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THE FEDERAL SPENDING POWER AND STATE RIGHTS

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A Commentary on United States v. Butler

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THE cry for constitutional change, that dwindled to a small voice with the repeal of Prohibition, has risen to a new pitch following decapitation of the AAA by the United States Supreme Court in *United States v. Butler*.[1] Burgeoning in Congress is a portentous, if unorganized, attack upon the Supreme Court's power of judicial review.[2]

It seems timely, therefore, to inquire how far the current conception of the Supreme Court as an obstacle to the exercise of legislative power by the central government is justified, and to canvass the extent of the need, if any, for curtailment of the functions of that tribunal.

A dispassionate reading of the AAA decision and its judicial antecedents will demonstrate, it is believed, that there is little present occasion for curtailing the powers of the federal judiciary, for the reason that it seems clear from those decisions that Congress now possesses ample power to reach its national objectives through the revenue raising and spending power granted to it by the Constitution. It is believed that attention more profitably would be directed to the question how and to what extent the current tendency toward centralization of governmental functions should be controlled, if control is deemed advisable. In short, the AAA decision, instead of being a victory for state rights and conservatism, is believed to point the way toward unprecedented expansion of federal functions.

SIGNIFICANCE OF THE DECISION

Beyond all else, the AAA decision is important as the first authoritative declaration that the federal taxing and spending power is unlimited by the enumerated powers of Congress. Said the Court:

> "the power of Congress to authorize expenditure of public moneys for public purposes is not limited by the direct grants of legislative power found in the Constitution." [3]

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[1] United States v. Butler et al., Receivers of Hoosac Mills Corporation, (U. S. 1936) 56 S. Ct. 312.

[2] Late information from Washington indicates that more than forty bills now pending in Congress have for their object limitation of the powers of the federal judiciary.

[3] United States v. Butler, (U. S. 1936) 56 S. Ct. 312 at 319. The powers of Congress are enumerated in the Constitution at Art. I, sec. 8.

Although, since the decision went against the statute under review, the above statement is but dictum, this determination doubtless is destined to stand as the final answer to the much mooted question whether the right of Congress to tax and spend money for the general welfare is a grant of power separate from the other powers enumerated in the Constitution.[4]

Earlier cases have vindicated the frequent exercise by Congress of its power to raise taxes and expend the proceeds and, incidentally thereto, to regulate objects that have attracted its concern.[5] *United*

[4] The conflicting views of the meaning of the general welfare clause that sprang up in the constitutional convention and have been debated on various occasions down to the present time are illustrated by the public utterances of two former presidents. The strict, or narrower, view was expressed by President Madison when, in vetoing a congressional appropriation of funds for internal improvements, he said, on March 3, 1817:

> "To refer the power in question (to raise and spend money for internal improvements) to the clause 'to provide for the common defense and general welfare' would be contrary to the established and consistent rules of interpretation, as rendering the special and careful enumeration of powers which follow the clause nugatory and improper. Such a view of the Constitution would have the effect of giving to Congress a general power of legislation instead of the defined and limited one hitherto understood to belong to them, the terms 'common defense and general welfare' embracing every object and act within the purview of legislative trust. . . ."

2 RICHARDSON, MESSAGES AND PAPERS OF THE PRESIDENTS (C. 1897) 569 (1922). For an early and celebrated exposition of the strict view, see also: Virginia Resolutions of January 8, 1800, quoted in 1 STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES, 5th ed., 669, § 918 (1891).

President Monroe, in his message to Congress, May 4, 1822, regarding use of federal funds for internal improvements, expressed the more liberal view:

> "Should the right to raise and appropriate the public money be improperly restricted, the whole system might be sensibly affected, if not disorganized. Each of the other grants is limited by the nature of the grant itself. This, by the nature of government only. Hence, it became necessary that, like the power to declare war, this power should be commensurate with the great scheme of the government and with all its purposes."

1 STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES, 5th ed., 726, § 989 (1891).

Story (op. cit. 661, § 905 et seq.) is perhaps the chief exponent of the liberal view. It is interesting to notice that Story, whose exposition of the subject received the approval of the Court in the AAA decision, makes the argument of "Publius" in the Federalist the model for his discussion of the meaning of the general welfare clause (op. cit. at 664). The portion of the Federalist thus expounded commonly is attributed to the pen of James Madison, who subsequently, as President, expressed the opposite view above quoted. United States v. Butler, therefore, presents the curious anomaly of the liberal doctrine being declared to be the law of the land upon the partial authority of a statesman who, when cloaked with the executive mantle, repudiated that doctrine. This, of course, in no way detracts from the soundness of the Court's construction of the welfare clause.

