, neither the offset, the appropriation, the criteria, nor all three together, have the effect either of inducing the establishment of any *particular* plan, or of *regulating* any established plan. Incidentally, this secondary purpose is itself fiscal in nature, since its effect is to reduce the need for federal expenditures.

A more informal statement of the general thesis of this article would be: Titles III and IX of the Social Security Act, taken together, might appropriately be called "An Act to Restore the Credit of the Federal Government," or, popularly, "The Federal Credit Security Act of 1935."

I

What is the nature of the tax in question? Is it a direct tax requiring apportionment among the states according to population (as required by Section 2, Clause 3, and Section 9, Clause 4, of Article I of the United States Constitution)? Or is it a duty, impost, excise, or income tax, requiring only uniformity (under Article I, Section 8, Clause 1, and Article XVI of the Constitution)?

The tax is obviously not an income tax; neither is it a duty nor an impost (which relate only to the importation of goods).[8] The sole question is whether the tax is a direct tax or an excise tax.

It may be asserted that the tax is a direct tax, and hence unconstitutional because it violates the rule against apportionment. It has been held, however, that the words "direct

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[8] Pacific Ins. Co. v. Soule, 7 Wall. 433 (1869).

taxes" were used in the Constitution in their natural and obvious sense to denote taxes on real property, personal property, and the rents or income from real and personal property.[9]

An excise tax is not a tax upon property or the ownership of property, but upon the use of property in a certain way.[10]

In upholding a tax on carriages as a tax on expense and therefore not a direct tax, the Court, in *Hylton v. United States,*[11] said:

> "The constitution evidently contemplated no taxes as direct taxes, but only such as Congress could lay in proportion to the census. . . . As all direct taxes must be apportioned, it is evident that the constitution contemplated none as direct but such as could be apportioned. If this cannot be apportioned, it is, therefore, not a direct tax in the sense of the constitution."

This early statement is probably not a very valuable guide in distinguishing direct from indirect taxes, but it and subsequent cases show that the Court is willing to go a long way in upholding taxes as excise taxes, if they have not been apportioned.

The tax in question is expressly stated in the Act to be an "excise tax" on "every employer . . . with respect to having individuals in his employ," and although it is based upon personal property owned by the employer in the nature of money used to pay wages, it is undoubtedly a tax upon the use of said money in a certain way, namely, for the employment of men, and the payment to them of wages, rather than a direct tax upon the money itself. Accordingly, it would be considered an excise tax, subject only to the rule of uniformity—not of apportionment.

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9 Pollock v. Farmers' Loan & Trust Company, 157 U. S. 429 (1895), *reversed on rehearing,* 158 U. S. 601 (1895)

10 Examples of taxes held to be excise taxes: Veazie Bank v. Fenno, 8 Wall. 533 (1869) (state bank notes); Flint v. Stone Tracy Co., 220 U. S. 107 (1911) (corporation); Knowlton v. Moore, 178 U. S. 41 (1900) (legacies and distributive shares); Patton v. Brady, 184 U. S. 608 (1902) (tobacco); Nicol v. Ames, 173 U. S. 509 (1899) (stock exchange).

11 3 Dall. 171, 174, 181 (1796).

It is held that a tax is "uniform" when it operates with the same force and effect in every place where the subject of it is found. "Geographical uniformity" is all that is necessary, geographical uniformity being synonymous with the expression "to operate generally throughout the United States." It makes no difference that the operation or working of the tax may be wholly different in the case of one taxpayer than it is in the case of another on account of diversity of state laws which may tend to enlarge or confine the subject of the tax; or that any other factor, such as business conditions, make the imposition of the tax a more serious burden on one taxpayer than on another.[12]

Thus, although the classes of taxpayers, especially those that may result under Sections 909 and 910, are numerous and somewhat complicated of determination, nevertheless, the tax is uniform within the requirements of the Constitution, inasmuch as it applies generally to all employers of each particular class throughout the United States. It is immaterial that its application will undoubtedly be more burdensome on some employers than on others, depending upon differences in the amount of contributions payable under state plans, competitive conditions, relative size of payrolls to other operating expenses, or other differences in individual conditions.

It should be parenthetically observed that there is not even a remote suggestion in Title IX of improper delegation of legislative power to an administrative body. The directions to the Social Security Board are clear and complete, leaving the Board a relatively simple task of matching state plans with criteria under Section 903, and applying a definite mathematical formula for certifying the additional credit under Section 910.

12 See: The cases cited in footnote 10; State of Florida v. Mellon, 273 U. S. 12 (1927); Gottlieb v. White, 69 Fed. (2d) 792 (C. C. A. 1st, 1934); Standard Oil Co. v. McLaughlin, 67 Fed. (2d) 111 (C. C. A. 9th, 1933), *certiorari denied*, 292 U. S. 631 (1934).

II

Is the purpose of the tax "to pay the debts and provide for the common defense and general welfare of the United States"? Or is it a tax for an unauthorized purpose?

Technically, there is no connection between Title III and Title IX of the Social Security Act. In this respect the Social Security Act can be readily distinguished from the Agricultural Adjustment Act.[13] There the tax and the appropriation, besides being provided for in the same Act, were expressly made coextensively interdependent. Here, Title IX, which levies the tax, is physically separated from Title III (which makes the only appropriation in the Act that could reasonably be construed to have any connection with the tax). Furthermore, the monies to be raised by Title IX are not, on the face of the Act, "appropriated in advance" so as not to go "to the general support of the government." On the contrary, they are expressly directed to be paid into the general fund. Moreover, the tax and the appropriation are not coextensive, because the revenues will greatly exceed the appropriation, at least until the time when all states have established "approved" plans; and even when that time arrives, if ever, the net amount unappropriated under the Act will be substantial. Hence, it would be logical to maintain that no relation between the two titles can either be found on the face of the Act or be legally deduced from its practical operation.

Adoption of this view would make it unnecessary to discuss the measure at any length in relation to the purpose for which the tax monies are raised, because as to revenues going into the general treasury, not appropriated beforehand or earmarked, the only possible presumption is that such revenues would be used for proper purposes. Title IX, standing by itself, would meet this test, since it makes no appropriation.

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13 May 12, 1933, c. 25, 48 STAT.

