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THE STRANGE CASE OF FLORIDA v. MELLON*

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The Supreme Court of the United States throughout its history has set an example to other courts of last resort by resolutely refusing to express its opinion on questions not before it, or not necessary for the decision of the case in hand. No small part of the respect in which that tribunal is held by the bar is due to its adherence to this rule, even in cases where laymen would be apt to think a settlement of some important question on the merits would be a more patriotic course than a decision on some technical point of jurisdiction or the like. In no class of cases has this self-imposed rule of judicial ethics been more scrupulously observed than in those involving the construction or application of the Constitution of the United States. For example, the Court has repeatedly gone to great lengths to construe a statute in such a way as to avoid deciding a constitutional question.[1] So far as the writer recalls, only once—prior to 1927—has the Court after holding a case to be not properly before it either for lack of jurisdiction, defect of parties or any similar cause, proceeded to announce its decision on a constitutional question sought to be raised on the merits; and the results in that single exceptional case—*Dred Scott v. Sanford*[2] — were not such as to encourage a repetition of the experiment.

But in 1926, the state of Florida asked the Supreme Court for leave to file a bill against the Secretary of the Treasury to restrain him from enforcing in Florida the Federal Estate Tax Law of that year, on the ground that the provision for "credit" of state inheritance taxes up to 80 per cent of what the Federal Estate Tax would otherwise be—a provision almost identical, except as to the amount of the allowable credit, with the corresponding section of the Revenue Act of 1924—rendered the act unconstitutional. The application was opposed on

*Read before the Lawyers' Round Table of Baltimore, November 5, 1927.

†Of the Baltimore Bar.

[1]U. S. v. Delaware & Hudson Co., 213 U. S. 366, 29 Sup. Ct. 527 (1909); U. S. v. Standard Brewery, 251 U. S. 210, 219, 40 Sup. Ct. 139 (1920); Missouri Pac. R. R. v. Boone, 270 U. S. 466, 471–2, 46 Sup. Ct. 341 (1926); Fox v. Washington, 236 U. S. 273, 277, 35 Sup. Ct. 383 (1915); U. S. v. Jin Fuey Moy, 241 U. S. 394, 401, 36 Sup. Ct. 658 (1916).

[2]19 How. 393 (U. S. 1856).

the ground that the state as such had no interest in the question, and was therefore not entitled to file the bill. The interest of the state, according to the allegations of the bill as interpreted by the Supreme Court, was sought to be vindicated on two grounds:

> "(a) that the state is directly injured because the imposition of the federal tax, in the absence of a state tax which may be credited, will cause the withdrawal of property from the state with the consequent loss to the state of subjects of taxation; and (b) that the citizens of the state are injured in such a way that the state may sue in their behalf as *parens patriae*."[3]

It may be remarked in passing that this analysis of the grounds on which the jurisdiction was invoked is a misstatement, or at least an inadequate statement, of the position of the complainant. Even the government's brief outlines the plaintiff's position in a fairer way. The Court itself in its statement of facts admitted that the complainant alleged that "the provisions of said section constitute an invasion of the sovereign rights of the state and a direct effort on the part of Congress to coerce the state into imposing an inheritance tax to penalize it and its property and citizens for failure so to do"[4]—an admission which might well have apprised the Court of the insufficiency of its statement of the grounds on which Florida based her claim of an interest in the subject matter of the suit.

The Solicitor General on behalf of the government naturally assumed that the constitutionality of the credit provision was not at this stage before the Court, the only question being whether the Court had jurisdiction. Accordingly, his brief contains not one word in support of the constitutionality of the Act. He contended merely (1) that the suit was forbidden by section 3224 of the Revised Statutes providing that no suit to restrain the collection of a federal tax shall be maintained in any court, (2) that the state of Florida had no direct pecuniary interest in the question of the constitutionality of the Act, and (3) that the state as *parens patriae* was not entitled to raise the question.

The Supreme Court, on January 3, 1927, in an opinion delivered by Mr. Justice Sutherland and concurred in by all the other members of the Court, passing *sub silentio* the first of these three objections, sustained both the other two, and overruled both grounds on which the complainant, as its position was apprehended by the Supreme Court, sought to sustain the jurisdiction.[5] "Neither ground" said the Court, "is tenable."

