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The Problem

In June and July of 1953 the Joint Committee on Atomic Energy of the Congress of the United States conducted extended public hearings[1] on the question of whether it was not now time to open up for private industrial development the field of atomic energy heretofore operated as a virtual government monopoly, under the Atomic Energy Act of 1946.[2] Since that time the Atomic Energy Commission has announced that it is preparing to construct a full-scale reactor for the express purpose of producing electrical energy as a contribution to the peacetime utilization of atomic energy.[3] In addition, Representative W. Sterling Cole, chairman of the Joint Committee, has suggested that there are already needs for electrical energy of a kind which would justify and perhaps best be met by relatively high-cost atomic reactor generating plants.[4] The Joint Committee's serious interest in the possibility of recommending that the field be opened to private industry is further indicated by their request to the American Bar Association to make recommendations as to the changes required in the Atomic Energy Act of 1946 to make it possible for private industry to enter the field. The American Bar Association announced on November 20, 1953, that the requested recommendations had been submitted to the Joint Committee and that the special committee making the report believed that private capital should be allowed and even encouraged to enter the field.[5]

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1 Hearings before the Joint Committee on Atomic Energy, Congress of the United States, 83d Cong., 1st sess., on "Atomic Power Development and Private Enterprise," June 24, 25 and 29; July 1, 6, 9, 13, 15, 16, 20, 22, 23, 27 and 31 (1953).

2 60 Stat. L. 755, 42 U.S.C. (1946) §1801.

3 N.Y. TIMES, October 23, 1953, p. 1:8.

4 N.Y. TIMES, October 30, 1953, p. 25C:1

5 N.Y. TIMES, November 21, 1953, p. 4C:2.

These expressions of official interest indicate that serious consideration will be given during this second session of the 83d Congress to the question of making possible, through changes in the Atomic Energy Act of 1946, a peacetime privately financed atomic energy industry. Before making such changes, however, Congress will undoubtedly consider the impact the changes would have on the regulation of the *somewhat* peculiar health and safety problems incident to atomic energy operations. Under the present act the Atomic Energy Commission not only has achieved a remarkable safety record in government operations through stringent health and safety standards but has also controlled the standards which are used by persons licensed to obtain and use fissionable material and radioactive isotopes for private purposes, such as research. Congress may feel that control of health and safety standards should remain in federal hands in view of the present development of the art and because federal personnel, as compared with most state agencies, have considerably greater knowledge of these problems. At least the Joint Committee has been concerned about the constitutional justification for continued federal health and safety controls if the present government monopoly should be relinquished.[6] It seems appropriate, therefore, to consider the question of whether or not Congress would have the constitutional power to regulate health and safety conditions if private industry were allowed to operate in something like a normal way in the atomic energy field.

This article is directed to the question of the power of Congress to provide for such regulation of those who handle radioactive materials in private industry and not to the policy question of whether Congress ought to attempt such regulation.

Preliminary Considerations

The argument usually made against federal power to control such things as health and safety conditions is that such matters traditionally have been the concern of the states and the Constitution left such matters to the states. Typically the Tenth Amendment is cited in support of this position. This amendment reads: "The powers not delegated to the United States by the Constitution, nor prohibited by

[6] The Joint Committee requested the American Bar Association Committee to give an opinion on the constitutional question and I was asked by that special committee to prepare a memorandum on the question. This article is based upon the memorandum submitted to the A.B.A. Committee and forwarded by it to the Joint Committee. I am indebted to David L. Howe, legislative analyst with the Legislative Research Center of the University of Michigan Law School for assistance in preparing the memorandum. He is not, however, to be held responsible for the views here expressed.

it to the states, are reserved to the states respectively, or to the people." In analyzing the power of Congress, therefore, it becomes important to keep in mind the attitude of the present Supreme Court toward the Tenth Amendment. At one time, it is true, the Supreme Court placed considerable dependence upon the Tenth Amendment in deciding whether Congress had the power to act in areas that might at first blush seem to be left to the states.[7] However, in such cases as *United States v. Darby*,[8] decided in 1941, the Supreme Court has made it clear that it considers the Tenth Amendment as nothing but a truism. Instead of asking, "Is this regulation of an area reserved to the states?" the present Court always asks, "What is the extent of Congress' power over commerce, or bankruptcy, or disposal of government property, etc.?" Therefore, in considering whether Congress would have the power to regulate health and safety conditions in peacetime private atomic energy operations it is essential that the question be approached from the standpoint of whether there is any possible power of Congress under which the action can be justified constitutionally, rather than with the query, "Does this fall in an area which has traditionally been left to the states?"

One further observation of considerable significance should be made concerning the general attitude of the Supreme Court toward congressional power. Since the invalidation of the first Agricultural Adjustment Act and the Bituminous Coal Act in 1936[9] the Supreme Court has *not once* invalidated an act of Congress on the ground that Congress did not have sufficient power under the Constitution to regulate some activity, though Congress has often painted with a broad brush during these past seventeen years. Congressional acts have been invalidated on other grounds but not because the kind of activity regulated was beyond the power of Congress to control.[10] Neither does the

[7] E.g., Hammer v. Dagenhart, 247 U.S. 251, 38 S.Ct. 529 (1918); Bailey v. Drexel Furniture Co., 259 U.S. 20, 42 S.Ct. 449 (1922); Railroad Retirement Board v. Alton R.R. Co., 295 U.S. 330, 55 S.Ct. 758 (1935); United States v. Butler, 297 U.S. 1, 56 S.Ct. 312 (1936); Carter v. Carter Coal Co., 298 U.S. 238, 56 S.Ct. 855 (1936).

[8] 312 U.S. 100, 61 S.Ct. 451 (1941).

[9] United States v. Butler, 297 U.S. 1, 56 S.Ct. 312 (1936), and Carter v. Carter Coal Co., 298 U.S. 238, 56 S.Ct. 855 (1936). Ashton v. Cameron Co. Water Improvement District No. 1, 298 U.S. 513, 56 S.Ct. 892 (1936), holding invalid the application of compulsory bankruptcy provisions in the Federal Bankruptcy Act to political subdivision of a state should perhaps be added, but the reason for invalidity is distinguishable from that used in the Butler and Carter Coal cases, since it is not based on the 10th Amendment argument.

[10] E.g., Tot v. United States, 319 U.S. 463, 63 S.Ct. 1241 (1943), invalidating a presumption of evidence provision in the Federal Firearms Act as a violation of the due process clause of the 5th Amendment; United States v. Lovett, 328 U.S. 303, 66 S.Ct. 1073 (1946), holding invalid, as a bill of attainder, a congressional act providing that no compensation should be paid to designated individuals. In addition in several recent cases the Court has worked hard to interpret a statute so as to avoid serious constitutional ques-

denial of inherent powers to the President in the Steel Seizure case[11] suggest limitations on Congress' power. While striking down the President's exercise of power there, the Court made it quite clear that Congress could have done the same thing denied to the President. While the practical significance of this seventeen-year trend is obvious some might well argue that it has no logical or theoretical relevance to our question of congressional power. Actually, it is submitted that this failure to invalidate a single law of Congress for lack of power is indicative of the Court's acceptance of a quite tenable, and certainly extremely significant constitutional principle concerning the relationship between the judicial and legislative branches of the federal government —that, except when some specific prohibition of the Constitution is found, such as the ex post facto clause, the Court should be *extremely* reluctant to substitute its own ideas of what is a proper exercise of power for that made by the politically representative body, Congress. In considering the federal wagering or gamblers' tax act the majority of the Court, in *United States v. Kahriger*,[12] upheld the tax largely upon the basis of this very philosophy. They first quoted from Marshall's opinion in *McCulloch v. Maryland*:

> ". . . But where the law is not prohibited, and is really calculated to effect any of the objects intrusted to the government, to undertake here to inquire into the degree of its necessity, would be to pass the line which circumscribes the judicial department, and to tread on legislative ground. This court disclaims all pretensions to such a power."[13]

The majority then went on in their own words:

> "Where federal legislation has rested on other congressional powers [than the tax power], such as the Necessary and Proper Clause or the Commerce Clause, this Court has generally sustained the statutes, despite their effect on matters ordinarily considered state concern. When federal power to regulate is found, its exercise is a matter for Congress. . . .
>
> "A reason was that 'the judicial cannot prescribe to the legislative departments of the government limitations upon the exercise of its acknowledged powers.' "[14]

tions. See, e.g., United States v. C.I.O., 335 U.S. 106, 68 S.Ct. 1349 (1948); United States v. Rumely, 345 U.S. 41, 73 S.Ct. 543 (1953). There is also a suggestion of a constitutional justification for the interpretation given in Erie R.R. Co. v. Tompkins, 304 U.S. 64, 58 S.Ct. 817 (1938).