Incidentally, if the separateness of the two titles should be thus established, Title III also would probably stand, regardless of whether or not it provides an appropriation for a proper purpose, because of the difficulty, under the doctrine of *Massachusetts v. Mellon* (the *Federal Maternity Act* case),[14] of attacking its constitutionality. This leading case held that a law appropriating certain sums to be dispensed by state boards for maternity aids could not be attacked by either an individual federal taxpayer, or by a state. The Court held that it had no jurisdiction because there was no judicial controversy presented to it. As to the individual plaintiff, his mere general interest in the effect of a law, without a showing of a definite injury to himself (which would be impossible because an individual's interest in general government funds is too infinitesimal and remote), was insufficient to give him standing in court. As to the state as plaintiff, it could not claim it was injured by having its reserved rights invaded, because they would not be invaded unless the state itself voluntarily consented thereto.

No argument is needed to show that the conditional grants to states, under Title III of the Social Security Act for aid in administering their unemployment compensation plans, are exactly analogous to the conditional grants to states under the Federal Maternity Act for aid in administering their maternity aid plans. Thus Title III, standing alone, would not be subject to attack.

The AAA decision apparently affirmed the doctrine announced in *Massachusetts v. Mellon,* and perhaps avoided its effect only by the fact that the plaintiff, Hoosac Mills, was contesting a tax actually imposed on it, rather than a mere appropriation; hence the apparent necessity, paradoxically, of a questionable appropriation's standing alone if it is not to fall.

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[14] 262 U. S. 447 (1923).

It appears, however, from the message of the President urging passage of the Bill,[15] from the reports of the two Congressional committees which studied the Bill, and from statements on the floor of Congress in the debates on the Bill, that Titles III and IX were considered parts of one plan relating to unemployment compensation.

It is true, of course, that in no case are statements of individual legislators, especially those not in charge of the Bill, given any consideration in determining the purpose of Congress.[16] Only when the purpose of the law is obscure, not clear upon its face, is it permissible to resort to committee reports to spell out an ulterior purpose.[17] If the Act can speak for itself, it must be allowed to do so.

Nevertheless, in the light of the Supreme Court's warning in the AAA case that it is a "novel suggestion that two statutes enacted as part of a single scheme should be tested as if they were distinct and unrelated," it would seem advisable not to depend upon the technicality of the mechanical separation of Titles III and IX, but rather to meet the possible claim that they are component parts of a single plan.

Viewed in that light, it is scarcely possible not to recognize that Titles III and IX had a dual purpose: (1) Primarily to provide substantial revenues for the Federal Government; and (2) Secondarily to reduce the need for federal expenditures by providing a stimulus for the establishment by the states of plans for unemployment relief, the stimulus consisting of (a) a certain credit or offset to individual taxpayers, and (b) a grant in aid to states.

The *revenue producing* features are to be found in Sections 901 and 905 (a) of Title IX. Section 901 reads as follows:

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15 H. R. 7260.

16 McCaughn v. Hershey Chocolate Co., 283 U. S. 488 (1931).

17 STATUTES, 59 C. J. 953; STATUTES, 25 R. C. L. 957; Van Camp & Sons Co. v. American Can Co., 278 U. S. 245 (1929); United States v. Missouri P. R. Co., 278 U. S. 269 (1929).

"On and after January 1, 1936, every employer (as defined in section 907 of this chapter) shall pay for each calendar year an excise tax, with respect to having individuals in his employ, equal to the following percentages of the total wages (as defined in section 907 of this chapter) payable by him (regardless of the time of payment) with respect to employment (as defined in section 907 of this chapter) during such calendar year:

(1) With respect to employment during the calendar year 1936 the rate shall be 1 per centum;

(2) With respect to employment during the calendar year 1937 the rate shall be 2 per centum;

(3) With respect to employment after December 31, 1937, the rate shall be 3 per centum."

Section 905 (a) reads as follows:

"The tax imposed by this title shall be collected by the Bureau of Internal Revenue under the direction of the Secretary of the Treasury and shall be paid into the Treasury of the United States as internal revenue collections. . ."

The features providing the stimulus for adoption of state unemployment compensation plans are to be found (a) in Sections 902-910, inclusive, of Title IX, which enable individual taxpayers to receive credit (up to 90 per centum of the federal tax) for their contributions to such state plans, and (b) in Title III, which provides for grants in aid to states to aid in administration of their plans.

Now, if Congress had levied merely a tax, payable into the general fund, with no offset and no appropriation, there could be no doubt, in light of the present extensive debt of the United States, that such a tax would be *prima facie* "to pay the debts . . . of the United States" and, hence, would be for a proper purpose.

Even with the offset and the appropriation, the measure will produce revenues for the Federal Government. The amount of gross revenue will vary widely, depending on business conditions and on the number of states which adopt "approved" unemployment compensation plans. Even if all states should adopt such plans, the gross revenue for the

Federal Government would still amount to ten per centum of the tax. Of the gross revenue, a portion would (under Title III) go to states to aid in administering their plans, and the balance would remain in the treasury. It must be conclusively presumed that *this balance, at least,* will be expended for proper purposes.

Thus the sole question which arises upon this phase of the problem is: Are grants in aid to states for the administration of unemployment compensation plans for the "general welfare"?

The underlying principle upon which this whole discussion is based is that *emergency* unemployment relief of the direct type is a matter of such general nation-wide concern that levying taxes to provide for it is within the taxing power of Congress as for the "general welfare."

It is very probable that the constitutional power to provide *ordinary* poor relief, if such power exists anywhere, rests solely in the several states, as a matter of reserved right. Most state constitutions, however, are just as restrictive as is the United States Constitution with regard to the exercise of the taxing power within their jurisdiction. Thus, nearly all of them authorize exercise of the state taxing power only for "public purposes."