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[3]Florida v. Mellon, 273 U. S. 12, 16, 47 Sup. Ct. 265 (1927).
[4]*Ibid.* [5]*Supra* note 3.

But, *mirabile dictu*, having thus declared that the Court had no jurisdiction to pass upon the constitutional question sought to be raised by the bill, the opinion proceeded to attempt to decide that question.

As to the contention that the tax was not geographically uniform throughout the United States, the opinion states:[6]

> "The contention that the federal tax is not uniform because other states impose inheritance taxes while Florida does not, is without merit. Congress cannot accommodate its legislation to the conflicting or dissimilar laws of the several states nor control the diverse conditions to be found in the various states which necessarily work unlike results from the enforcement of the same tax. All that the Constitution (Art. I, Sec. 8, cl. 1) requires is that the law shall be uniform in the sense that by its provisions the rule of liability shall be the same in all parts of the United States."

As to the contention that the credit provisions of the Act are in effect not a tax upon a constitutional subject, but an effort to coerce the states into levying inheritance or estate taxes equal at least to 80 per cent of the federal rates, the opinion declares:[7]

> "The act is a law of the United States made in pursuance of the Constitution and, therefore, the supreme law of the land, the constitution or laws of the states to the contrary notwithstanding. Whenever the constitutional powers of the federal government and those of the state come into conflict, the latter must yield."

Of course, this is a manifest begging of the question. If the act is "a law of the United States made in pursuance of the Constitution", the fact that it is in conflict with state policy on purely local matters is no objection to its validity. But the very question at issue, if the Court had jurisdiction, was whether the law *was* made in pursuance of the Constitution. With the merits of the ruling, there is, however, at this point, no quarrel. Amazement is concentrated upon the expression of *any* opinion on a constitutional question which the Court declared it has no jurisdiction to decide. The criticism would have been the same if the Court, instead of expressing approval of the controverted provision of the Revenue Act of 1926, had declared it unconstitutional.

The judicial pronouncement is the more remarkable because not only did the government's brief contain no argument in support of the constitutionality of the Act, but also the briefs for the plaintiff contained little or no direct argument against its validity. The only

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[6]*Supra* note 3, at 17. [7]*Ibid.*

real argument against the statute was found in briefs filed by *amici curiae*, which set forth in a sketchy way some arguments against the constitutionality of the challenged provision of the Revenue Act of 1926, but only by way of inducement, as it were, and as a step in the process of showing that the state had an interest in the question. Moreover, only half an hour a side was allowed by the Court for oral argument, on the express ground, (as the writer is informed by one who was present in court at the time) that the constitutionality of the Act would not be considered but only the question of jurisdiction.

At all events, it is clear that the opinion expressed by Mr. Justice Sutherland in favor of the constutitionality of the Act of 1926 was quite unnecessary to the decision—which was that the Court had no jurisdiction to pass on the question, and therefore should not allow a bill to be filed to raise that question; and consequently the opinion expressed upon that question was *obiter dictum*, extrajudicial, and not binding either upon the Supreme Court itself or upon any inferior tribunal.

To the constitutional question upon which the Supreme Court, thus "with a light heart" expressed its *obiter* opinion, this article is directed.

The expedient of "crediting" taxes paid the several states against taxes due the federal government had its origin in section 300 of the Revenue Act of 1924, which after levying an excise tax upon the transfer of the net estate of every decedent subsequently dying, and after providing a graduated scale of rates up to a maximum of 40 per cent of the amount by which the net estate exceeds $5,000,000, declares that "the tax imposed by this section shall be credited with the amount of any estate, inheritance, legacy or succession taxes actually paid to any state or territory, or the District of Columbia, in respect of any property included in the gross estate", subject, however, to the proviso that "the credit allowed by this sub-section shall not exceed 25 per centum of the tax imposed by this section." The Act of 1926 repeats the provision, almost verbatim, but increases the limit of the credit from 25 per cent to 80 per cent of what the tax would otherwise be.