[11] Youngstown Sheet and Tube Co. v. Sawyer, 343 U.S. 579, 72 S.Ct. 863 (1952).
[12] 345 U.S. 22, 73 S.Ct. 510 (1953).
[13] Id. at 29, quoting from 4 Wheat. (17 U.S.) 316 at 423 (1819).
[14] Id. at 29, 31.

One further preliminary consideration should be mentioned. As yet there is relatively very little experience in peacetime industrial use of atomic energy. Therefore, before a constitutional analysis of congressional power can be made, some assumptions must be accepted as to the likely character and extent of peacetime uses should Congress open the door to private utilization. This article has been prepared on the basis of several such assumptions. One is that Congress might desire to regulate health and safety standards for *all* uses of radioactive material. Another is that, at least at the beginning of peaceful use of atomic energy (other than the use of radioactive isotopes as at present), the primary emphasis will be on the generation of electric power from atomic reactors for distribution by the typical electric utility, solely within the boundaries of a single state. However, it is also assumed that, with this production of electric power, it is very likely that marketable by-product materials will be produced also and that they will be sold in interstate as well as intrastate commerce. Even the present stage of technological development makes these assumptions reasonable and it certainly is fair to assume that the use of radioactive isotopes is going to expand greatly.

On these assumptions there will be problems of health and safety regulations for the use and handling of radioactive isotopes (such as are now being used by industry) of fissionable material (such as is now being used privately only for research) and of radioactive waste materials (incident mostly to operation of atomic reactors). While the handling and use of each of these materials presents its own peculiar safety problems (though waste materials are actually in one sense only a form of radioactive isotopes) no distinctions are made for purposes of this analysis of congressional power because the necessity for proper health and safety control is in each case dependent on the same assumptions that the problems of health and safety in atomic energy are *somewhat* peculiar and that the knowledge of these problems is still largely restricted to the federal government and those who have participated with the government in the present atomic energy program.

Specific Congressional Powers

This article suggests five powers specifically or impliedly given to Congress by the Constitution which might be used to justify control of health and safety conditions. As to each the leading cases are considered and the manner in which the power might be used to achieve the desired control is indicated, all on the assumption that Congress would want to exercise the greatest possible control so as to point up

the constitutional problems most sharply. Since our concern is with control of private peacetime operations no consideration is given to the power of Congress to control the working conditions to be followed by private companies supplying materials to the federal government under government contract. In any event this power is clear under the cases upholding the Public Contracts Act.[15]

The analysis of these five powers is almost necessarily broken down into five parts. However, there is nothing to prevent Congress from justifying its regulations upon more than one of these listed powers. In any event, it undoubtedly would be wise for Congress to make careful fact findings as to the necessity for health and safety regulations, possibly to write such reasons into a preamble to any act, and to phrase the regulations in terms of the power given to it under the specific clauses suggested.

1. *Power to Dispose of Property Owned by the Government.* Article 4, section 3, paragraph 2 of the Constitution reads as follows: "The Congress shall have power to dispose of and make all needful rules and regulations respecting the territory or other property belonging to the United States . . ." In *United States v. Gratiot,* decided in 1840, the Supreme Court upheld the right of the United States, in disposing of lead found on government property, to license the right to mine the lead and to impose conditions upon the leasehold which the lessee did not like and attempted to break, rather than be forced to sell it outright as argued by the lessee. The Court said that this power to dispose of property "is vested in congress *without limitation.* . . ."[16] In 1918 the Supreme Court decided *Ruddy v. Rossi.* The Court there held that the provisions of the Homestead Act, limiting the right of prior creditors to seize homestead property, were constitutional and stated that these lands "may be leased, sold or given away upon such terms and conditions as the public interests require."[17]

In 1935 the Supreme Court decided the landmark case of *Ashwander v. Tennessee Valley Authority.*[18] This case involved the right of the United States, through the TVA program, to dispose of surplus electrical energy generated at the Wilson Dam. The dam had been built under the war power during World War I. The Court held that

[15] 49 Stat. L. 2036 (1936), 41 U.S.C. (1946) §35. In Perkins v. Lukens Steel Co., 310 U.S. 113, 60 S.Ct. 869 (1940), the Court held that suppliers who objected to wages set by the Secretary of Labor had no legally protected right invaded and so had no standing to complain.

[16] 14 Pet. (39 U.S.) 526 at 537 (1840). Emphasis added.

[17] 248 U.S. 104 at 106, 39 S.Ct. 46 (1918).

[18] 297 U.S. 288, 56 S.Ct. 466 (1936).

this surplus power could be sold even though the amount generated was far in excess of the amount reasonably needed to operate the navigation locks and flood gates at the dam. The Court said that the dam created usable power and the government could dispose of that power as it saw fit. The Court also held that TVA could buy the necessary transmission lines and real property necessary to dispose of the energy generated at the dam. At page 338 of the opinion, the Court said "the Government could lease or sell and fix the terms."

In *United States v. City and County of San Francisco,*[19] decided in 1939, the Supreme Court was faced with the question of the constitutionality of the Raker Act of 1913.[20] This act had granted to the city and county of San Francisco certain lands and rights of way in the public domain in Yosemite National Park and an adjoining national forest to supply water for domestic purposes and to establish a system for the generation and sale of electrical energy. By the terms of the grant the city was prohibited from selling or letting property to any private corporation or individual. The Secretary of Interior was allowed to enjoin the arrangement made by the city of San Francisco to distribute its power through a private company. The Court said:

> "Thus, Congress may constitutionally limit the disposition of the public domain to a manner consistent with its views of public policy. And the policy to govern disposal of rights to develop hydroelectric power in such public lands may, if Congress chooses, be one designed to avoid monopoly and to bring about a widespread distribution of benefits. The statutory requirement that Hetch-Hetchy power be publicly distributed does not represent an exercise of a general control over public policy in a State but instead only an exercise *of the complete power which Congress has over particular public property entrusted to it.*"[21]

Certainly, at the beginning of private utilization of atomic energy for the production of electric power it looks as if the private concerns will have to obtain fissionable material from the AEC. Radioactive isotopes are already being distributed by the AEC for non-military purposes. In the light of the above cases it seems obvious that Congress has the constitutional right to authorize the AEC to require that, as a condition to the purchase or lease of such material, certain health and safety standards be followed by the purchaser or lessee.

However, it is certainly contemplated that once private reactors

[19] 310 U.S. 16, 60 S.Ct. 749 (1940).
[20] 38 Stat. L. 242 (1913).
[21] 310 U.S. 16 at 30. Emphasis added.

go into full operation they may well produce fissionable material which it is hoped Congress will allow private companies to sell to other licensed companies. This material, if the act is changed to allow ownership by private individuals, would not, therefore, be government property in the same sense as in the cases cited above. It is possible to argue that all material which is *derived from* an initial loan of fissionable material from the AEC will be subject to the regulations which the AEC places upon its initial loan of material. The Court might hold, however, that this power to control health and safety conditions in the use of material is limited to that which is actually sold or loaned by the federal government. It might be possible to work out a lending or selling agreement with the initial purchaser by which that purchaser agreed to make its subsequent purchasers abide by established health and safety standards. A heavy penalty could be imposed in the form of a damage clause in case the original purchaser of material does not insist on such agreements from its purchasers. Certainly, future deliveries of the government material may be cut off to those who refuse to conform.

It should also be observed that in addition to controlling fissionable material the government can control the disposition of raw materials which are necessary for the production of fissionable material. The right to obtain such material could be restricted to those who use such material themselves and sell only to others who will use it in accordance with health and safety regulations established by the AEC. Even though private reactors do create new non-governmentally owned fissionable material there will be a continuing need for source material over which the government has control. This would not, however, necessarily directly control all forms of radioactive materials in subsequent hands, but the threat of cutting off future supplies is a strong deterrent against refusal to comply with AEC regulations.