It is particularly interesting to note, therefore, that tax levies in several states for the relief of the unemployed have, as a matter of fact, been attacked as not for a public purpose, but that in each instance such taxes have uniformly been upheld as for a public purpose.[18]

If relief for the emergency unemployed in a state is a public purpose from the viewpoint of state taxation, then by the same token nation-wide relief for the emergency unem-

18 Appeal of Van Dyke, 217 Wis. 528, 259 N. W. 700 (1935); City of Muskegon Heights v. Danigelis, 253 Mich. 260, 235 N. W. 83 (1931); Jennings v. City of St. Louis, 58 S. W. (2d) 979 (Mo. 1933); Commonwealth v. Liveright, 161 Atl. 697 (Pa. 1932).

ployed is general welfare from the viewpoint of federal taxation. The Court, in the AAA case, stated clearly that mere "wide-spread similarity of local conditions" does not necessarily create a "situation of national concern." It might be conceded that wide-spread similarity of *ordinary* poor relief conditions would not be a matter of national concern. But it is inconceivable that the Court would fail to recognize that wide-spread pauperization, due to protracted nation-wide unemployment occurring during our periodical depressions, *is* a matter of national concern. When, as occurred early in the present depression, great numbers of people are suddenly thrown upon public relief and the tax resources of the individual states are taxed beyond their capacities to provide the requisite *immediate* relief for them, it is unquestionably not merely the Federal Government's right, but its positive duty, to utilize its resources to help the states save their citizens from cruel physical suffering and the desperation of despair.

The legislatures (and, in turn, the courts) of the states whose supreme court decisions have just been cited take notice of the obvious fact that *unemployment* is the basic cause of the need for poor relief, so that such relief might also be termed public *unemployment* relief.

Unemployment is due to two major causes: (1) Physical or mental imperfection of the individual which unfits him for available work; and (2) The economic forces of a depression.

In the light of what has been said, it seems clear that the responsibility for the care of individuals of the first class, namely, unemployables, properly belongs to the states. The responsibility for the care of the individuals of the second class, the depression unemployed, belongs primarily and solely to the states except during emergency periods, when the cash and credit resources of the states are not sufficient to bear the special and tremendous financial load of exten-

sive direct relief. During such emergency periods, the Federal Government has the secondary duty of utilizing its credit resources to bear at least a part of the emergency burden as a matter of the "general welfare."

The states will always have the problem of ordinary poor relief. Hundreds of thousands of people, because of their status as unemployables, are more or less destitute at all times, while many others are engaged in occupations that do not readily permit of either public or private reserves being built up against the time of their unemployment. Accordingly the states' resources are being continually taxed for ordinary poor relief, and their tendency is to make no provision for emergency relief. "Sufficient unto the day is the evil thereof" seems to be their improvident attitude in this regard. Naturally, then, they are unprepared to bear any sudden additional load. Such was the situation developed by the present depression, which was one of the most severe of our regular cyclical depressions. In view of the apparently inevitable recurrence of such depressions (according to the weight of economic authority), some feasible system of money reserves for the unemployed is greatly to be desired from the standpoint of the nation's welfare.

The establishment of any reasonable plan for the payment of unemployment benefits would (aside from incidental aid to personal morale, social tone, and sustained mass purchasing power) at least have the effect of lightening the financial burden of relief during the period of a depression. Such plans are solely within the reserved powers of the states, and hence any such plans must be established by the individual states. The degree of effectiveness of such plans, individually and collectively, would depend upon the amount of reserve funds available at the beginning of the depression and the severity of the depression. But in any event such establishment would have the result of placing the states in a better position to assume the full primary

responsibility for giving direct relief (both ordinary and emergency) and correspondingly to lighten the secondary responsibility of the Federal Government to aid in providing *emergency* relief.

Accordingly it would seem natural and highly proper for Congress to make available to the states moneys to help defray the cost of administering unemployment compensation plans, and thus to encourage both their establishment and their conscientious maintenance.

Since it appears clear that the Federal Government has the power under the "general welfare" clause to appropriate money for direct relief during emergency periods (and, by the same token, to tax for that purpose), it logically follows that it has the incidental power to appropriate and grant moneys for purposes which will prevent so far as possible the necessity for the government's making emergency relief grants to the states in the future. Individuals recognize the wisdom of putting something aside for a rainy day. Business and industrial concerns make adequate provision for unfavorable contingencies of all kinds by building up reserve funds. It would be strange if the Government were to be denied the same privilege, particularly in an instance like the present, where the establishment of reserves in time will save the proverbial nine of emergency relief expenditures.

The argument may be summarized as follows: *Emergency* poor relief is a matter of the general welfare; hence, under the "general welfare" clause, Congress may levy taxes to provide funds for aids to the states in providing for *emergency* poor relief; unemployment is the basic cause of the need for poor relief, both ordinary and emergency; unemployment compensation plans definitely and directly tend to lighten the burden of both ordinary and *emergency* unemployment (poor) relief; hence, Congress may, under the

"general welfare" clause, levy taxes to provide revenues for aids to the states in maintaining unemployment compensation plans.

Questions arising from the possible coercive or regulatory effect of the conditions of the grants under Title III are discussed later herein.

III

The third question remains: Do the means adopted for levying and collecting the tax bear a reasonable relation to this ostensible exercise of the taxing power of Congress?

The rule on this point was recently repeated in the *Railway Pensions* case,[19] where the Supreme Court succinctly stated (in note 5) that when the question is whether Congress has properly exercised a granted power, the inquiry is whether the means adopted bear a reasonable relation to the ostensible exercise of the power, and cited *Mugler v. Kansas,*[20] *Hammer v. Dagenhart,*[21] *and Bailey v. Drexel Furniture Co.*[22]

It has already been conceded that the measure under discussion has a definite secondary purpose (which is fiscal in nature), namely, to stimulate the adoption and maintenance of state unemployment compensation plans. Is not such stimulation or inducement reasonably related to the power of Congress to raise revenues by taxation? It may be conceded (it is, in fact, insisted by the writers) that the Constitution contains no grant of power to set up a federal unemployment compensation plan, or to require the states to set up such plans, or in any way to interfere with the states' exclusive jurisdiction over the subject. But may not Congress in some way *induce* the states at their option to set up such plans which would be truly their own?

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19 Railroad Retirement Board v. Alton R. Co. 295 U. S. 330 (1935).

20 123 U. S. 623 (1887).

21 247 U. S. 251 (1918).

22 259 U. S. 20 (1922).