[5] Cases cited infra, note 14.

States v. Butler now tells Congress that it may use those powers for any purpose referable to the as yet undefined general welfare. Whether we like it or not, therefore, we must face the fact that, after *United States v. Butler*, the Federal Government is possessed of a power that is akin to a federal police power, but which travels incognito. The ability to police rests upon the power to raise and spend money for police purposes. The power of Congress to tax and spend for unenumerated purposes, conversely, implies the power to effect the results ordinarily reached by exertion of the police power. With the Court recognizing this money power in Congress, as it does in *United States v. Butler*, well considered constitutional amendment or legislation could accomplish little, unless, perchance, one favors the total elimination of the states as effective units of government.

The power of Congress to tax and expend the proceeds, then, being plenary except as limited to objects of common defense and general welfare, the judicial function from here on is to define those limits.

WHAT ARE THE INDICIA OF GENERAL WELFARE?

1. *"National" Welfare*

The Court follows Story[6] where it says:

> "if the tax be not proposed for the common defense or general welfare, but for other objects wholly extraneous, it would be wholly indefensible upon constitutional principles. And he [Story] makes it clear that the powers of taxation and appropriation extend only to matters of national, as distinguished from local, welfare." [7]

The Court thus has taken the first step toward defining the general welfare by indicating that such welfare must be "national" in order to justify exertion of the federal spending power in its behalf. Beyond that point the Court does not venture in the *Butler* case. It says:

> "We are not now required to ascertain the scope of the phrase 'general welfare of the United States' or to determine whether an appropriation in aid of agriculture falls within it." [8]

That the Court foresees a broad field for Congress to occupy, if it wills, is indicated by these words:

"we naturally require a showing that by no reasonable possibility

[6] 1 STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES, 5th ed., 673, § 922 (1891).

[7] United States v. Butler, (U. S. 1936) 56 S. Ct. 312 at 320.

[8] Ibid. at 320.

> can the challenged legislation fall within the wide range of discretion permitted to Congress. How great is the extent of that range, when the subject is the promotion of the general welfare of the United States, we need hardly remark." [9]

The single criterion of "national" welfare suggested by the Court probably will require elucidation in future litigation. Probably the distinction between "national" welfare and "local" welfare is not destined to ripen into a geographical formula. An object may be of national import without being of national occurrence in the geographical sense. A local phenomenon may be related to the national welfare. Probably the Court means, and when called upon will decide, that it is the relationships and connotations, not the phenomena, that must be of national rather than merely sectional significance.[10]

The *Butler* case shows that the Court is going to construe the general welfare clause with appropriate caution. The premises of definition contained in that opinion, with the single exception above noted, are all negative. The question that engages us is whether the inevitable elaboration of this judicial theme reasonably may be expected to vindicate a liberal construction of the welfare clause without need for the interposition of constitutional amendment or legislation curtailing the judiciary. It is believed that such result may be expected.

2. *Statutory Form*

Apart from the belated construction given to the congressional taxing and spending power as a separate and additional authority over and beyond the powers enumerated in the Constitution,[11] the chief lesson taught by *United States v. Butler* is believed to be in the field of legislative bill writing. No more will the draftsmen of administration measures be expected to feel free to implement legislative declarations of the purposes of legislation with the substantive portions of proposed revenue bills, or to mix provisions aimed at regulation with other provisions

[9] Ibid. at 320.

[10] "It is certainly not necessary that any particular expenditure be spread over the whole country to bring it within the meaning of a...welfare which shall be general.... Congress expends vast sums of money in the erection and adornment of a capitol, in furnishing a library, in the purchases of pictures, statues and busts and in endowing a scientific institution; but it is not claimed that these disbursements are not made for the general welfare. . . . In short, the legislature is not trammelled by these provisions; it has ample scope and verge in which to indulge its proclivities to raise and expend money." POMEROY, INTRODUCTION TO CONSTITUTIONAL LAW, 10th ed. 229, § 275 (1888).