One other possibility under the power to dispose of property should be suggested. The Supreme Court in the *Ashwander* case held that the government can purchase or otherwise obtain the necessary equipment and organization to dispose of government property in the most economical way. Since the government already owns facilities which can produce almost all kinds of fissionable and radioactive materials it is perfectly possible from a constitutional standpoint for Congress to decide to go into the private business of distributing fissionable materials as well as radioactive isotopes for peacetime use. In this way a yardstick type of industry might be set up by Congress, at least from the standpoint of constitutional limitations, which could make it

very uncomfortable competitively for businesses which do not live up to the health and safety standards set by the AEC. This could take the form of undercutting such companies on all products made by them. This method of controlling health and safety practices, however, is an indirect one and would not be as effective as more direct control would be.

2. *The Commerce Power.* The Supreme Court, particularly in the past fifteen or sixteen years, has interpreted the commerce clause as giving Congress an immense amount of power to control economic activities in this country. The cases so holding make it certain that a great deal of control is possible as to health and safety standards for workers in the atomic energy industry, if one is created by allowing private industry to enter the field. The only serious question will be how far can Congress go in controlling such standards for *all* workers who deal in *any* way with radioactive materials.

The Court would undoubtedly approve a properly worded statute controlling the working conditions surrounding the production of materials which actually cross state lines. The Court has many times decided that Congress has *plenary* power to control the movement of goods across state lines. This has been true even though obviously in many cases the purpose of the statute was not to control the effect on the economy of the country but rather because Congress did not want the channels of interstate commerce to be used to transport materials of a nature or produced under conditions contrary to what Congress deemed good public policy and the welfare of the country generally. The plenary character of this power is well indicated by Supreme Court cases upholding prohibition against transportation of convict-made goods in interstate commerce;[22] upholding prohibition of transportation of stolen motor vehicles across state lines;[23] sustaining the National Firearms Act which prohibits interstate transportation of unregistered firearms;[24] sustaining the Federal Food, Drug and Cosmetic Act prohibitions against sale *at retail* of sulphathiazole tablets even though the sale occurred six months after the tablets had been brought into the state properly labeled;[25] upholding an act prohibiting the shipment of lottery tickets across state lines;[26] applying the Mann Act to an in-

[22] Kentucky Whip and Collar Co. v. Illinois Cent. R.R. Co., 299 U.S. 334, 57 S.Ct. 277 (1937).
[23] Brooks v. United States, 267 U.S. 432, 45 S.Ct. 345 (1925).
[24] United States v. Miller, 307 U.S. 174, 59 S.Ct. 816 (1939).
[25] United States v. Sullivan, 332 U.S. 689, 68 S.Ct. 331 (1948).
[26] Champion v. Ames, 188 U.S. 321, 23 S.Ct. 321 (1903).

dividual transporting a woman across state lines for purposes of an immoral practice having no commercial aspects;[27] upholding a conviction under the Mann Act for transporting a woman across state lines for purposes of polygamous marriage;[28] upholding the federal act prohibiting the shipment of filled milk in interstate commerce when compounded with any fat or oil other than milk fat and so compounded to resemble milk or cream;[29] and upholding the power of Congress to exclude from interstate commerce goods produced under conditions detrimental "to the maintenance of the minimum standards of living necessary for health and general well-being."[30]

These cases make it clear that, so long as Congress does not run afoul of some specific prohibition in the Constitution, there is nothing in the Tenth Amendment's reserved powers idea which prevents Congress from prohibiting the shipment across state lines of goods which Congress deems to be inimical to the public health or welfare of the country, or which have been produced in a manner which is inimical to the public welfare. Justice Douglas summarized this power in *Cleveland v. United States*:

> "The fact that the regulation of marriage is a state matter does not, of course, make the Mann Act an unconstitutional interference by Congress with the police powers of the States. The power of Congress over the instrumentalities of interstate commerce is plenary; it may be used to defeat what are deemed to be immoral practices; and the fact that the means used may have 'the quality of police regulations' is not consequential."[31]

Justice Stone had expressed this idea earlier in the *Darby* case as follows: "The motive and purpose of a regulation of interstate commerce are matters for the legislative judgment upon the exercise of which the Constitution places no restriction and over which the courts are given no control."[32]

It is also clear that Congress has the right to control conditions under which goods are "produced for commerce." Beginning with *National Labor Relations Board v. Jones and Laughlin Steel Corporation*,[33] in 1937, the Court has consistently held that Congress can control the working conditions surrounding the production of goods

[27] Caminetti v. United States, 242 U.S. 470, 37 S.Ct. 192 (1917).
[28] Cleveland v. United States, 329 U.S. 14, 67 S.Ct. 13 (1946).
[29] United States v. Carolene Products Co., 304 U.S. 144, 58 S.Ct. 778 (1937).
[30] United States v. Darby, 312 U.S. 100 at 109, 61 S.Ct. 451 (1941).
[31] 329 U.S. 14 at 19, 67 S.Ct. 13 (1946).
[32] 312 U.S. 100 at 115.
[33] 301 U.S. 1, 57 S.Ct. 615 (1937).

for interstate commerce. In the *Jones and Laughlin* case the Court upheld the National Labor Relations Act as applied to a steel company producing products which ultimately flowed into interstate commerce even though the activity regulated was production taking place only in one state. The Court held that the labor conditions might well "burden" or "affect" commerce and therefore Congress could regulate them. In *United States v. Darby*,[34] the Court upheld the constitutionality of the Fair Labor Standards Act as applied to all the workers in a plant where at least some of the goods (in that case most of the goods) produced would be shipped into interstate commerce. In upholding the act the Court said:

> "We think also that § 15(a)(2), now under consideration, is sustainable independently of § 15(a)(1), which prohibits shipment or transportation of the proscribed goods. As we have said *the evils aimed at by the Act are the spread of substandard labor conditions* through the use of the facilities of interstate commerce for competition by the goods so produced with those produced under the prescribed or better labor conditions; and the consequent dislocation of the commerce itself caused by the impairment or destruction of local businesses by competition made effective through interstate commerce. The Act is thus directed at the suppression of a method or kind of competition in interstate commerce which it has in effect condemned as 'unfair,' as the Clayton Act has condemned other 'unfair methods of competition' made effective through interstate commerce. See *Van Camp & Sons Co. v. American Can Co.*, 278 U.S. 245; *Federal Trade Comm'n v. Keppel & Bro.*, 291 U.S. 304.
>
> "The Sherman Act and the National Labor Relations Act are familiar examples of the exertion of the commerce power to prohibit or control activities wholly intrastate because of their effect on interstate commerce. See as to the Sherman Act, *Northern Securities Co. v. United States*, 193 U.S. 197; *Swift & Co. v. United States*, 196 U.S. 375; *United States v. Patten*, 226 U.S. 525; *United Mine Workers v. Coronado Coal Co.*, 259 U.S. 344; *Local No. 167 v. United States*, 291 U.S. 293; *Stevens Co. v. Foster & Kleiser Co.*, 311 U.S. 255. As to the National Labor Relations Act, see *National Labor Relations Board v. Fainblatt, supra*, and cases cited.
>
> "The means adopted by § 15(a)(2) for the protection of interstate commerce by the suppression of the production of the condemned goods for interstate commerce is so related to the commerce and so affects it as to be within the reach of the commerce

[34] 312 U.S. 100, 61 S.Ct. 451 (1941).

power. See *Currin v. Wallace, supra,* 11. Congress, to attain its objective in the suppression of nationwide competition in interstate commerce by goods produced under substandard labor conditions, has made no distinction as to the volume or amount of shipments in the commerce or of production for commerce by any particular shipper or producer. *It recognized that in present day industry, competition by a small part may affect the whole* and that the total effect of the competition of many small producers may be great. See H. Rept. No. 2182, 75th Cong. 1st Sess., p. 7. The legislation aimed at a whole embraces all its parts. Cf. *National Labor Relations Board v. Fainblatt, supra,* 606."[35]

Some of the subsequent cases under the Fair Labor Standards Act clearly indicate how far Congress can go in controlling things that have some effect on interstate commerce and therefore are sufficiently a part of the production for commerce to be controllable by Congress. The act has been upheld when applied to maintenance personnel such as elevator operators, firemen, watchmen, carpenters, and porters in a loft building where manufacturers engaged in producing goods for interstate commerce had their establishments,[36] to a night watchman of a veneer plant, [37] to the employees of a daily newspaper with a circulation of about 10,000 newspapers of which 45 copies went across state lines (½ of one percent), in this case applying the overtime regulations of the Fair Labor Standards Act,[38] to the employees of a local electrical contractor who did commercial and industrial wiring for customers who were themselves engaged in the production of goods for commerce,[39] and to employees treating railroad ties for use in the same state by an interstate railroad.[40]

In these cases the Court made it clear that not only employees who could be shown to have directly worked on goods going into interstate commerce, but also all employees engaged in a plant, where some of the goods produced went into interstate commerce, could be regulated simply as a matter of administrative efficiency in enforcing the statute. They also indicate that Congress can regulate the laboring conditions of employees who in effect are doing maintenance or other work on equipment or supplies which will be used to produce goods in interstate commerce or carry on interstate activities.