As we have seen, Congress had sufficient reason for attempting to find some way of relieving the serious federal credit situation which has arisen during the present emergency (and which is reasonably certain to continue for some years as a heavy debt burden and to arise again at the time of future depressions) because of the grants which have been made to the states to take care of emergency unemployment relief. Congress might have accomplished this object by any one of the following methods:

1. By levying a simple tax, the revenues from which would flow unappropriated into the general funds for payment of the present indebtedness of the Federal Government, and thus would increase its borrowing power at the time of the next depression.

2. By levying a tax, the revenues from which would be appropriated to a reserve to be used specifically to meet future calls for grants for emergency poor relief.

3. By levying a tax, the revenues from which would be specifically appropriated for grants to the states upon proper conditions for the purpose of aiding them not only with the cost of administering unemployment compensation plans, but also with their total costs under such plans, including benefits as well as administration.

4. By levying a tax with a partial offset feature calculated to induce the establishment of state unemployment compensation plans, and with appropriation of part of the net collections from such tax for grants to the states to aid them in defraying the cost of administering their plans.

In the light of the undoubted *right* (and practical responsibility) of Congress to levy a tax to provide funds for *emergency* unemployment relief as a matter of *general welfare,* no constitutional objection to any of the above-mentioned schemes is immediately apparent, though several

practical objections can doubtless be raised against each. In any event, Titles III and IX of the Social Security Act are definitely designed to protect the credit of the United States in precisely the manner above indicated. For that reason they have no logical place in an act designated "Social Security Act." As was stated at the outset, they would more appropriately have been incorporated in a separate measure designated "Federal Credit Security Act." Certainly the scheme as a whole is framed as a revenue-providing and expenditure-reducing measure, that is, the Federal Government will either obtain abundant revenues direct from the taxpayers, available for payment of debts or for emergency unemployment relief, or both, *or* the taxpayers will (whether because of the supposed inducement in the measure or otherwise, who can say?) contribute to state reserves which will be available for emergency unemployment relief and thus obviate the need for federal expenditures to a substantially equivalent extent.

The *general effect* of the measure as revenue-producing and expenditure-reducing may not be sufficient, however, to validate it. As stated in the AAA case, Congress has no power to raise revenue for the general welfare other than by a valid exercise of the taxing power. Hence it is necessary to show that Titles III and IX are not essentially a scheme to *regulate* unemployment compensation with the tax simply incidental thereto, but that they constitute a true revenue measure, and that none of their features are inconsistent with that characteristic. Specifically, it is necessary to establish that the *appropriation* and the *offset* and the *criteria,* all of which, concededly, are component parts of a single scheme, are not arbitrarily inserted in the measure, but are all reasonably related to the proper purpose of the measure as a tax, especially in the sense that they do not render the measure regulatory or coercive of the states in a matter within the exclusive realm of the states.

An offset, or credit, for payments to funds under state unemployment compensation plans does, in the nature of things, bear a reasonable relation to the purpose and to the levying and collection of an excise tax on payrolls. At the time the Act was passed, state unemployment compensation plans had been and were being inaugurated, which, in the first place, were deriving their funds from payrolls, and in the second place, were calculated to have the effect over a long period of time of greatly reducing distress due to unemployment and consequently the burden of emergency unemployment relief currently being borne by the Federal Government. The first of these facts bears a reasonable relation to the subject of the tax, namely, payrolls; the second bears a reasonable relation to the object of the tax, namely, to raise revenues, a substantial portion of which are, or may be, used for emergency unemployment relief. Puting the two together, Congress decided that, in the first place, it is fair to relieve a subject of the burden of double taxation, and that, in the second place, by so doing, the passage of state unemployment compensation plans would be actually induced, with the effect of reducing the necessity for federal revenues in approximately the same amounts as the "offset." On both counts, therefore, the particular offset chosen is reasonably related to the tax as such.

Sections 909 and 910, providing that an employer under certain conditions may obtain credit against the tax even when he makes no actual contribution payments, might at first glance seem difficult to defend as being reasonably related to the tax. As stated later, it would seem that Congress can validly allow *offsets* only for *payments*, not for good behavior. However, until the employer qualifies for this continuing credit, payments (as opposed to mere "good behavior") have been made by him, enough payments, in fact, to establish, on the part of the particular employer, private resources or reserves equivalent to the responsibility

(or voluntary liability) which the government might properly be presumed to have with regard to the relief of such employer's unemployed employes.

The allowance of additional credit under these conditions is entirely consistent with the secondary "expenditure-reducing" purpose of Title IX. Payments into state unemployment compensation funds do not represent the only, or even invariably the most economic, way in which employers may reduce the need for federal (or state) expenditures for unemployment relief. Some employers may, by making special effort and expenditures, be able to give regular employment to their employes. If an employer's record of contributions and benefits paid under a state law demonstrates his achievement along these lines, he logically should be permitted additional credit against his federal tax, because his achievement will undoubtedly reduce the need for federal expenditures to substantially an equivalent extent.

Sections 909 and 910, in permitting such additional credit, set up merely sufficient safeguards to assure that such extra credit will not be granted except where the given employer's performance has in fact served the federal expenditure-reducing purpose. They do not interfere or "regulate" within a province reserved to the states. On the contrary, the practical effect of these sections is to *preserve* the rights of the states in the field of unemployment compensation. The following statement by the Industrial Commission of Wisconsin is directly in point:

> "Section 909 of the Social Security Act provides that an employer may credit and offset against the federal payroll tax not only the money actually paid under a state law, but also such additional amount (if any) by which his state contributions have been reduced because of his steady employment experience. These additional credit provisions are a vital part of Title IX of the Social Security Act. They are essential to permit state laws to offer employers inducements to regularize employment,—a primary objective of the Wisconsin reserve type of law, and likewise of all other merit rating systems. (If no additional tax credits were permitted under Title IX

of the Social Security Act, then no reserve or other merit rating system would be possible under state laws,—since those steady employers whose state contribution rates were reduced, based on their favorable experience, would in any event merely have to pay the difference in federal tax.)" [23]

In other words, Sections 909 and 910 make it possible for the states to give their unemployment compensation laws a dual fiscal purpose, just as Title IX has a dual fiscal purpose, namely, to collect revenue and reduce expenditures. These sections of the federal measure leave each state free to reduce its contribution collections from an employer to the extent that he has reduced the state's need for expenditures to relieve unemployment. The federal measure does not *require* any state to include such provisions in its unemployment compensation law; nor does it prescribe any one system which must be used by a state desiring to use merit-rating. On the contrary, Section 910 defines several alternative systems which will be recognized for federal tax purposes as assuring a genuine expenditure-reducing effect.