The remarkable effects of this provision for "credit" are perhaps not at first apparent, and certainly have not always been recognized. A moment's thought will show, however, that one result is to produce as between the several states an inequality in rate of tax which is mitigated in degree, but not altered in kind, by the limitation of the "credit" to 25 per centum, or 80 per centum, of what the tax would otherwise be.

For instance, the state of Maryland, although one of the first of the states to adopt inheritance taxation, has never imposed any tax upon transmission of property to a lineal descendant of the decedent; and the state of Florida, which has never had an inheritance tax, has recently, by constitutional amendment, expressly prohibited estate, legacy, inheritance or succession taxes. On the other hand, most of the other states impose a tax of varying amounts on both lineal and collateral descents. Now, if a resident of Maryland or a resident of Florida should die, leaving a "net estate" of $1,000,000[8] descending to his only son, as sole heir at law, no state inheritance or succession taxes would be payable. A federal estate tax of $48,500 would be payable. On the other hand, if the same decedent had lived, or the property which he owned had been situated, in, say, Connecticut, a tax of $40,262 would be payable to the state, and although the net amount received by the heir would be almost the same, the identical estate would have paid a federal estate tax of only $9,700. In fact, in any state imposing on such an estate inheritance or estate taxes of an amount equal to or greater than $38,000, the federal tax would be only $9,700.

Appended[8a] is a table showing in the case of eight states the amount of state and federal taxes on a "net estate" of $1,000,000, and the ratio of the federal tax (1) to the amount of the taxable "net estate" computed, under sections 301 and 302 of the federal act, without deduction for any inheritance or estate taxes, (2) to the amount of the estate before deducting the federal exemption of $100,000, (3) to the net amount passing to the enjoyment of the heir or legatee after payment of all taxes, both state and federal, (4) to the amount of the estate after deducting the state inheritance or estate taxes but without deducting the federal estate tax itself, and (5) to the amount of the estate after deducting the federal estate tax but without deducting the state inheritance or estate taxes.

The inevitable result and, indeed, the avowed purpose, of such a system of federal taxation, if it be valid and persisted in, is to force the states to impose in all cases inheritance or estate taxes at least equal to the "credit" allowed by the federal law. By doing so, they add nothing to the burden borne by their own citizens, and secure to themselves a considerable revenue which would otherwise go to the federal government. The states, in the exercise of powers expressly reserved to them by the Tenth Amendment, are thus to be made mere instrumentalities for executing the policy of progressive inheritance

[8]Computed according to §§ 302 and 303 of the Revenue Act of 1926 after deduction of the exemption of $100,000.

[8a] On p. 356.

TABLE IN CASE OF "NET ESTATE" OF $1,000,000

(OR $1,100,000 WITHOUT DEDUCTING THE FEDERAL EXEMPTION OF $100,000)

DESCENDING TO AN ONLY SON

(Under Revenue Act of 1926)

Location of Estate	State Succession Tax	Federal Estate Tax	Net taxable Estate under Sec. 302 and 303 of Federal Act	Net amount passing to heir after deducting both State and Federal taxes	Amount after deducting State tax but without deducting Federal tax	Amount after deducting Federal tax but without deducting State tax	Ratio of Federal Tax: To net taxable Estate under Sec. 303 of Federal Act	Ratio of Federal Tax: To amount before deducting Federal exemption of $100,000 or any taxes	Ratio of Federal Tax: To net amount passing to heir after deducting both State and Federal taxes	Ratio of Federal Tax: To amount after deducting State tax but without deducting Federal tax	Ratio of Federal Tax: To amount after deducting the Federal tax but without deducting the State tax
Md........	none	$48,500	$1,000,000	$1,051,500	$1,100,000	$1,051,500	4.85%	4.41%	4.61%	4.41%	4.61%
N. Y.......	$40,750	9,700	1,000,000	1,049,550	1,059,250	1,090,300	.97%	.88%	.92%	.88%	.89%
N. Car......	46,548	9,700	1,000,000	1,043,752	1,053,452	1,090,300	.97%	.88%	.94%	.93%	.89%
Ill..........	115,842	9,700	1,000,000	974,458	984,158	1,090,300	.97%	.88%	1.00%	.99%	.89%
Wis........	98,460	9,700	1,000,000	991,840	1,001,540	1,090,300	.97%	.88%	.98%	.97%	.89%
Conn.......	40,262	9,700	1,000,000	1,050,038	1,059,738	1,090,300	.97%	.88%	.92%	.92%	.89%
Idaho.......	29,585	18,915	1,000,000	1,051,500	1,070,415	1,081,085	1.89%	1.72%	1.80%	1.77%	1.75%
Kansas......	21,557	26,923	1,000,000	1,051,500	1,078,423	1,073,077	2.69%	2.45%	2.56%	2.50%	2.50%