[11] Notes 4 and 6, supra.

calculated to raise the money to make regulation effective.[12] Henceforth, we probably may look for silence as to legislative aims in tax statutes, and for a minimum of specific legislative regulations. We may expect the emphasis hereafter to be placed on the taxing provisions, with details of administration left to the executive and with Congress left to appropriate the tax money after it has been collected.[13]

These conclusions are inescapable in the light of those decisions by which the Court has revealed its approach to the task of construing congressional taxing statutes. The first principle gleaned from those cases is that a tax statute must, above all things, appear upon its face to be primarily and essentially a revenue measure, no matter what true purposes may have induced its adoption. The rule seems now to be firmly established that an enactment of Congress which provides for the levying of taxes will not be subjected to judicial scrutiny as to its intent and purpose unless it is apparent on the face of the statute itself that the congressional powers are exceeded in the object at which the statute aims.[14]

[12] The Soil Conservation and Domestic Allotment Act [Public No. 461, 74th Cong., approved February 29, 1936; 3 U. S. LAW WEEK, No. 27, sec. 2 (March 3, 1936)] apparently is framed on the theory that Congress lawfully may "purchase" the economic complaisance of the states to such farm control as the Secretary of Agriculture may evolve despite the Court's condemnation, in the Butler case, of "purchasing" individual compliance with AAA regulations. [See text of Soil Conservation and Domestic Allotment Act, section 7 (a), (b), (c), (f).] The soil conservation legislation is completely divorced from any revenue producing enactments. It is understood that funds to finance the new program will be supplied from general revenues.

[13] The Soil Conservation and Domestic Allotment Act (supra, note 12) undertakes no description of the means by which the new farm program is to be inaugurated or carried out; nor does it provide for the levy of any taxes to effectuate its purposes. The method of regulation to be pursued is left to the administering authority with but vague declarations of policy for its guidance. Query, whether the objections to delegation of legislative power which proved the downfall of NRA [Schechter Poultry Corp. v. United States, 295 U. S. 495, 55 S. Ct. 837 (1935)] may not hereafter be heard again, this time directed at the terms of the new farm legislation. For a suggestive discussion of the probabilities in future development of congressional control over social and economic matters by exercise of the federal taxing and spending powers, see Dodd, "Adjustment of the Constitution to New Needs," 22 A. B. A. J. 126 (1936); also 34 MICH. L. REV. 366 at 382 (1936).

[14] Gibbons v. Ogden, 9 Wheat. (22 U. S.) 1 (1824); Pacific Ins. Co. v. Soule, 7 Wall. (74 U. S.) 433 (1869); Austin v. Boston, 7 Wall. (74 U. S.) 694 (1869); Veazie Bank v. Fenno, 8 Wall. (75 U. S.) 533 (1869); Spencer v. Merchant, 125 U. S. 345, 8 S. Ct. 921 (1888); In re Kollock, 165 U. S. 526, 17 S. Ct. 444 (1897); Knowlton v. Moore, 178 U. S. 41, 20 S. Ct. 747 (1900); McCray v. United States, 195 U. S. 27, 24 S. Ct. 769 (1904); Treat v. White, 181 U. S. 264, 21 S. Ct. 611 (1901); Patton v. Brady, 184 U. S. 608, 22 S. Ct. 493 (1902); United States v. Jin Fuey Moy, 241 U. S. 394, 36 S. Ct. 658 (1915); United States v. Doremus, 249 U. S.

The Court, in earlier decisions involving the federal taxing power, blocked out a vast area within which it held congressional taxing legislation must be given *carte blanche*, free of critical scrutiny as to purposes. It was held that the Court would not inquire as to the objects of the exercise of the federal taxing and spending power so long as the statute, on its face, was a revenue measure.[15] This is perhaps best illustrated in the leading case of *McCray v. United States*.[16]

In that case an act of Congress imposing a tax of ten cents a pound on the sale of oleomargarine was upheld against the contention that the imposition, far from being a revenue measure, was prohibitory of the business purportedly taxed. To this argument the Court replied:

> "Undoubtedly, in determining whether a particular act is within a granted power, its scope and effect is to be considered. Applying this rule to the acts assailed, it is self-evident that on their face they levy an excise tax. That being their necessary scope and operation, it follows that the acts are within the grant of power. The argument to the contrary rests on the proposition that, although the tax be within the power, as enforcing it will destroy or restrict the manufacture of artificially colored oleomargarine, therefore the power to levy the tax did not obtain. This, however, is but to say that the question of power depends, not upon the authority conferred by the Constitution, but upon what may be the consequences arising from the exercise of the lawful authority." [17]

Quoting from an earlier case,[18] the Court, in the *McCray* opinion, said:

> "The judicial department cannot prescribe to the legislative department limitations upon the exercise of its acknowledged powers. The power to tax may be exercised oppressively upon persons; but the responsibility of the legislature is not to the courts, but to the people by whom its members are elected." [19]

The *McCray* case had been preceded by another oleomargarine tax case in which a like conclusion had been reached on somewhat different

86, 39 S. Ct. 214 (1919); United States v. Behrman, 258 U. S. 280, 42 S. Ct. 303 (1922); Hamilton v. Kentucky Distilleries Co., 251 U. S. 146, 40 S. Ct. 106 (1919); Flint v. Stone Tracy Co., 220 U. S. 107, 31 S. Ct. 342 (1911); Magnano Co. v. Hamilton, 292 U. S. 40, 54 S. Ct. 599 (1934).

[15] Cases cited in note 14, supra.

[16] 195 U. S. 27, 24 S. Ct. 769 (1904).

[17] 195 U. S. 27 at 59.

[18] Spencer v. Merchant, 125 U. S. 345, 8 S. Ct. 921 (1888).

[19] 195 U. S. 27 at 61.

facts.[20] In the *McCray* opinion [21] the earlier decision is approvingly quoted as follows:

> "The act before us is on its face an act for levying taxes, and although it may operate in so doing to prevent deception in the sale of oleomargarine as and for butter, its primary object must be assumed to be the raising of revenue." [22]

A group of cases arising under the Harrison Narcotic Act [23] shed further light upon the Court's approach to the problem of defining the federal taxing and spending power. The statute imposed a special tax upon distributors of opium and similar products; required all persons dealing in such products to register with the Commissioner of Internal Revenue and to fill out written memoranda of all sales or other dispensation. The act made it unlawful for any person, with certain exceptions, to possess such products without having registered and paid a tax. In the first case to reach the Court under the act it was held that the offense of possession of drugs must be strictly construed to apply only to those who were required under the act to register. Justice Holmes, speaking for the Court, said:

> "It may be assumed that the statute has a moral end as well as revenue in view, but we are of opinion that the District Court, in treating those ends as to be reached only through a revenue measure and within the limits of a revenue measure, was right." [24]

In the next case it was held that the act was constitutional as a revenue measure. Justice Day for the Court said:

> "If the legislation enacted has some reasonable relation to the exercise of the taxing authority conferred by the Constitution, it cannot be invalidated because of the supposed motives which induced it. . . .
>
> "The act may not be declared unconstitutional because its effect may be to accomplish another purpose as well as the raising of revenue." [25]

The Chief Justice and three associates dissented on the ground the act invaded state rights.[26]

[20] In re Kollock, 165 U. S. 526, 17 S. Ct. 444 (1897).
[21] 195 U. S. 27 at 51.
[22] In re Kollock, 165 U. S. 526 at 536, 17 S. Ct. 444 (1897).
[23] 38 Stat. L. 785 (1914).
[24] United States v. Jin Fuey Moy, 241 U. S. 394 at 402, 36 S. Ct. 658 (1915).
[25] United States v. Doremus, 249 U. S. 86 at 93, 39 S. Ct. 214 (1919).
[26] 249 U. S. 86 at 95.

In a later case, the regulatory provisions of the act were again vindicated when there was affirmed the conviction of a physician who had enabled an addict to obtain large quantities of narcotics.[27]

Enforcement of the act, however, was held improper in the case of *Linder v. United States*,[28] where it was decided that the act might not be construed to allow the prosecution of a physician for delivery of a small quantity of drugs to a known addict. The ground of the decision apparently was that, if carried to this extreme, the act would constitute a regulation of medical practice to an extent wholly dissociated from raising of revenue. The case is cited to that effect by the Court in *United States v. Butler*.[29]

The only essential distinction that is apparent between the facts in the *Linder* case [30] and those of the *Behrman case* [31] is that in the former the petitioner was acting in his normal capacity of physician when he prescribed the drugs, whereas, in the latter, the accused probably was wholesaling dope. The decisions, then, when placed side by side, seem to mean that while the federal revenue power may be exerted for the "incidental" purpose of preventing bold face traffic in pernicious drugs, it may not be used, even "incidentally," to regulate customary medical practice.