[35] Id. at 122-123. Emphasis added.
[36] Kirschbaum Co. v. Walling, 316 U.S. 517, 62 S.Ct. 1116 (1942).
[37] Walton v. Southern Package Corp., 320 U.S. 540, 64 S.Ct. 320 (1943).
[38] Mabee v. White Plains Publishing Co., 327 U.S. 178, 66 S.Ct. 511 (1946).
[39] Roland Electric Co. v. Walling, 326 U.S. 657, 66 S.Ct. 413 (1946).
[40] Alstate Construction Co. v. Durkin, 345 U.S. 13, 73 S.Ct. 565 (1953).

The Supreme Court in another series of cases has interpreted the Constitution as giving to Congress the power to regulate those activities, in themselves wholly intrastate, which "substantially affect" interstate commerce. In 1911 the Supreme Court decided *Southern Railway Co. v. United States.*[41] The Court upheld the application of the Federal Safety Appliance Act governing railroads to cars used solely in transporting goods within the boundaries of a given state. The Court justified this regulation on the ground that the railroad was used as a highway of both interstate and intrastate commerce, that the employees and the tracks and much of the equipment were used interchangeably, and that, even as to cars which might not be used interchangeably, the employees have to work on both interstate and intrastate cars and an accident on an intrastate car might well burden the flow of goods in interstate commerce. In *Railroad Commission of Wisconsin v. Chicago, Burlington, and Quincy Railroad Co.,*[42] the Supreme Court upheld the grant of power to the Interstate Commerce Commission to regulate *intra*state rates on railroads in Wisconsin contrary to an order of the Wisconsin Railroad Commission. The Court there said:

> "Commerce is a unit and does not regard state lines and while under the Constitution, interstate and intrastate commerce are ordinarily subject to regulations by different sovereignties, yet when they are so mingled together that the supreme authority, the Nation, cannot exercise complete effective control over interstate commerce without incidental regulation of intrastate commerce, such incidental regulation is not an invasion of state authority or a violation of the proviso."[43]

Language quoted above from the *Darby* case also supports this conclusion.

Then in 1942 the Supreme Court decided *Wickard v. Filburn.*[44] The Court upheld the enforcement of the Agricultural Adjustment Act allocating wheat acreage to a farmer who was raising grain on his own farm to feed his own livestock. The Court there said:

> "But even if appellee's activity be local and though it may not be regarded as commerce, it may still, whatever its nature, be reached by Congress if it exerts a *substantial economic effect* on interstate commerce and this irrespective of whether such effect

[41] 222 U.S. 20, 32 S.Ct. 2 (1911).
[42] 257 U.S. 563, 42 S.Ct. 232 (1922).
[43] Id. at 588.
[44] 317 U.S. 111, 63 S.Ct. 82 (1942).

is what might at some earlier time have been defined as 'direct' or 'indirect'."[45]

In holding that there was the necessary effect from this man's 11.1 acres of wheat the Court said that all such persons produced about 20 percent of the average national yield and therefore the cumulative effect of such production was a substantial one on interstate commerce. The Court then went on to state:

"It is said, however, that this Act, forcing some farmers into the market to buy what they could provide for themselves, is an unfair promotion of the markets and prices of specializing wheat growers. It is of the essence of regulation that it lays a restraining hand on the self-interest of the regulated and that advantages from the regulation commonly fall to others. The conflicts of economic interest between the regulated and those who advantage by it are *wisely left under our system to resolution by the Congress under its more flexible and responsible legislative process.* Such conflicts *rarely lend themselves to judicial determination.* And with the wisdom, workability, or fairness, of the plan of regulation we have nothing to do."[46]

In *American Power Company v. SEC,*[47] decided in 1946, the Court upheld the constitutionality of the Public Utility Holding Company Act which allows the SEC to order dissolution of holding companies under the conditions prescribed by the act. The company was only a holding company and therefore shipped nothing in interstate commerce. The Court, however, held the company subject to the act because it was in interstate commerce. The Court stated:

"Congress, of course, has undoubted power under the commerce clause to impose relevant conditions and requirements on those who use the channels of interstate commerce so that those channels will not be conduits for promoting or perpetuating economic evils. *North American Co. v. SEC, supra; United States v. Darby,* 312 U.S. 100; *Brooks v. United States,* 267 U.S. 432. Thus, to the extent that corporate business is transacted through such channels, affecting commerce in more states than one, Congress may act directly with respect to that business to protect what it conceives to be the national welfare. It may prescribe appropriate regulations and determine the conditions under which that business may be pursued. It may compel changes in the voting rights and other privileges of stockholders. It may order the

[45] Id. at 125. Emphasis added.
[46] Id. at 129. Emphasis added.
[47] 329 U.S. 90, 67 S.Ct. 133 (1946).

divestment or rearrangement of properties. It may order the reorganization or dissolution of corporations. In short, Congress is completely uninhibited by the commerce clause in selecting the means considered necessary for bringing about the desired conditions in the channels of interstate commerce. Any limitations are to be found in other sections of the Constitution. *Gibbons v. Ogden*, 9 Wheat. 1, 196."[48]

One other case well illustrating the kind of regulation that certainly could be imposed by Congress to protect health and safety or general welfare should be noted. In *Consolidated Edison v. NLRB*,[49] the Supreme Court upheld the application of the National Labor Relations Act to Consolidated Edison which had allegedly engaged in unfair labor practices. In upholding the jurisdiction of the Board over Consolidated Edison the Court held that the power which was produced by the company was a vital factor in the production of goods in interstate commerce and therefore could be regulated even though no electricity was sold for resale outside the state. The Court there said:

"The effect upon interstate and foreign commerce of an interruption through industrial strife of the service of the petitioning companies was vividly described by the Circuit Court of Appeals in these words: 'Instantly, the terminals and trains of three great interstate railroads would cease to operate; interstate communication by telegraph, telephone, and radio would stop; lights maintained as aids to navigation would go out; and the business of interstate ferries and of foreign steamships, whose docks are lighted and operated by electric energy, would be greatly impeded. Such effects we cannot regard as indirect and remote.' 95 F. 2d 390, 394."[50]

In the light of these cases it seems fair to predict that the Court would uphold the application of health and safety regulations to the atomic energy business even though conducted by private enterprise. As to goods which are actually shipped across the state lines, such as radioisotopes often are now, there is no question but that the Supreme Court would interpret the Constitution as allowing Congress under its commerce power to regulate the manner in which those goods were produced. Likewise, since health and safety regulations are no less directly connected to the economy of the country than are wage and hour regulations, there seems little question as to Congress' power also

[48] Id. at 99-100.
[49] 305 U.S. 197, 59 S.Ct. 206 (1938).
[50] Id. at 221.

to control the health and safety standards used in the production of goods "for commerce," as in the *Darby* and following cases.