taxation, approved by Congress for the purely state purpose of reducing "swollen fortunes". Already the great and once sovereign state of New York,—it is noteworthy that the Supreme Court in *Florida v. Mellon,* for almost the first time in its history, speaks of the states not as "sovereign", but as "quasi-sovereign"[9]—the great and once sovereign state of New York, hearing its master's voice, has imposed an estate tax equal to the excess of four-fifths of the federal rates over the pre-existing state taxes, to continue in force only so long as the federal law allows a "credit" for state estate taxes up to four-fifths of what the federal tax would otherwise be. Georgia, the state of Alexander Stephens, has likewise meekly obeyed the federal command. California, Colorado, Delaware, Maine, Massachusetts, Missouri, Montana, North Carolina, Pennsylvania, Ohio, and Vermont have done the same. Doubtless other states, if the law be continued in force, will be driven to follow their example.

It has even been proposed to raise the credit to 100 per cent of what the federal tax would otherwise be, or, in other words, to repeal the Federal Estate Tax in these states imposing inheritance or estate taxes equal to, or greater than, the federal rates, but to leave it in force, to a varying extent, in the remaining states.

Now, there are at least three restrictions upon, or limitations of, the power of Congress to levy an estate tax or other excise—(1) the tax must be "uniform throughout the United States", (2) the tax must not be so laid as to obstruct the exercise by the states of the governmental powers inherent in the structure of the Union and reserved to them by the Constitution, and (3) the tax must be a real tax, and not appear on its face to be an attempt under the guise of a tax to legislate upon matters reserved by the Constitution exclusively to the states.

Since the very recent case of *Nichols v. Coolidge,*[10] we are justified in adding a fourth restriction—namely, that the tax must not be arbitrary and whimsical in its operation. But this restriction, notable though it be, has perhaps little bearing on our present subject.

All three of the other restrictions or limitations above mentioned may, however, perhaps be claimed as invalidating the Estate Tax of 1924, with rates varying as we have seen in different parts of the country, and still more the Estate Tax of 1926, both of which are avowedly levied for the purpose of coercing the states into adopting

[9]The only earlier instances, recalled by the writer, in which the Supreme Court has applied the term "quasi-sovereign" to states of the American Union are: Georgia v. Tenn. Copper Co., 206 U. S. 230, 237, 27 Sup. Ct. 618 (1907), per Holmes, J.; Missouri v. Holland, 252 U. S. 416, 431, 40 Sup. Ct. 382 (1920), per Holmes, J.; Massachusetts v. Mellon, 262 U. S. 447, 482, 485, 43 Sup. Ct. 597 (1923), per Sutherland, J.

[10]274 U. S. 531, 47 Sup. Ct. 710 (1927).

higher rates of inheritance taxation than some of them have seen fit voluntarily to impose. It behooves us, therefore, to examine, in all three of these aspects, the system of "crediting" state taxes upon a federal tax.

I

As every law student knows, the constitutional provision that "all duties, imposts and excises shall be uniform throughout the United States" requires only "geographical" or "territorial" uniformity, and does not, like the equal protection clause of the Fourteenth Amendment (which is applicable only to the states), require that taxes be laid according to any rule of reason either in the selection of the subjects of the tax or in fixing the rates of tax.[11]

It is also settled that Congress in levying an excise tax is not obliged, by the requirement of geographical uniformity, to select subjects which are found, even with approximate uniformity, throughout the several states. For example, a tax on sleighs would produce considerable revenue in Maine, and none at all in Florida; but it would be none the less uniform "throughout the United States". So a tax on the production of oysters or tobacco would produce considerable revenue in Maryland and none at all in Montana; but it would be none the less uniform in the constitutional sense. All that is necessary is that the law should say, with the White Knight in "Through the Looking Glass" when reproached with the unlikelihood of a mouse-trap catching any mice on the back of a horse, "Not very likely perhaps; but if they *do* come, I don't choose to have them running about," free of tax.