If the Supreme Court adheres as strongly to the theory of individual employer responsibility (as against "pooling") as enunciated in the *Railway Pensions* case decision, the foregoing "additional credit" provision may well prove a good make-weight when the present case is argued; for certainly it should add considerably to whatever effect the Act may otherwise have of inducing states and individuals to assume *their own* economic and social responsibilities in respect of that grave problem—unemployment.

In any event, once the requirement of the reasonableness of the credit in relation to the exercise of the taxing power in question is established, the matter of prolonging it would seem to be within the discretion of Congress. At most, such prolongation only creates a different classification of taxpayers, all members of which class are uniformly affected.

[23] Wisconsin Industrial Commission's "Summary Analysis of Chapter 446, Laws of 1935," released September 30, 1935 (pages 10, 11).

Having determined that an offset, *per se,* for contributions under state unemployment compensation plans bears a reasonable relation to an excise tax on payrolls, the question arises as to the propriety of the "criteria" set forth in Section 903 (a), according to which only contributions under such plans as contain certain stipulated characteristics will qualify for the offset. Are these criteria merely incidental parts of the tax, properly related to its purpose as a tax, and to its levy and collection; or are they "regulations," and as such the heart of the Act, around which the tax references are cleverly draped?

Suppose that prior to the imposition of this federal payroll tax, a great number of states had established unemployment compensation plans. Would not Congress have wished to write into its law some offset for amounts paid by employers under such plans? Not, of course, if Congress had planned merely to raise money. But Congress could have been easily persuaded to allow such offset on the strength of the argument that the Federal Government had theretofore been getting from employers contributing to effective state plans the benefit of the contributions made thereunder, and that the imposition of such federal tax would be an unfair additional burden.

In providing for such an offset, however, Congress would wisely attempt not to give credit except where credit was due, and would carefully *define* the kind of plan, for contributions to which the offset would be given. Would the definition be different from the "criteria" of Title IX? Perhaps in certain details, according to wisdom born of longer experience than the 74th Congress had, but not in kind. They would all tend with logical consistency to insure the effectiveness of the plans as measures aiding the federal credit (by lightening the future—and possibly present—load of federal expenditures for emergency unemployment relief) by stipulating that no contributions would be "offset" except

such as were made to *adequate* and *properly safeguarded* funds, *readily* available for the *unemployed*—in other words, plans that really deserved the name of unemployment relief plans. Congress might better collect the whole tax rather than allow credit for moneys that would be spent in a way not tending directly or indirectly to aid the federal credit by lightening the government's emergency relief burden.

Do the "criteria" of Section 903 (a) of Title IX meet this test? From the standpoint of the constitutionality of the measure comprising Titles III and IX as a whole, this determination is unimportant because the measure provides for severability of its various provisions in the event that any of them do not meet the test of constitutionality. But comment on this question is illuminating to emphasize the fact that each of the criteria may be *individually* attacked as to constitutionality.

Under the rule of *A. Magnano Co. v. Hamilton* [24] a particular criterion would not be stricken if it interfered to some extent with the rights of the states, but if in addition to that fault it bore no reasonable relation to the purpose or collection of the tax it would be void. In the light of this rule, the following conclusions seem justifiable:

1. The condition that the fund be built up for two years before benefits become payable represents the long-range view of building reserve funds that will be reasonably *adequate* for future emergency unemployment; as such, it is entirely consistent with the purpose of protecting the federal credit.

2. The condition that the funds be deposited in the United States Treasury seems necessary for proper *safeguarding* of funds, so that they will be available when needed to protect the federal credit.

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[24] 292 U. S. 40 (1934).

3. The condition that benefits be paid through public employment offices or other agencies approved *by the Board* seems improperly regulatory. The probable purpose of this condition is to assure that there will be a minimum of confusion, uncertainty, delay, and fraud in payments of benefits. However, at the country's present level of experience with unemployment compensation, it is rather presumptuous of Congress to assume that the states will not provide as satisfactory machinery for payment of benefits as the Board could suggest. But in any event, this condition has no direct relation to protection of the federal credit, and hence is probably bad.

4. The condition that the funds be paid only for unemployment compensation is obviously reasonable, for if such moneys were used for other purposes there would not be the intended protection of the federal credit.

5. The condition that the plan be subject to amendment by the state legislature seems reasonably necessary to prevent one legislature from tying the hands of succeeding legislatures (if that be possible) by setting up restrictive provisions which would prevent utilization of the fund for payment of unemployment benefits during emergency periods. Furthermore, this provision protects, rather than interferes with, the continuing control of the states over their plans.

6. The condition that compensation shall not be denied under certain conditions relating to labor disputes seems clearly regulation of a matter within the exclusive jurisdiction of the states, and has no relation to the purpose of the measure.

The criteria of Title III, that is, the seven conditions in Section 303 (a) upon which the Federal Government will

grant monies to a state to use in meeting the costs of administering an unemployment compensation plan, would probably not need to be subjected to the foregoing test if Title III could properly be construed as standing alone, since, as before explained, under the doctrine of *Massachusetts v. Mellon*[25] a conditional grant-in-aid to states from general funds is not subject to attack regardless of what its conditions are. If said title, however, is to be construed with Title IX as a component part of a single scheme (as the writers believe it should be), its criteria (each severable) will be subject to the same tests as applied above to the "criteria" of Title IX. Most of the criteria of Section 303 (a) are the same as those in Section 903 (a), and the same comments would apply to them. The remainder deal with reports by the beneficiary states to the government, on matters directly affecting the amount of the grant, and as such seem entirely reasonable.