This leaves only those who are either not making products for commercial purposes at all or who are making products for sale solely within state lines. The ability to regulate health and safety standards in these cases will be dependent upon how far the Court will allow Congress to carry the ideas upheld in the *Darby* and *Filburn* cases, as well as the *Southern Railway* and *Wisconsin Rate* cases. Since there undoubtedly will be considerable commerce in radioisotopes and perhaps even in fissionable material across state lines it would seem quite likely that in the light of the *Filburn* case Congress will be allowed to control even intrastate sales and transfers because competition from them will have the necessary "substantial effect on interstate commerce." Assuming there will be an interstate commodity market in radioactive materials, even producing such materials for self-consumption may have as much effect on the interstate market as did the production of 11 acres of wheat in *Wickard v. Filburn.* What is so produced will not be bought on the market and this affects that market. Certainly the amount of control that Congress can exercise in the light of *Wickard v. Filburn* is very substantial and probably is ample to take care of nearly all if not all production of fissionable or other radioactive materials. Certainly if Congress is careful in drafting the act in this respect and makes findings as to the impact that such "unfair" competition may have on the interstate transactions in such commodities produced in accordance with congressional regulations there is every reason to believe that the Court will allow Congress such regulatory power.

3. *The War Power.* Chief Justice Hughes, in referring to the federal war power in *Home Building and Loan Association v. Blaisdell,*[51] stated that it "is a power to wage war successfully, and thus it permits the harnessing of the entire energies of the people in a supreme cooperative effort to preserve the nation." We are all familiar with the extent to which the Court has followed this philosophy in allowing Congress during World War II to control the economic and other activities of nearly everyone in the United States. The Court upheld the Selective Service Act in several cases,[52] it upheld the price control

[51] 290 U.S. 398 at 426, 54 S.Ct. 231 (1934).

[52] Billings v. Truesdale, 321 U.S. 542, 64 S.Ct. 737 (1944); Falbo v. United States, 320 U.S. 549, 64 S.Ct. 346 (1944); Estep v. United States, 327 U.S. 114, 66 S.Ct. 423 (1946)—not the present writer.

and rationing acts,[53] it allowed the seizure of property held by enemy aliens,[54] and likewise approved, from the standpoint of constitutionality, the Japanese exclusion orders involving the removal of Japanese persons from sensitive West Coast areas.[55] If health and safety regulations in the use of radioactive materials could be brought within the war power the scope of permissible regulation is extremely broad. This at least would be the case were we in actual war and certainly there is some reason to believe that the Court might allow such legislation even in peacetime, particularly during a period of such uneasy peace as at present. The real question is just how far will the Court allow Congress to go in *preparing* for war.

Congress clearly has some powers to provide for war even in peacetime; e.g., the powers to provide and regulate the army, navy and militia.[56] Under these powers the AEC has continued to produce fissionable material to provide for our defense needs in case we do become involved in another war. No question has really been raised as to the ability of Congress to provide adequate forces for the eventuality of war. As mentioned before, there is no question as to Congress' power to regulate the health and safety standards used by contractors and suppliers furnishing material to the federal government for use as potential war weapons.[57] This, however, would not, as such, necessarily indicate that Congress could control health and safety regulations in private industry where it is not expected that the products would go toward the national defense effort in a direct manner such as into military stockpiles. The question in any case would be how far Congress could go in preparing for the eventuality of war when this preparation will entail taking over regulation of areas which, other than for the war power, Congress might not be able to control.

As related to our particular problem of peacetime utilization of atomic energy it might be argued as follows: in time of actual conflict our need for trained personnel is tremendous—we must be sure they have not been exposed already to the maximum amount of permissible radiation—therefore, Congress needs to control the health and safety standards to be applied to persons handling such materials even in peacetime. In many ways our thinking today has shifted to the point where we recognize that the maintenance and training of an adequate

[53] Yakus v. United States, 321 U.S. 414, 64 S.Ct. 660 (1944); Bowles v. Willingham, 321 U.S. 503, 64 S.Ct. 641 (1944).

[54] Silesian-American Corp. v. Clark, 332 U.S. 469, 68 S.Ct. 179 (1947).

[55] Korematsu v. United States, 323 U.S. 214, 65 S.Ct. 193 (1944).

[56] U.S. CONST., Art. I, §8.

[57] See note 15 supra.

civil defense organization may be almost as important as the maintenance of a trained army to be used in time of conflict. Unless we have an adequate reserve of civilians who know how to use radioactive material and who have not been overexposed in prior use of such material it certainly is arguable that our whole ability to recuperate from the initial blow of unannounced attacks would be seriously impaired if not made impossible. It could be argued that this is particularly true in the area of atomic energy because of the peculiar nature of the material being handled and its extreme danger to the country as a whole in case of atomic attack. Adding to this the present uneasy world situation with the continuation of the cold war and our need to be prepared for any eventuality, it could be concluded from the above premises that Congress must, in order adequately to prepare for war, control the health and safety standards used in handling radioactive materials, even when used in private peacetime industry.

Actually, this question as applied to atomic energy is quite similar to the question of whether Congress can constitutionally provide for universal military training even in times of peace. This latter question as to universal military training has been discussed from the constitutional standpoint by Freeman, "The Constitutionality of Peacetime Conscription,"[58] and Montgomery, "Peacetime Compulsory Military Training."[59] These men take opposite positions. It is my own opinion that, in the light of the war power cases, Congress will be allowed to provide for universal military training if it decides this is necessary to "raise and support armies" preparatory to defending our country in time of actual war, any involuntary servitude arguments to the contrary notwithstanding.[60] Assuming the correctness of this statement the question for our purposes is whether the necessity for providing for well-trained and well-protected civilian employees who know how to use radioactive materials is as important for our preparation for war as is the training of soldiers who are to actually serve in the armed forces. In the light of the cumulative effect of radiation exposure, with which all persons conversant with the technical aspects of radioactive materials

[58] 31 VA. L. REV. 40 (1944).

[59] 31 VA. L. REV. 628 (1945).

[60] The involuntary servitude arguments as to wartime conscription were rejected in the cases cited note 52 supra, and in the earlier case under the act for World War I, Arver v. United States, 245 U.S. 366, 38 S.Ct. 159 (1918), the Court concluding that there was nothing in the 13th Amendment's history indicating that it was meant to prevent the Congress from exercising its powers to raise and support an army. There likewise is nothing to suggest that the 13th Amendment meant to draw a line between involuntary servitude in time of war and in peacetime. For what it is worth, admittedly there is nothing to indicate an intent not to draw such a line.

are familiar, Congress might decide that there was a peculiar necessity for regulating the handling of materials even in times of peace and even in peaceful private enterprise. In this respect the training of such personnel and the creation of the reserve of experienced persons in this area is quite different from the maintenance of mechanics and other skilled workers in other areas where we can adequately train them through spending federal funds for training periods and courses. Merely training workers in how to handle radioactive materials safely would not be enough in the case of atomic energy operations because, if overexposed in their private work, they would not then be useful in time of war because they would have already been subjected to the maximum exposure which their bodies could safely tolerate. It certainly could be argued that this would at least be true in the initial stages of developing a peacetime atomic energy industry because we as yet do not have standards of sufficient certainty that states could be expected to adopt uniform regulations. It might well be that, at some time in the future when sufficient information will have been amassed to make such standards with reasonable accuracy, such regulation would be turned over to the state, but in this initial period, because of the crucial character of overexposure, control must be kept over health and safety standards as a matter of preparation for national defense. Should Congress so declare the necessity for regulating health and safety standards for purposes of defense preparation the Court might well accede to this congressional declaration, at least at the present time in the light of the present world situation.