Not only is this true, but subjects of federal excise taxation may be selected even though their non-existence in some states is due to the laws of those states. For instance, in the days of American liberty, an excise tax on the sale of liquor produced large revenues in the free states and none at all—if the state prohibition laws were enforced—in the prohibition states; but federal liquor excises were nevertheless quite constitutional. As said by the Supreme Court:[12]

> "A liquor tax is not rendered unlawful as a revenue measure because it may yield nothing in those states which have prohibited the liquor traffic."

[11]U. S. v. Singer, 15 Wall. 111, 121 (U. S. 1872); Head Money Cases, 112 U. S. 580, 594, 5 Sup. Ct. 247 (1884); Knowlton v. Moore, 178 U. S. 41, 20 Sup. Ct. 747 (1900); Patton v. Brady, 184 U. S. 608, 622–3, 22 Sup. Ct. 493 (1902); Flint v. Stone Tracy Co., 220 U. S. 107, 158, 31 Sup. Ct. 342 (1911); Billings v. United States, 232 U. S. 261, 282, 34 Sup. Ct. 421 (1914); Brushaber v. Union Pac. R. R., 240 U. S. 1, 24, 36 Sup. Ct. 236 (1916); La Belle Iron Works v. U. S., 256 U. S. 377, 392, 41 Sup. Ct. 528 (1921).

[12]Flint v. Stone Tracy Co., *supra* note 11, at 174. See also—License Cases, 5 Wall. 462 (U. S. 1866); Knowlton v. Moore, *supra* note 11, at 106.

But on the other hand, the very cases which establish this principle, also outline what is meant by geographical uniformity. For example, in the leading case, the Supreme Court said:[13]

> "Wherever a subject is taxed anywhere, the same must be taxed everywhere, throughout the United States, and at the same rate."

And again:

> "The tax is uniform when it operates with the same force and effect in every place where the subject of it is found."[14]

And still again, with reference to a tax on distillers levied in proportion to 80 per cent of the capacity of the distillery, whether produced or not:

> "The tax is uniform in its operation, that is, it is assessed equally upon all distilleries wherever they are."[15].

Mr. Justice Miller in his "Lectures on the Constitution" gives a similar definition:[16]

> "They"—*i. e.*, duties, imposts and excises—"are not required to be uniform as between the different articles that are taxed, but uniform as between the different places and different states. Whiskey, for instance, shall not be taxed any higher in the state of Illinois, or Kentucky, where so much of that article is produced, than it is in New York or Pennsylvania. The tax must be uniform on the *particular article;* and it is uniform within the meaning of the constitutional requirement if it is made to bear *the same percentage* all over the United States."

How is it possible to reconcile with the principle that "if a subject is taxed anywhere, it must be taxed everywhere, *and at the same rate*", a law which taxes the transmission of a net estate of $1,000,000 in Maryland or Florida to a lineal descendant, at 4.85 per cent, and the transmission of an estate of the same amount to a lineal descendant in New York at 0.97 per cent, and in Kansas at 2.69 per cent as is done by the Estate Tax Law of 1926?

Congress in taxing net income may indeed allow deduction of taxes paid to the state pursuant to the laws thereof, in calculating the taxable subject, as has been done not only in the Corporation Excise Tax of 1909, but also in the various revenue acts, beginning with that of 1913, passed pursuant to the Sixteenth Amendment. The amount of the taxable net income is thus affected by state laws, but the same tax

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[13]Knowlton v. Moore, *ibid.* 84. *Cf.* Fairbank v. U. S., 181 U. S. 283, 298, 21 Sup. Ct. 648 (1901).

[14]Head Money Cases, *supra* note 11.

[15]U. S. v. Singer, *supra* note 11.