Although not precisely pertinent to a discussion of the present Act, nevertheless it is interesting to consider whether or not Congress could allow *any* specified out-of-pocket payments whatever, under a state law or not, as an *offset* to a federal excise tax. If so, Congress could perhaps "induce" the establishment of state (or private) old age pension plans (as it has attempted to do along different lines in Section I of the Social Security Act), state health plans, and the like, by a further excise tax on payrolls or some other convenient object, with an "offset" feature for amounts contributed under such plans. It is the writers' conviction that such an inducement tax would be valid only if, as in the present case, the offset bore a reasonable relation to both the subject and the purpose of the tax. But in any event, it is clear that no such inducement program for minimum wages and maximum hours, or divorce laws, or unfair trade practices, or the like (matters within the ex-

25 *Op. cit. supra* note 14.

clusive jurisdiction of the states), could well be devised, for, there being no money to pay under such laws or plans, there would be no "offset" available, and only a "penalty" or "purchase of compliance" tax could be used—and these, of course, would be invalid.

Again, though not affecting the constitutionality of the Act *as written,* nevertheless it should be pointed out most emphatically that, if the offset and the appropriation in all their features must be reasonably related to the tax (and it is believed that they must), every future modification of the "criteria" for approval of state systems under both Title III and Title IX must be carefully scrutinized to determine whether or not such modification bears a proper relation to the taxing power; in other words, whether the modification is on the one hand reasonably calculated to maintain the fair equivalency of the offset to the direct tax, or on the other hand designed merely to regulate details of the operation of the state systems and hence interfere with powers reserved solely to the states. Thus, although the Act as written meets the test (except perhaps as to one or two of the "criteria"), each future modification must be separately tested, and will raise a separate and distinct question of fact as to constitutionality.

At any rate, it would appear from the foregoing that *mechanically,* so to speak, the offset and the criteria generally do meet the test of reasonable relation. A more fundamental objection to the appropriation and the offset with their "criteria" still remains to be met. This is that they constitute an attempt by Congress, under the mere *guise* of the taxing power, to *regulate* unemployment compensation, a matter solely within the province of the states; that the measure consisting of Titles III and IX of the Act, is essentially not a revenue-providing measure, but a regulatory one. It is believed that this objection is not sound.

The only power granted to Congress by the Federal Constitution is the power to *tax*, not to *regulate*. Nevertheless, the taxing power may be, and undoubtedly often has been, used to regulate, or to bring about other secondary results, even where such results were "beyond the constitutional power of the lawmakers to realize by legislation directly addressed to their accomplishment," [26] and still has been considered within the authority of Congress.

Three classes of such cases can readily be cited: One represented by such cases as *Veazie Bank v. Fenno*,[27] where a tax of ten per cent on state bank notes tended to drive such notes from circulation, and *McCray v. United States*,[28] where a tax of ten cents a pound on colored oleomargarine, as against one-quarter cent a pound on white oleomargarine tended to destroy the market for, and thus production of, colored oleomargarine (see also the more recent oleomargarine case of *A. Magnano Co. v. Hamilton*[29]); another represented by such a case as *State of Florida v. Mellon*,[30] where the fact that the whole amount of a state's inheritance tax would be allowed against the federal inheritance tax up to 80 per centum of the federal tax undoubtedly tended to induce the states to levy inheritance taxes in order to collect for themselves moneys that would otherwise go to the Federal Government; and the third by such cases as: (1) *Felsenheld v. United States*,[31] where a stamp tax act forbade a package to contain any but the article subject to the tax; (2) *Dougherty v. United States*,[32] where a butter and oleomargarine tax act prescribed certain regulations as to marking, stamping, and branding

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26 A. Magnano Co. v. Hamilton, *op. cit. supra* note 24.
27 *Op. cit. supra* note 10.
28 *Op. cit. supra* note 6.
29 *Op. cit. supra* note 24.
30 *Op. cit. supra* note 12.
31 186 U. S. 126 (1902).
32 108 Fed. 56 (C. C. A. 3rd, 1901), *certiorari denied*, 181 U. S. 623 (1901).

packages; and (3) *Nigro v. United States,*[33] where an act imposing a tax upon the sale of narcotics and making it a criminal offense to sell narcotics except in certain stamped packages and pursuant to a written order upon a prescribed form tended to discourage undercover traffic in such drugs.

In all of the foregoing cases, the secondary results obtained were held to have been purely incidental and not apparent on the face of the acts involved. All provisions of the respective acts were held to have borne a proper relation to the exercise of the taxing power. This in spite of the fact that the revenue-producing functions of several of the acts involved were almost negligible. For instance, the federal estate taxes, prior to the enactment of the amendment in question in the *Florida* case,[34] had *no* offset. The amendment, therefore, was not a revenue producer—it was very decidedly a revenue reducer. Nevertheless, it left the Act as a whole a revenue producer. So, also, in the *Nigro* case,[35] probably the deciding factor of the decision was that the Act (as amended) provided more than "nominal" revenue—though the revenue amounted to only a million dollars a year, a mere drop in the bucket compared to the revenue which will be raised by Title IX.

On the other hand, there have been several cases where the court held that the act showed on its face that it was *primarily* an effort to regulate a matter wholly within the reserved authority of the states, and that its operative provisions disclosed no reasonable relation to the taxing power.

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33 276 U. S. 332 (1928). It should be pointed out that this case was decided *after* Hammer v. Dagenhart (the First Child Labor case, *op. cit. supra* note 21), Bailey v. Drexel Furniture Co. (the Second Child Labor case, otherwise known as the Child Labor Tax case, *op. cit. supra* note 22), and Hill v. Wallace (the Grain Futures case, 259 U. S. 44 (1922)), thus settling the question of constitutionality raised by the *five* to *four* decision in United States v. Doremus, 249 U. S. 86 (1919), and mentioned in Dougherty v. United States, *op. cit. supra* note 32.

34 *Op. cit. supra* note 12.

35 *Op. cit. supra* note 33.

The most familiar of these cases are the *Child Labor Tax* case [36] and the *Grain Futures* case.[37]

The Child Labor Tax Law [38] levied an excise tax equivalent to ten per centum of the entire net profits received or accrued during any year in which the taxpayer employed one or more children under the age of 16 years (except in cases of bona fide mistake), and authorized inspections by the Secretary of Labor and the Collector of Internal Revenue. The Act thus disclosed on its face that the sole purpose of Congress was to impose a *penalty* upon the employment of child labor, and the Supreme Court declared it to be an unlawful attempt to regulate the employment of child labor in the states, which is an exclusively state function under the Federal Constitution and within the reservations of the Tenth Amendment.