There is practically no case authority directly or even closely in point, but we do have some indication of the Court's attitude toward regulations under the war power in times of cessation of hostilities. In *Hamilton v. Kentucky Distillers Co.*,[61] the Supreme Court upheld the National Prohibition Act passed during World War I but continued in effect after the actual cessation of hostilities. The attitude of the Court in that case is well summarized in the following language from the opinion:

> "Conceding, then, for the purposes of the present case, that the question of the continued validity of the war prohibition act under the changed circumstances depends upon whether it appears that there is no longer any necessity for the prohibition of the sale of distilled spirits for beverage purposes, it remains to be said that on obvious grounds every reasonable intendment must be made in favor of its continuing validity, the prescribed period

[61] 251 U.S. 146, 40 S.Ct. 106 (1920).

of limitation not having arrived; that to Congress in the exercise of its powers, not least the war power upon which the very life of the nation depends, *a wide latitude of discretion must be accorded;* and that it would require *a clear case* to justify a court in declaring that such an act, passed for such a purpose, had ceased to have force because the power of Congress no longer continued. In view of facts of public knowledge, some of which have been referred to, that the treaty of peace has not yet been concluded, that the railways are still under national control by virtue of the war powers, that other war activities have not been brought to a close, and that *it can not even be said that the man power of the nation has been restored to a peace footing,* we are unable to conclude that the act has ceased to be valid."[62]

Following World War II the federal government continued rent control over rental property in certain areas and the Supreme Court upheld this continuation of the war power in *Woods v. Miller Company,*[63] even though all actual hostilities had ceased to exist three years earlier. The Court held that, because the serious housing shortage was created by the embargo on building during the war, Congress could continue to legislate to meet this condition caused by the war. The language of the majority opinion states:

"We recognize the force of the argument that the effects of war under modern conditions may be felt in the economy for years and years, and that if the war power can be used in days of peace to treat all the wounds which war inflicts on our society, it may not only swallow up all other powers of Congress but largely obliterate the Ninth and the Tenth Amendments as well. There are no such implications in today's decision. We deal here with the consequences of a housing deficit greatly intensified during the period of hostilities by the war effort. Any power, of course, can be abused. *But we cannot assume that Congress is not alert to its constitutional responsibilities.* And the question whether the war power has been properly employed in cases such as this is open to judicial inquiry."[64]

It is true that in each of these cases the question was one of continuation of the war power into peacetime because of continuation of effects of the actual conduct of war. However, it seems perfectly proper for Congress to have at least some power to make adequate preparation for war itself. In fact, no one has ever questioned the

[62] Id. at 163. Emphasis added.
[63] 333 U.S. 138, 68 S.Ct. 421 (1948).
[64] Id. at 143-144. Emphasis added.

power of Congress to provide for navies, armies, and the militia, probably because specific authorization is given in the Constitution. The question always is just how far can Congress go in these matters. The implications of the *Woods* and *Hamilton* cases may well be that at least some preparatory measures can be taken above merely providing for military personnel. The question would seem to be one of whether it is reasonably necessary in order to prepare adequately for eventual war that Congress regulate the manner in which workers are exposed to radiation as they handle radioactive materials in peacetime operation. The atomic energy hazards are peculiar enough so that such preparatory measures might be upheld by the Court. It would be wise for Congress to place such factual conclusions in the statute itself or at least in the hearings so as to lay the necessary foundation for justifying the health and safety regulations as an exercise of the war power.

It is important to recognize, as stated before, that this is an opinion as to what the Court might hold as to congressional power, not an opinion as to whether or not Congress *ought* to adopt the policy. The conclusion as to what the Court might do is based on language to the effect that Congress is not to be assumed to be unaware of its constitutional responsibilities, on the language concerning the broad latitude which Congress has in exercising its recognized powers, and on the stated reluctance of the Court to impose its ideas as to what is desirable upon Congress, even though the Court does reserve to itself ultimate review power. While not now actually engaged in war with the consequent pressures to allow the Congress to do about anything it thinks necessary to win the war, it must be recognized that this is a time of extreme international tension and great potential danger which Congress may feel calls for extraordinary measures of preparatory defense. The Court would undoubtedly hesitate a long time before deciding that Congress' conclusions as to the necessity for such regulations are not sufficiently justified by the present state of our knowledge about atomic energy and of foreign relations.

4. *Power to Provide for the General Welfare.* Article 1, section 8 of the Constitution states that Congress may "provide for the . . . general welfare." In 1937, in *Steward Machine Co. v. Davis*,[65] and *Helvering v. Davis*,[66] the Supreme Court upheld the unemployment compensation and the old age benefits provisions of the Social Security

[65] 301 U.S. 548, 57 S.Ct. 883 (1937).
[66] 301 U.S. 619, 57 S.Ct. 904 (1937).

Act.[67] The Court there said that the power of the federal government to spend for the general welfare was broad enough to allow spending to alleviate the lack of funds among the unemployed and the aged since these problems were "plainly national in area and dimensions." The Court also clearly indicated that the question of what is for the general welfare is largely a question for Congress, not the courts:

> "The discretion, however, is not confided to the courts. The discretion belongs to Congress, unless the choice is clearly wrong, a display of arbitrary power, not an exercise of judgment. This is now familiar law. 'When such a contention comes here we naturally require a showing that *by no reasonable possibility* can the challenged legislation fall within the wide range of discretion permitted to the Congress.' [cases omitted] Nor is the concept of the general welfare static. Needs that were narrow or parochial a century ago may be interwoven in our day with the well-being of the Nation. What is critical or urgent changes with the times."[68]

In the light of this attitude the Court surely would hold that Congress can encourage proper handling of radioactive materials through expenditure of federal funds, even though control over such matters was considered outside its powers otherwise.[69] Certainly federal funds could be spent to gather information to be used in recommending health and safety standards. In addition, if Congress felt it desirable, a program of financial and technical assistance could be made available to such states as adopted standards approved by the AEC, as is done with the present federal grants-in-aids programs. Attractive financial bene-

[67] 49 Stat. L. 620 ff. (1935), now, as amended, 42 U.S.C.A. (1952; 1953 Supp.) §301 et seq., and 26 U.S.C.A. (1945; 1953 Supp.) §§480, 1400, 1410, 1600 et seq.

[68] Helvering v. Davis, 301 U.S. 619 at 640-641. Emphasis added.

[69] Actually there have been very few cases involving the constitutionality of such spending programs because of the party in interest problem. See discussion p. 361 infra. To the Social Security Act cases should be added Florida v. Mellon, 273 U.S. 12, 47 S.Ct. 265 (1927) (spending with a reverse twist through means of a tax exemption), and Cincinnati Soap Co. v. United States, 301 U.S. 308, 57 S.Ct. 764 (1937), both cited by Justice Douglas in the Steward Machine Co. case. There is extensive literature on the welfare spending power; e.g., Corwin, "The Spending Power of Congress—Apropos the Maternity Act," 36 HARV. L. REV. 548 (1923); Grant, "Commerce, Production, and the Fiscal Powers of Congress," 45 YALE L.J. 751, 991 (1936); Bergman, "Federal Power to Tax and to Spend," 31 MINN. L. REV. 328 (1947); Turner, "The Fifth Horseman of the Apocalypse!" 22 N.Y. UNIV. L.Q. REV. 19 (1947); Lutz, "The General Welfare Clause: Does It Authorize a Welfare State?" 36 A.B.A.J. 196 (1950). While some of the writers are critical of the interpretation, they all recognize the broad implications of the Social Security cases. See also, cases and materials cited in DOWLING, CASES ON CONSTITUTIONAL LAW, 4th ed., 435-436 (1950); KAUPER, CASES ON CONSTITUTIONAL LAW 237, 246 (Lithoprinted, 1952). There is also a difficult party in interest problem in objecting to competition from the government as illustrated in Tennessee Electric Power Co. v. T.V.A., 306 U.S. 118, 59 S.Ct. 366 (1939).

fits might also be used as an inducement to encourage private compliance with federal standards. If these were made attractive enough, few would feel free to refuse to comply. This might be described as the power to buy compliance rather than demand it.

Admittedly such methods of control would not be as complete as those which could be enforced as a legal obligation, such as under the commerce or war powers. This approach would also necessitate the expenditure of more federal funds in the form of the monetary benefits provided.

5. *The Power to Tax.* Article 1, section 8 of the Constitution gives to Congress the power "to lay and collect taxes." This clause theoretically does not give to Congress a separate regulatory power, though taxation is a permissible means of carrying out regulation of activities which can be controlled under one of the other enumerated powers.[70] The theory has been that tax statutes can be upheld only when a revenue purpose is being served.

The economic and social impact of taxes, however, cannot be denied. Our graduated income tax does effectuate some redistribution of wealth and the luxury taxes undoubtedly do rechannel some industrial endeavors into areas not taxed so heavily. Actually, the Court over a long period of years has upheld tax measures having a much greater regulatory impact than those mentioned and which were adopted by Congress with motives other than simply revenue raising in mind. It is also possible to combine the power to tax with the power to spend in such a manner as to achieve in fact a great measure of regulatory power.