[16]MILLER, THE CONSTITUTION (1891) 240. Italics the writer's.

is levied upon the same net income in one state as in another. For instance, A, residing in one state, may have an income of $100,000 over and above all exemptions and deductions other than state taxes. If his state taxes amount to $10,000, he is taxed upon a net income of $90,000, and his federal income tax, under the Act of 1924, would amount to $18,600. On the other hand, B, residing in some more fortunate or more parsimonious state, may have exactly the same amount of property and the same income; but if his state taxes amount to only $2,000, his net taxable income is $98,000, and his federal income tax, under the act of 1924, is $21,940. But this is no unconstitutional discrimination against B; for both A and B are subject to the same tax on the same net income. Or again, C, residing in the second state may have an income of $91,836 over and above all deductions other than state taxes, and may pay state taxes of $1,836, so that his net taxable income is $90,000, upon which, like A in the first state, a federal tax of $18,600 will be payable. He and A are treated exactly alike on the same net income, so that there is no violation of the constitutional requirement of territorial uniformity.

But suppose Congress, in order to make up to A the disadvantage of living in some state which, by reason of unfortunate circumstances or bad government, is obliged to levy comparatively high taxes, should enact that A on his net income of $90,000 should pay a tax of $12,680 or 12.68 per cent, while B on his net income of $98,000 should pay a tax of $19,940 or 20.35 per cent, and C on his net income of $90,000 should pay a tax of $16,600 or 18.44 per cent—what then? Would anybody deny that such a law would not be "uniform throughout the United States"? Yet that is what would be done by laying the tax on the income without deducting state taxes while "crediting" the state taxes in reduction of the federal tax.

To come still closer to the subject in hand, Congress in levying an estate tax might impose the tax on the net estate after deducting all state estate or "inheritance" taxes levied upon the estate before distribution as distinguished from taxes levied upon the distributee and payable by him, as was in fact done by the act of 1916. Such a tax was uniform throughout the United States, although the burden was more heavily felt in those states which levied, instead of a tax on the estate in respect of the right to transmit the property to the various legatees or distributees, a tax on the several legatees or distributees, after distribution, in respect of their rights to receive the property from the decedent's estate. The difference between those two classes of state taxes may be almost as fine in substance—though not in theory—as that between Tweedledum and Tweedledee; but at

any rate, it is not a "geographical" or "territorial" distinction. The same *taxable subject* paid the same federal tax in one state as in another.

So, too, Congress might have levied its tax on the net estate passing to the ultimate beneficiaries, after deduction of all taxes levied by state law, whether levied, technically, in respect to the right to transmit or of the right to receive; and such taxes, too, would have been "uniform throughout the United States," because, although the taxable subject, and therefore the amount of the tax, would to some extent depend on state law, yet the *same subject* would be taxed everywhere in the United States *and at the same rate.*

Yet again, Congress might levy a tax upon the "net estate" but without permitting, in calculating the taxable estate, the deduction of any state inheritance or estate taxes, whether the latter be levied, technically, upon the estate before distribution, or on the respective distributees. This was in fact done by the Revenue Acts of 1918 and 1921, and of course such taxes were uniform throughout the United States.

But in the Act of 1924, for the first time Congress undertook to depart from these constitutional paths, and, while nominally selecting as the taxable subject the decedent's estate without deduction for state inheritance or estate taxes, yet to vary the rate of tax in different parts of the country.

Defenders of this system of state coercion insist that the method of allowing "credits" upon federal taxes is not new, but has its antetype in several provisions of the Income Tax Laws. It is indeed true that the Income Tax Laws contain several provisions for regulating the amount of federal tax collectible by allowing certain "credits"; but none of these provisions is such as in any way to affect the geographical or territorial uniformity required by the Constitution. Thus, the Revenue Act of 1918 provided that the income tax as computed under other provisions of the act should in certain cases be credited with the amount of income tax paid during the taxable year to foreign countries or to any possession of the United States.[17] But as the requirement of uniformity does not extend to foreign countries or to possessions of the United States, and as the citizens or residents of all the states have precisely the same privilege with respect to crediting foreign taxes, the tax levied by Congress is none the less "uniform through the United States." Congress has power to levy certain extra-territorial taxes, such as taxes upon income from foreign real estate owned by an American citizen, or upon income earned in a foreign country by a