The Court nowhere expresses it, and the distinction, if it exists, is entirely inchoate at this time; but may not the germ of a principle be gleaned from these cases — i.e., that if the "incidental" purpose of the revenue measure be to regulate an object which, by general consent is recognizedly harmful, such purpose will be upheld; whereas, a purpose that reaches to an object not necessarily harmful, but requiring only moderate regulation, such as medical practice, will not be upheld? Is it reasonable to go a step further to suggest that one of the possible indicia, then, of general welfare is the "general" recognition of an object, problem or difficulty as anti-social, although it may be within the traditional scope of local regulation? It will be remembered, in this connection, that a matter is not necessarily beyond congressional power merely because it is within the scope of state regulation.[32] The

[27] United States v. Behrman, 258 U. S. 280, 42 S. Ct. 303 (1922).

[28] 268 U. S. 5, 45 S. Ct. 446 (1925).

[29] (U. S. 1936) 56 S. Ct. 312 at 320.

[30] Supra, note 28.

[31] Supra, note 27.

[32] United States v. Doremus, 249 U. S. 86, 39 S. Ct. 214 (1919); License Tax Cases, 5 Wall. (72 U. S.) 462 (1867).

implications of this possible distinction if it should be developed by the Court in future litigation are obvious.

In the *McCray* case and others of its kind [33] the Court seems to have said as plainly as language can be made to speak that the intent, purpose and motive of a federal tax ordinarily are not matters for its attention. Justice Holmes apparently regarded this as the settled doctrine of the Court when he dissented in the first child labor case.[34] But there was a limitation inherent in that doctrine which, when occasion arose, was enforced.

In the *Child Labor Tax* case an act of Congress which purported to levy an annual tax of ten per cent of the net profits upon any manufacturer who employed child labor was held void. The statute was defended on the ground that it was merely an exercise of the taxing power conferred by section 8 of Article I of the Constitution. The Court held the act to show on its face that the levy was a penalty, intended for regulation rather than revenue, and hence void.[35]

The *Child Labor Tax* case, and *Hill v. Wallace*,[36] decided the same day, made clear the primary limitation upon congressional power to lay taxes for the general welfare. That limitation is that the statute must not demonstrate *of itself* that the objects in view are reserved to the states for regulation. This conclusion is apparently the basis of the decision, as is demonstrated by the grounds on which the Court distinguished the statutes then before it from those involved in the earlier cases.[37] The Court implies that if the statutes had been drawn in such form that they would not have exhibited their infirmity on their face, they might have withstood attack.[38]

[33] Cases cited, note 14.

[34] Hammer v. Dagenhart, 247 U. S. 251, 38 S. Ct. 529 (1918).

[35] Child Labor Tax Case (Bailey v. Drexel Furniture Co.) 259 U. S. 20, 42 S. Ct. 449, 21 A. L. R. 1432 (1922).

[36] 259 U. S. 44, 42 S. Ct. 453 (1922).

[37] It was contended in the Child Labor Tax Case that Veazie Bank v. Fenno, 8 Wall. (75 U. S.) 533 (1869), and McCray v. United States, 195 U. S. 27, 24 S. Ct. 769 (1904), proved the validity of the statute under review. Distinguishing those cases, the Court said:

> "In neither of these cases did the law objected to show on its face, as does the law before us, the detailed specifications of a regulation of a state concern and business with a heavy exaction to promote the efficacy of such regulation." Child Labor Tax Case, 259 U. S. 20 at 42, 42 S. Ct. 449, 21 A. L. R. 1432 (1922).

In Hill v. Wallace, 259 U. S. 44 at 67, 42 S. Ct. 453 (1922), the Court again distinguishes the Veazie Bank and McCray cases on the above ground.

[38] Child Labor Tax Case, 259 U. S. 20 at 42, 42 S. Ct. 449, 21 A. L. R. 1432 (1922). Hill v. Wallace, 259 U. S. 44 at 67, 42 S. Ct. 453 (1922).