One of the earliest and most significant cases upholding as a revenue measure a tax which obviously also imposed economic regulation is *McCray v. United States,*[71] decided in 1904. The Court there upheld a statute which imposed a tax of ten cents per pound upon oleomargarine, "Provided, When oleomargarine is free from artificial coloration that causes it to look like butter of any shade of yellow, said tax shall be one-fourth of one cent per pound." Two excerpts from the opinion are indicative of the attitude of the Court:

[70] Veazie Bank v. Fenno, 8 Wall. (75 U.S.) 533 (1869), is the classic example. The Court there upheld a federal tax on notes issued by others than the federal government so high as to be prohibitory as a practical matter. It was justified as an exercise of the fiscal power of Congress as well as the power to tax.

On the general problem of using the federal taxing power for purposes other than revenue raising, see notes, 28 NOTRE DAME LAWYER 127 (1952); 14 UNIV. PITTS. L. REV. 71 (1952). See earlier articles collected in KAUPER, CASES ON CONSTITUTIONAL LAW 214 (Lithoprinted, 1952).

[71] 195 U.S. 27, 24 S.Ct. 769 (1904).

"It being thus demonstrated that *the motive or purpose of Congress in adopting the acts in question may not be inquired into,* we are brought to consider the contentions relied upon to show that the acts assailed were beyond the power of Congress, putting entirely out of view all considerations based upon purpose or motive.

"The right of Congress to tax within its delegated power being unrestrained, except as limited by the Constitution, *it was within the authority conferred on Congress to select the objects upon which an excise should be laid.* It therefore follows that, in exerting its power, no want of due process of law could possibly result, because that body chose to impose an excise on artificially colored oleomargarine and not upon natural butter artificially colored. The judicial power may not usurp the functions of the legislative in order to control that branch of the government in the performance of its lawful duties."[72]

The Narcotic Drug Act of 1914[73] was upheld in *United States v. Doremus.*[74] This act requires registration and payment of a special tax by all who deal in opium or its derivatives and makes unlawful the sale of such materials except to persons having orders on forms issued by the Commissioner of Internal Revenue. The act also forbids any person to obtain the drug for any purpose other than in the conduct of a lawful business or profession. The regulatory effect upon peddling drugs to dope addicts is obvious, yet the Court upheld the statute as an exercise of the power to tax.

In *Sonzinsky v. United States,*[75] decided in 1937, the Court upheld the National Firearms Act of 1934[76] which provides that every dealer in firearms, as defined in the act, must register and pay an annual occupation tax of $200 and an additional tax of $200 on each transfer of any firearm. "Firearm" is given a very special definition which makes it perfectly obvious that it was aimed at "sawed-off" shotguns, machine guns and silencers in vogue among gangsters during the 1920's and 1930's. The regulations issued under the act also require the identification of all purchasers. The Court said:

"The case is not one where the statute contains regulatory provisions related to a purported tax in such a way as has enabled this Court to say in other cases that the latter is a penalty resorted to as a means of enforcing the regulations. See *Child Labor Tax*

[72] Id. at 59 and 61. Emphasis added.
[73] 38 Stat. L. 785 (1914), now 26 U.S.C.A. (1948; 1953 Supp.) §2550 et seq.
[74] 249 U.S. 86, 39 S.Ct. 214 (1919).
[75] 300 U.S. 506, 57 S.Ct. 554 (1937).
[76] 48 Stat. L. 1236 (1934), now 26 U.S.C.A. (1948; 1953 Supp.) §2720 et seq.

Case, 259 U.S. 20, 35; *Hill v. Wallace,* 259 U.S. 44; *Carter v. Carter Coal Co.,* 298 U.S. 238. Nor is the subject of the tax described or treated as criminal by the taxing statute. Compare *United States v. Constantine,* 296 U.S. 287. Here § 2 contains no regulation other than the mere registration provisions, which are obviously supportable as in aid of a revenue purpose. On its face it is only a taxing measure, and we are asked to say that the tax, by virtue of its deterrent effect on the activities taxed, operates as a regulation which is beyond the congressional power.

"Here the annual tax of $200 is productive of some revenue. We are not free to speculate as to the motives which moved Congress to impose it, or as to the extent to which it may operate to restrict the activities taxed. As it is not attended by an offensive regulation, and since it operates as a tax, it is within the national taxing power."[77]

The present Supreme Court has taken a similar view. In 1950, in *United States v. Sanchez,*[78] they upheld the validity of the Federal Marihuana Tax Act[79] with the following language:

"It is obvious that § 2590, by imposing a severe burden on transfers to unregistered persons, implements the congressional purpose of restricting traffic in marihuana to accepted industrial and medicinal channels. Hence the attack here rests on the regulatory character and prohibitive burden of the section as well as the penal nature of the imposition. But despite the regulatory effect and the close resemblance to a penalty, it does not follow that the levy is invalid.

"*First.* It is beyond serious question that a tax does not cease to be valid merely because it regulates, discourages, or even definitely deters the activities taxed. *Sonzinsky v. United States,* 300 U.S. 506, 513-514 (1937). *The principle applies even though the revenue obtained is obviously negligible, Sonzinsky v. United States, supra,* or the revenue purpose of the tax may be secondary, *Hampton & Co. v. United States,* 276 U.S. 394 (1928). *Nor does a tax statute necessarily fall because it touches on activities which Congress might not otherwise regulate.* As was pointed out in *Magnano Co. v. Hamilton,* 292 U.S. 40, 47 (1934): 'From the beginning of our government, the courts have sustained taxes although imposed with the collateral intent of effecting ulterior ends which, considered apart, were beyond the constitutional power of the lawmakers to realize by legislation directly addressed to their accomplishments.' These principles

[77] 300 U.S. 506 at 513-514.
[78] 340 U.S. 42, 71 S.Ct. 108 (1937).
[79] 50 Stat. L. 551 (1937), now 26 U.S.C.A. (1948; 1953 Supp.) §2590 et seq.

are controlling here. The tax in question is a legitimate exercise of the taxing power despite its collateral regulatory purpose and effect."[80]

Three years later, in *United States v. Kahriger*,[81] the Court went even further in upholding a tax act which had a largely regulatory motive underlying it. The act imposes a tax on all persons in the gambling business and requires registration of name and place of business. Such information is made available to the public, which just happens to include state enforcement officers. The Court's attitude is expressed in the following excerpts from the opinion:

"It is conceded that a federal excise tax does not cease to be valid merely because it discourages or deters the activities taxed. Nor is the tax invalid because the revenue obtained is negligible. Appellee, however, argues that the sole purpose of the statute is to penalize only illegal gambling in the states through the guise of a tax measure. As with the above excise taxes which we have held to be valid, the instant tax has a regulatory effect. But regardless of its regulatory effect, the wagering tax produces revenue. As such it surpasses both the narcotics and firearms taxes which we have found valid.

"It is axiomatic that the power of Congress to tax is extensive and sometimes falls with crushing effect on businesses deemed unessential or inimical to the public welfare, or where, as in dealings with narcotics, the collection of the tax also is difficult. . . . That case [*Veazie Bank v. Fenno*, 8 Wall. 533 (1869)] allowed a tax, however, that obliterated from circulation all state bank notes. A reason was that 'the judicial cannot prescribe to the legislative departments of the government limitations upon the exercise of its acknowledged powers.' *Id.*, at 548. The tax cases cited above in the third preceding paragraph followed that theory. It is hard to understand why the power to tax should raise more doubts because of indirect effects than other federal powers. . . .