[17]Revenue Act of 1918, §§ 224(a), 238.

citizen of the United States residing therein; and in levying such taxes there can be no violation of the requirement of geographical uniformity throughout the United States, provided citizens or residents of all the states are treated alike. Excises levied by Congress upon, or in respect of, property in one state—say, New York—are not required to be uniform with those levied by Congress in Porto Rico or the Phillipines, in Canada or any other foreign country; but they are required to be uniform—that is, levied at the same rate upon the same property—with taxes levied by Congress in Pennsylvania or any other state.

But, some objector may say, the discrimination in the Act of 1924 and in the Act of 1926, is not against certain states or parts of states "geographically" or "territorially", but is against the residents of certain places, or against the estates of persons owning property in those places, *because of the laws thereof*. According to this view, Congress cannot discriminate by name against Maryland or Florida, but it can discriminate against all residents of places where such laws prevail as those in force in Maryland or Florida, as distinguished from those in force in New York or other states.

Now, the Supreme Court has never had occasion to define the Constitutional requirements of uniformity of excise taxation throughout the United States,—if we except the extraordinary *dictum* in *Florida v. Mellon*—except to say that it contemplates nothing more than "geographical" or "territorial" uniformity and that it means that "whenever a subject is taxed anywhere" in the United States, "it must be taxed everywhere" in the United States, "and at the same rate". No case exists in which the Supreme Court has held an excise tax invalid because not "uniform throughout the United States". We are, therefore, compelled to resort to a consideration of the question on principle.

Surely, however, the constitutional requirement of uniformity cannot be evaded by designating the favored states by description rather than by name. For instance, an excise tax applicable only in the states where the laws prohibited slavery would, prior to the Civil War, have been clearly unconstitutional. So, too, prior to the Eighteenth Amendment, an excise applicable only in the free or license states would equally clearly have been invalid. Even today, if Congress should pass an excise law applicable only, or at an increased rate, in those states whose laws permit child labor, would anyone be so bold as to maintain its constitutionality?

The truth is, of course, that law—at least Anglo-American law—is *local* or *territorial*, and any discrimination based on the law prevailing

in any state is necessarily a geographical or territorial discrimination, and as such prohibited by the Constitution.

Of course, federal taxation must be superimposed upon the background of a system of rights of property and contract created and regulated by state laws, and therefore must take cognizance of, and may properly be to some extent affected by, variation in those state laws. For instance, in determining whether money lost in betting on a horse-race can be deducted in calculating the net income subject to the federal tax, the Commissioner of Internal Revenue rules that the question depends upon whether betting be legal or illegal according to state law. Therefore, in Maryland, where betting on horse races, under certain regulations, is permitted, money lost at the races may be deducted in calculating the taxable income; but money lost in precisely the same way at precisely similar races, in states where all betting is illegal, may not be deducted. At first sight, this may seem to be a discrimination against the latter class of states because of their laws, very similar to the discrimination against states levying low inheritance taxes which characterizes the Estate Tax Law of 1924. But a moment's thought and analysis will show the wide difference. Gambling losses in transactions illegal under state law cannot be deducted because they are really not losses at all. It is a case where the "subject of the tax" does not exist, or exists to a lesser extent, in states having certain laws. Gambling losses, where gambling is illegal, are merely voluntary payments.

Another case of the fitting of the system of federal taxation upon a system of diverse state laws, with a consequent variation in the amount of tax according to the laws of the state, is found in the provision that insurance companies in calculating their taxable income may deduct "the net addition *required by law* to be made within the year to reserve funds". At first blush, this provision may seem to bear unequally in those states having lax insurance laws; for an addition to a reserve fund required to be made by conservative business methods cannot be deducted unless it be required by the law of the state. Consequently, an insurance company operating in one state may deduct an addition to a certain reserve fund made within the taxable year, while a rival company operating in another state cannot deduct a precisely similar addition to a precisely similar reserve fund—and all on account of the diversity in the laws of the two states. But in all this, there is no inequality within the United States, because the same income deducting only *compulsory* additions to reserve funds is taxed. The law everywhere taxes the same subject—namely, the income after deduction of compulsory additions to reserve funds.