The Court carefully distinguished between cases where revenue was the primary object of the tax, and regulation was used merely to aid in the collection of the tax, and cases where regulation was the primary purpose of the tax, and the tax was used as a penalty to enforce the regulation.[39]

The tax under consideration in the *Grain Futures* case [40] was one of 20 cents a bushel on all contracts for the sale of grain for future deliveries, except sales on boards of trade designated as contract markets by the Secretary of Agriculture upon fulfillment by such boards of certain conditions

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36 *Op. cit. supra* note 22.

37 *Op. cit. supra* note 33. The *first* Child Labor case (*op. cit. supra* note 21) involved a wrongful use of the *interstate commerce power* to regulate a matter purely within the reserved powers of the states, and is not in point here.

38 40 STAT. 1138-40, § 1200.

39 The Court cited: Veazie Bank v. Fenno (the State Bank Notes case), *op. cit. supra* note 10; Flint v. Stone Tracy Co., *op. cit. supra* note 10; McCray v. United States (the Oleomargarine case), *op. cit. supra* note 6; and United States v. Doremus (the Narcotic Drug Act case), *op. cit. supra* note 33. All of these cases were shown to have involved taxes for revenue, any regulations being only incidental and having a reasonable relation to the purpose or enforcement of the tax.

40 *Op. cit. supra* note 33.

and requirements set forth in the Act, including the adoption of a specifically outlined code of ethics and procedure, and an agreement to enforce the same. This tax was in addition to an existing tax of 25 cents on every $100 value of such sale, imposed by the Revenue Act of February 24, 1919, and was a very heavy tax, amounting according to the kind of grain from 20% to 50% of its value. The Secretary of Agriculture was given the power to determine what boards were complying with the law, and to disqualify boards found not to be complying. The Court there held:

"The manifest purpose of the tax is to compel boards of trade to comply with regulations, many of which can have no relevancy to the collection of the tax at all. . . . When this purpose is declared in the title to the bill, and is so clear from the effect of the provisions of the bill itself, it leaves no ground upon which the provisions we have been considering can be sustained as a valid exercise of the taxing power."

After citing the *Child Labor Tax* case and the cases therein cited, the Court went on:

"It was pointed out [41] that in none of those cases did the law objected to show on its face, as did the Child Labor Tax Law, detailed regulation of a concern or business wholly within the police power of the state, with a heavy exaction to promote the efficacy of such regulation."

To this illustrious line of cases can now be added the *AAA Processing Tax* case.[42] That case held essentially that it was evident from the face of the statute that regulation (in a field reserved to the states), and not revenue, was the primary object of the law, and that the tax was a mere "incident of such regulation," being used as a penalty to enforce the regulation—or rather, as the Court said, it was used "to purchase a compliance" which Congress was "powerless to command."

These cases clearly show, with respect to the tax levied by Title IX of the Social Security Act, that Congress has the

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41 In the Child Labor Tax case, *op. cit. supra* note 22.

42 *Op. cit. supra* note 7.

absolute power to levy the tax as such. They also, perhaps, show on the one hand that if Congress had laid down a set of procrustean detailed regulations relating to unemployment compensation, and levied the tax against those who violated such regulations, the "tax" would be considered a "penalty" for an act over which Congress has no authority, or as otherwise stated, an "instrument to enforce a regulation of matters of state concern with respect to which the Congress has no authority to interfere," and, hence, unconstitutional; or on the other hand that if Congress had levied the tax against employers (or any other class of taxpayer) and concurrently appropriated the revenues to such employers as were complying with unemployment compensation plans prescribed by Congress, the "tax" would be considered a "purchase of compliance" which Congress was "powerless to command"—a "scheme for purchasing with Federal funds submission to Federal regulation of a subject reserved to the states" and, hence, unconstitutional. *This, however, is not our present factual situation.*

In the first place, the measure under discussion is (admittedly) not a simple tax. Its provisions, in fact, are very complicated (as compared, for instance, with the simple tax on employers and employes under Title VIII of the Act). But is the tax purely an incident to "regulations" in a forbidden field, as in the *Child Labor Tax* case, the *Grain Futures Tax* case and the *AAA Processing Tax* case? In other words, has Congress laid out a course of action in a matter outside its jurisdiction and merely adopted the tax to force or induce compliance therewith?

As stated before, any possible *desire* Congress may have had to regulate unemployment compensation should not be confused with the actual *action* it has taken. It is not detrimental to the thesis of this article to suspect that Congress perhaps legislated better than it knew, in the sense that, with a purpose in mind that might possibly have rendered

the law unconstitutional had it appeared too prominently in the Act, it kept that purpose from appearing upon the face of the Act. The controlling consideration as far as constitutionality is concerned is not what Congressional Committees reported or what Congressmen said in debate, but what law they passed after they got through talking. The question therefore remains, Does the Act, either by express statement or necessary effect, evidence a *primary purpose* of Congress to *regulate* unemployment compensation?

The answer is No. The title certainly states no such purpose. The word "aid" is there used, but can only have reference to Title III, providing for grants to states for unemployment compensation administration, and possibly to Section 904, providing for the investment and handling of state unemployment compensation funds by the Federal Government. The part of the title of the Act most applicable to Title IX reads "to raise revenue."

The body of Title IX contains no express statement of intent, other than to levy a tax. The Title can be fairly construed to show only an intent to levy an excise tax on payrolls, with a recognition of the fact that the states may also levy such a tax (or require employers, under state supervision, to make contributions to a certain fund, which amounts to the same thing), and hence that it would be only fair to allow all or a part of the state contributions to be credited against the federal tax.

Is then the *necessary effect* of the Act *regulation* of unemployment compensation, so that the intent to regulate could be imputed to Congress? The answer again is No.