"Nor do we find the registration requirements of the wagering tax offensive. All that is required is the filing of names, addresses, and places of business. This is quite general in tax returns. Such data are directly and intimately related to the collection of the tax and are 'obviously supportable as in aid of a revenue purpose.' *Sonzinsky v. United States*, 300 U.S. 506, at 513. *The registration provisions make the tax simpler to collect.*"[82]

These cases make it clear that Congress could impose an excise

[80] 340 U.S. 42 at 44-45. Emphasis added.
[81] 345 U.S. 22, 73 S.Ct. 510 (1953).
[82] Id. at 28, 31-32. Emphasis added.

tax upon those who deal in radioactive materials. Even the few cases which have struck down federal taxes do not cast any doubt on this proposition. In order to make effective the administration of the tax, even though fairly nominal in amount, reports undoubtedly could be required and inspections of plants and facilities used in handling the materials could be authorized under the taxing power. The next step would be to require reports and authorize inspections concerning health and safety standards used by the taxpayer. Then provision might be made prohibiting transfer of radioactive material to persons who do not have adequate facilities and health and safety standards to handle such materials safely. This would seem no more unrelated to a revenue purpose than the requirement that none can purchase narcotics except in the conduct of a lawful business in such drugs which was upheld in the *Doremus* case in the following language:

> "The provisions of § 2, to which we have referred, aim to confine sales to registered dealers and to those dispensing the drugs as physicians, and to those who come to dealers with legitimate prescriptions of physicians. Congress, with full power over the subject, short of arbitrary and unreasonable action which is not to be assumed, inserted these provisions in an act specifically providing for the raising of revenue. Considered of themselves, we think they tend to keep the traffic aboveboard and subject to inspection by those authorized to collect the revenue. They tend to diminish the opportunity of unauthorized persons to obtain the drugs and sell them clandestinely without paying the tax imposed by the federal law. This case well illustrates the possibility which may have induced Congress to insert the provisions limiting sales to registered dealers and requiring patients to obtain these drugs as a medicine from physicians or upon regular prescriptions."[83]

In predicting what the present Supreme Court would do with such a statute, account must be taken of such cases as *Bailey v. Drexel Furniture Company*,[84] and *United States v. Constantine*,[85] decided between the *Doremus* (1919) and *Sonzinsky* (1937) cases. The statute involved in the *Drexel Furniture* case imposed a 10 percent income tax on all businesses which knowingly hired even one person coming under the act's definition of child labor. The tax was invalidated on the ground that it was apparent *on the face of statute* that it was regulatory *only*. The Court pointed to the scienter requirement, the provision for Labor Department enforcement, and the imposition of the tax in

[83] 249 U.S. 86 at 94-95, 39 S.Ct. 214 (1919).
[84] 259 U.S. 20, 42 S.Ct. 449 (1922).
[85] 296 U.S. 287, 56 S.Ct. 223 (1935).

full whether one or 500 children were employed. The Court said these made it clear *on its face* (not because of the Court's knowledge of hidden motives or economic impact) that the tax was a penalty and not for the purpose of raising revenue. *United States v. Constantine* struck down the "special excise tax" of $1000 on liquor dealers when they carried on their business contrary to local state or municipal law, there being no tax when state laws were not violated. The majority held that such a condition made it obvious that it was a penalty for violation of a state law and not a revenue measure. Cardozo, Stone, and Brandeis dissented and made the following observation:

> "Congress may reasonably have believed that, in view of the attendant risks, a business carried on illegally and furtively is likely to yield larger profits than one transacted openly by law-abiding men. Not repression, but *payment commensurate with the gains is thus the animating motive.*"[86]

The objections found in the *Drexel Furniture* case could be avoided easily; scienter should be omitted, administration of the tax should be by the Treasury Department, and the tax should be imposed upon each transaction cumulatively rather than in one lump sum for the first violation of proper health and safety standards. Perhaps the *Constantine* case also could be avoided since there would be no violation of a penal law upon which payment of the tax is conditioned, but simply desirable health and safety standards established by the AEC. The language of the Court in the *Sanchez* case is pertinent here:

> "Since his tax liability does not in effect rest on criminal conduct, the tax can be properly called a civil rather than a criminal sanction. The fact Congress provided civil procedure for collection indicates its intention that the tax be treated as such. *Helvering v. Mitchell,* 303 U.S. 391 (1938)."[87]

In addition, we should note that the views of the dissenters in the *Constantine* case are followed by the present Supreme Court in other areas of constitutional law, such as the right of Congress under the commerce clause to prohibit employment of child labor and underpaid workers, and so may also be followed as to the power to tax.

Actually, if the *McCray* case (oleomargarine tax) is still good law, and it was cited with approval in the *Kahriger* case, a good case can be made for a federal tax which places a very low tax on those who manufacture, process, or handle radioactive materials safely and a

[86] Id. at 297. Emphasis added.
[87] 340 U.S. 42 at 45.

much higher one on those who do not do so. This would seem no more a police power measure than the distinction of colored margarine upheld in the *McCray* case. It could also be argued that making radioactive products without proper safety standards would be more profitable and therefore could be taxed more heavily, as suggested by the dissenters in the *Constantine* case.

In any event, in the light of the *Kahriger* case, surely the AEC could be authorized to make available to the public, including state officials, a list compiled from tax returns of all who handle radioactive materials.

One other real possibility should be mentioned. If the spending power were properly combined with the power to tax it is quite possible that Congress might effectively regulate health and safety standards. As indicated, it is clear that Congress can tax the privilege of handling radioactive materials, even if the tax be burdensome. Then Congress could provide, under the spending power, for subsidies and technical assistance to those persons who handle radioactive material in accordance with health and safety regulations set by the AEC. It seems likely that the Court would say that the problem of safely handling such materials and thereby protecting the health of our workers is a proper subject for general welfare spending. Such combination of tax and spending power has been upheld in such cases as *Cincinnati Soap Company v. United States*,[88] upholding a coconut oil processing tax earmarked for return to the Philippine Islands, and *Steward Machine Company v. Davis*,[89] and *Helvering v. Davis*,[90] upholding the Social Security Act programs.

If there is doubt as to the power of Congress to spend to achieve proper health and safety standards then Congress should levy the tax on all who handle radioactive materials in one statute and then in a separate statute appropriate money to "buy" compliance with federal standards. Under the holding of *Massachusetts v. Mellon*,[91] an individual taxpayer of the United States cannot object to the spending of federal funds. In that case the taxpayer was seeking to object to the Maternity Act[92] provisions appropriating money to such states as accept and comply with federal provisions aimed at reducing maternal and infant mortality. The Court held that the taxpayer's interest was too

[88] 301 U.S. 308, 57 S.Ct. 764 (1937).
[89] 301 U.S. 548, 57 S.Ct. 883 (1937).
[90] 301 U.S. 619, 57 S.Ct. 904 (1937).
[91] 262 U.S. 447, 43 S.Ct. 597 (1923).
[92] 42 Stat. L. 224 (1921), now 42 U.S.C.A. (1952) §701 et seq.

insignificant, since he was only one of many millions of taxpayers to raise the question. Only when a tax is earmarked within the same statute for a specific spending program rather than for payment into the general funds has the Court allowed a taxpayer to object to a spending program as not within the power of Congress.[93]

Conclusions

An attempt has been made to analyze every reasonably possible basic constitutional justification for congressional control of health and safety standards. This analysis indicates that substantial congressional control of even wholly private operations is not only possibly but quite likely constitutional should the government monopoly be given up. Certainly, under the power to dispose of government property, and the commerce power, and even perhaps the war power, Congress will be allowed a degree of control that will cover most of the important uses that will be made of radioactive material. It even seems perfectly within the realm of possibility that the Supreme Court would uphold congressional control of the handling of substantially all such materials. Even the tax power is not impossible in the light of the cases. If Congress is careful to make the necessary fact findings and the draftsmen tailor the type of regulation imposed to fit the constitutional concepts discussed, it seems quite unlikely that the Court will substitute its ideas as to the necessity for such regulations for those reached by Congress.

Actually, Congress might well provide for regulation under more than one of the powers suggested, as indicated earlier. An example of such a combination is the federal act giving to the Secretary of Interior, acting through the Bureau of Mines, power to investigate and inspect all coal mines whose operations "substantially affect commerce."[94] The spending power justified the administrative expenses even before mandatory inspections were authorized and the commerce clause justified the grant of power to compel mine operators to allow federal inspectors to check on health and safety conditions.[95]

These conclusions as to what the Supreme Court would do are, of course, in no way meant to indicate what Congress should enact as a matter of policy separated from the constitutional problems.

[93] See cases collected note 7 supra.

[94] 55 Stat. L. 177 (1941), 30 U.S.C. (1946) §4f, now, as substantially amended, 30 U.S.C.A. (1952 Supp.) §451 et seq.

[95] The additions made in 1952, 66 Stat. L. 710, 30 U.S.C.A. (1952 Supp.) §451 et seq., make an interesting study in cooperation between federal and state regulatory authorities.