The *Child Labor* case was a direct harbinger of the conclusion reached in *United States v. Butler*. True, the processing and floor taxes levied under the AAA were not penalties in the sense of the child labor tax; but the act of May 12, 1933, did carry in its every part the marks of its true character as a regulatory measure. It thus denied the Court any opportunity to indulge the presumption that the purposes of the enactment were legitimate.[39]

That the Court is willing to indulge such presumption if given opportunity by the legislators is clear from the holding in *Hill v. Wallace*.[40] It therein was held that section 4 of the Future Trading Act [41] was an invasion of state functions in that it sought to impose a tax upon future sales of grain, except where the seller should comply with certain specific rules, enumerated in the statute. These rules were calculated, on their face, to regulate the manner of conducting grain exchanges.[42] It is significant, however, that the Court expressly declined to overturn the taxing provisions of another portion of the act which were unencumbered by any rules or regulations, but which were aimed at transactions which the Court thought to "approximate gambling." [43] The net result was that tax provisions which were tied up with express regulations were held void, while tax provisions which were unassociated with regulations, although in themselves having the inevitable effect of regulation, were passed over.

It is clear, then, that in determining whether it is a legitimate exercise of the federal taxing power the Court feels bound to give great weight to the form in which the statute is cast. Nor is this merely sophistical. The approach is sound under familiar canons of statutory construction, whereby it is held that the courts must indulge every doubt in favor of the validity of enactments and may not usurp legis-

[39] The structure of the act of May 12, 1933, (the AAA) is analyzed in the opening pages of the court's opinion in the Butler case to lay the foundation for the holding that the statute is primarily a regulatory measure. What may be considered the gist of the decision is succinctly stated (56 S. Ct. 312 at 320):

"It is a statutory plan to regulate and control agricultural production, a matter beyond the powers delegated to the federal government. The tax, the appropriation of the funds raised, and the direction of their disbursement, are but parts of the plan. They are but means to an unconstitutional end."

Thus, the approach taken by the Court in the Butler case is exactly the same as in the Child Labor Tax Case and Hill v. Wallace—i.e., analysis of the face of the statute only. The Court did not go behind the express language of the act to find its illegality.

[40] 259 U. S. 44, 42 S. Ct. 453 (1922).

[41] 42 Stat. L. 187 (1921).

[42] 259 U. S. 44 at 64, 42 S. Ct. 453 (1922).

[43] 259 U. S. 44 at 71, 42 S. Ct. 453 (1922).

lative functions by sifting motives and purposes.[44] That principle is inherent in our system of divided powers.[45]

The formalistic approach thus dictated for the Court provides a sharp tool in the hands of legislative draftsmen. Knowing in advance that the Court must scrutinize the results of his labor through rose-colored glasses and with blinkers at its temples, the clever legislative counsel may be expected to find wide latitude for exercise of the will of a determined legislature.[46]

If it were not for the unfair facility of hindsight, one would be tempted to criticize the draftsmen of the defunct AAA for failure to heed the handwriting left by the *Child Labor Tax* case and *Hill v. Wallace*. The Court seems therein to have laid down the standard to which all future tax legislation of Congress, having for its real purpose the supervision of social or economic development of the country, must conform. The act of May 12, 1933, by no means complied with that standard. It was not, on its face, purely a revenue enactment; its regulatory features were not calculated to facilitate the enforcement of its revenue purposes; it did not provide the Court an opportunity to presume it valid. It was replete with the same type of objectionable regulatory matter that led the Court to its conclusions in the child labor tax and future trading tax cases, above. Had the framers of the AAA adhered rigidly to the "fair face" criterion demanded by the Court, it is at least arguable that a different result might have been reached in the *Butler* case.

This suggestion must not be misunderstood as indicating a belief that the Court is limited to a blind subservience to any language that might be chosen by Congress. Obviously, it would serve no purpose for Congress to declare a statute to be revenue producing when every lineament of the enactment might bespeak a different intent. The Court is not to be trifled with. The principle to be gained from study of the precedents above cited, a principle felt to have been violated by the draftsmen of the AAA, is that the statute must be so cast that it is fairly susceptible of construction as a revenue measure, and *must* appear to be such on its face.