There is no coercion of individual taxpayers, nor of states, not even the type of coercion "by economic pressure" condemned in the AAA case. There is no doubt a definite inducement, as in the *Florida* case, for employers to urge their

respective state legislatures to pass laws enabling them to contribute to funds which they know will be spent, if not for their own respective employes, at least for the benefit of unemployed citizens of their own respective states, rather than to require them to pay the same amounts to Washington with no assurance that they will benefit in proportion to their contributions. But this is not interference with states' rights; the states are still free to provide for any unemploymen compensation plans they want, or none at all, *and the expense to their taxpayers would be approximately the same in either event.* The plans would be created by the states, administered by the states, changed by the states, discontinued by the states; the amount and the method of collection of contributions would be provided for by the states; the amount and the time and manner of payment of benefits would be according to the wisdom of the states. Sufficient leeway is given so that a state could set up any kind of plan, from almost a pure relief system to a pure system of reserves to be used only during emergency unemployment periods. Thus, whereas the effect of the schemes in the *Child Labor Tax* case, the *Grain Futures* case, and the *AAA* case was the complete elimination of state control over the subject matter, the effect of the measure under discussion is precisely to induce and help the states to assume themselves complete control of the subject matter. The tax, as the Court said in *Knowlton v. Moore,*[43] is "a burden cast upon" the employer, "and not upon the power of the state to regulate."

Furthermore, the principal inducement here used is the *offset,* which was not present in either of the three mentioned cases. In them if the taxpayer complied with the federal scheme, he paid no tax (or he received benefits); if he failed to comply, he paid the tax (or he received no benefits). Under this Act, however, as under the inheritance and income tax laws, he pays tax (or the equivalent of a tax) in any

[43] *Op. cit. supra* note 10.

event, either to the state or to the Federal Government or to both, the state tax payments (or contributions), if any, being allowed in each case as a *partial credit* against the federal tax. The designated credits in this case happen to be contributions under unemployment compensation plans, and Congress says only that such plans must contain certain essential characteristics, otherwise they will not definitively qualify as unemployment compensation plans at all. Any effect such offset might have of inducing (much less regulating) the passage of state unemployment compensation laws would in legal contemplation be too remote from the levying of the tax to be considered a *necessary* effect of the tax. And in any event, the Federal Government will obtain *some* revenue—not merely a nominal amount, not merely a million dollars a year as in the *Nigro Narcotics* case,[44] but 10% of 3% of the country's business and industrial payrolls—close to a hundred million dollars.

Thus the "offset" in this case is quite obviously an entirely different creature from "regulations," and its use brings the case out of the classes represented by the *Child Labor Tax* case, the *Grain Futures* case, and the *AAA* case, and puts it in line with the *Florida Inheritance Tax* case. There Congress allowed taxpayers to credit state inheritance tax payments against federal inheritance tax payments. Here Congress, in levying a tax on payrolls, allows as a credit certain other payments which the taxpayers may be required to make in the states on the same tax subject, and for practically the same ultimate object or purpose. Naturally the offset must be defined. In the *Florida* case "inheritance tax" was given its legal definition; and the "criteria" in Title IX of this Act are indisputably not *regulations* but constitute collectively merely a careful *definition* of the kind of payments that will be allowed as a credit against this payroll tax.

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44 *Op. cit. supra* note 33.

What has been said concerning the offset might well be repeated as to the appropriation under Title III: Any effect which such appropriation might have of inducing the passage of state unemployment relief plans would in legal contemplation be too remote to be considered a *necessary* effect of such appropriation. And it obviously provides as little regulation of, or interference with, the operation of such plans as the offset does.

CONCLUSION

In conclusion and summary, it cannot be emphasized too strongly that Title IX of the Social Security Act is not a new departure in tax procedure. True, it is not a simple tax-for-revenue measure. It falls definitely into the category of those taxes which, as a matter of fact, but not of appearance, had another purpose than merely the direct raising of revenue. But its incidental purpose is definitely fiscal, namely, to reduce the need for federal expenditures. If the Supreme Court approved a relatively heavy tax on a thing, tending to drive it out of existence, such as state bank notes or oleomargarine, and a relatively light tax on a thing, coupled with strict packing, or branding, or sales regulations, and above all an inducement tax with a simple offset feature, where the right to, and amount of, offset was easily ascertainable, such as inheritance taxes, none of which produced much more than nominal revenues, and all of which interfered to a greater or less extent with matters within the police powers, or other powers exclusively reserved to the states, why should it not approve this tax, which is nothing more than an inducement tax with a not unduly complex offset feature, the whole effect of which leaves the Act primarily a revenue measure, with no regulatory effect on matters within the exclusive control of the states?

Every material provision of both the appropriation and the offset bears a proper relation to the fiscal purpose of the

tax. The "criteria" in Sections 303 and 903 (with several possible exceptions) are not regulations; they are nothing but conditions, in the one section, and definitions, or exclusions, if you please, in the other. The Act marks the effort of Congress not to coerce any person or any state into a prescribed course of action, but to provide large federal revenues for general purposes, and to recognize the indirect financial benefit which will accrue to the Federal Government by reason of the establishment in the various states of reserve funds for unemployment relief, and thus to equalize and if possible lighten individual tax burdens. Instead of delaying this act of fairness until only two or three states would remain without unemployment compensation laws (as it did in the case of inheritance taxes), it provided, at a time when only five or six states had plans, that proper credit be given taxpayers as their respective states fall into the new but already definitely established line of march toward unemployment compensation.

Stated in simplest language, Titles III and IX of the Act express the following Congressional philosophy. We, the Congress, have met the actuality of responsibility for emergency unemployment relief—a responsibility properly belonging to you, the states. We have been obliged to meet this responsibility through the compulsion of humanitarian necessity and because you did not make adequate provision against the contingency of the emergency.

Meeting this responsibility has strained the government credit. Since we have no assurance that you will relieve us of the ultimate responsibility during future depressions, we have decided to make adequate preparation to that end by levying a tax to replenish the government's depleted treasury and thus place the government in a financial position to pay off the debt already incurred and to meet the aforesaid responsibility during the next depression. If, however, you elect to make adequate preparation by the collection of

funds for the payment of future emergency unemployment benefits, we will grant you administrative aid and tax offset.

We care not what kind of relief plan you adopt just so long as it has the effect of causing you to meet your emergency humanitarian obligation of caring for your unemployed people and thus relieving us of that responsibility. The aids which we are offering to you are made conditional, not with the purpose of regulating you in the selection of the type of relief plan or the manner of your administration thereof, but, on the other hand, merely with the intention of making certain that your relief plans in their adoption and administration will relieve us of *your* responsibility of alleviating the physical and mental suffering of the poverty of emergency unemployment.

The foregoing philosophy seems to exemplify business sagacity rather than constitutional heresy.

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