[44] J. W. Hampton, Jr. & Co. v. United States, 276 U. S. 394, 48 S. Ct. 348 (1928); Arizona v. California, 283 U. S. 423, 51 S. Ct. 522 (1931); Magnano Co. v. Hamilton, 292 U. S. 40, 54 S. Ct. 599 (1934).

[45] McCray v. United States, 195 U. S. 27 at 54, 24 S. Ct. 769 (1904).

[46] Mr. Walter F. Dodd suggests some ingenius ways in which the facilities of bill writing may be accommodated to the Court's objective approach. Dodd, "Adjustment of the Constitution to New Needs," 22 A. B. A. J. 126 at 129-130 (1936).

3. *Conclusions Based upon the Court's Approach to the Problem of Statutory Construction*

We thus are led to some inevitable conclusions.

The first is that *United States v. Butler* is neither a victory nor a defeat for liberal construction of the powers of the Federal Government; it is but a prelude to the future task of defining the extent of those powers, in so far as they relate to the general welfare.

The second is that nothing contained in *United States v. Butler* should encourage the belief that, with proper bill writing, Congress cannot vindicate a broad power of regulation based upon its taxing and spending authority.

The third, and perhaps most immediately important, conclusion is that, with Congress possessed of the now judicially recognized money power exercisable in behalf of the general welfare, there is no occasion for curtailment of the power of judicial review possessed by the Court.

If the decision is an encouragement to advocates of central government, it is by the same token a warning to those who fear over-centralization.

Probably the day is now past when men will divide on the clean line of federalism versus state rights.[47] The issue today is more complex. Ours is no longer a struggle of sectionalism, but a strife against the world for jobs and bread. Many a citizen who adequately values his personal liberties must yet look to Washington for his daily sustenance. Despite these puzzling new problems, there remain some old principles that are unobscured by novel difficulties. One of them is that centralized bureaucracy administered by corps of underlings far from the seat of government is foreign to American institutions as we have known them.[48]

It would be error of the most serious kind for any numerous body of the people to conclude from *United States v. Butler*, or from any

[47] For suggestive discussion of the factors that have been responsible for changing concepts of state rights, see: 1 BRYCE, AMERICAN COMMONWEALTH, 2d ed., 337 et seq. (1891); Briggs, "State Rights," 10 Iowa L. Bul. 297 (1925); West, "Federal Power and the People," 47 BOOKMAN 525 (1918).

[48] The Declaration of Independence, among its recitals of grievances visited by the king upon his colonies, charged that

> "He has erected a multitude of New Offices, and sent hither swarms of Officers, to harrass our people, and eat out their substance."

UNITED STATES, FORMATION OF THE UNION, DOCUMENTS (Government Printing Office) 23 (1927).

source, that the Supreme Court is the constitutional guarantor of undiminished personal or state rights. On the contrary, *United States v. Butler* makes it clear that the Court's function is to preserve personal and state rights from federal encroachment only for so long as they are administered in such way that the objects of personal or state regulation do not become matters of national concern. When a subject, such as crop control, becomes of national importance, it becomes also an object of the congressional spending power. Such is the lesson of the AAA decision. It is the function of the courts to enforce the limitation of "general welfare"; but only the people, by giving intelligent direction to the activities of the state governments, can control the factors that prevent state or local problems from becoming matters of national concern.[49] The meaning of *United States v. Butler*, it is believed, is that while the Constitution did not intend the Federal Government for a parent, the basic law was so drawn that if a federal parent should become necessary there would be one. Only the voters, not the Court, can forestall that necessity.

[49] Thus, President Monroe in his message to Congress regarding proposed improvements of the Cumberland Road, May 4, 1822, said:

"Nor will Congress be apt to apply money in aid of the State Administrations, for purposes strictly local, in which the nation at large has no interest, although the State should desire it. The people of the other States would condemn it. They would declare that Congress has no right to tax them for such a purpose, and dismiss at the next election such of their representatives as had voted for the measure, especially if it should be severely felt."

1 STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES, 5th ed., 727, § 990 (1891).

Cf. Justice Stone, dissenting, in United States v. Butler:

"For the removal of unwise laws from the statute books appeal lies, not to the courts, but to the ballot and to the processes of domestic government." 56 S. Ct. 312 at 325 (1936).