Numerous other illustrations might be given. For example, take the case of a stamp tax on contracts. A paper which is not a contract according to the laws of one state may be a binding contract according to the laws of another. Such a paper, under such a law, would be taxable in the latter state but not in the former. In all this there is no violation of the constitutional requirement of uniformity throughout the United States, for the same subject—namely, an enforceable contract—is taxed everywhere, and at the same rate, throughout the United States.

But, it may be claimed that the estate tax provisions of the Acts of 1924 and 1926 can be justified on the same principles. If it be permissible to tax only such contracts as are legally binding by the laws of the several states, why is it not permissible to tax only such inheritances as pass free of tax under the laws of the several states? To this question several answers may be given. In the first place, this is *not* what the Acts of 1924 and 1926 do. They expressly levy the tax on the estate *without deduction for any state inheritance taxes*. A federal tax on inheritances which pass free of state tax would be less objectionable than a tax on estates without deduction for state taxes with a provision that the amount of the state tax may be "credited" on the federal levy. A federal tax on inheritances passing free of state tax would indeed tend to induce the states to impose *some* state inheritance tax; but it would have no such coercive force as the Acts of 1924 and 1926, which not merely induce the states to pass inheritance taxes, but actually fix the rates of the taxes which they are required to impose. In the second place, it is one thing to lay a tax on legally binding contracts and quite a different thing to levy a tax on inheritances which the states do not tax. In the one case, the thing taxed is something which state laws contribute to produce, and which can not exist without the concurrence of state laws: in the other case the thing taxed exists quite independently of state laws—at least of the state tax laws—and the state laws the existence or non-existence of which determine the imposition of the federal tax are *purely collateral*. It is one thing to select for taxation objects which must have various characteristics, among which is conformity, or lack of conformity, to state laws; and a very different thing to select the taxable objects without reference to state laws, and then to say that they shall be taxed or not, or that the rates of tax shall be fixed, according to state laws on some *collateral* subject.

This distinction deserves to be emphasized. For example, a tax on contracts is, of course, "uniform throughout the United States" although what constitutes a contract depends upon state laws and

although what would be a contract in one state may not be a contract in another. But on the other hand, a tax on contracts collectible only in states which refuse to prohibit child labor, pass state Volstead Acts, or otherwise to comply with the demands of Congress would be, it is submitted, clearly in conflict with geographical uniformity, and therefore unconstitutional.

It is one thing to select for federal taxation objects which have certain characteristics among which is conformity, or non-conformity, with state laws; and quite a different thing after you have selected the objects of federal taxation to gauge the amount or rate of federal tax by state legislation on some collateral subject—whether such state legislation relate to taxation or any other subject.

It is claimed, however, that the effect of the provision for crediting state inheritance taxes on the Federal Estate Tax is to promote, and not to destroy, uniformity of taxation throughout the United States. Indeed, the evil against which the advocates of such measures are clamoring is the present lack of uniformity in inheritance taxation in the different states. What they consider the unsisterly action of Florida in bidding for immigration of multi-millionaires by prohibiting all inheritance taxes, has made them see red. They apparently fear that all the rich men of other states will leave them for the torrid —or shall we say salubrious?—climate of Florida, and that it will be necessary for other states to meet the competition of Florida by reducing their rates of inheritance taxation. How far this fear is justified, or how far the present lack of uniformity in state inheritance taxation is an unmixed evil, we need not pause to inquire; for however great that evil may be, it cannot be remedied by imposing an unconstitutional federal tax. What the Constitution requires is not uniformity of all excise taxation, state and federal, but only of *federal* excise taxation. It is not permissible, in order to counteract a diversity in rates of state taxation in different parts of the country— a diversity which the Constitution permits—to create a countervailing diversity of rates in federal taxation in different parts of the United States—a diversity which the Constitution prohibits. In order to bring about a kind of uniformity which the Constitution does not require, it cannot be right to destroy the kind of uniformity which the Constitution commands.

As said by the Supreme Court in another case in which an attempt was made to justify unconstitutional legislation by the desirability of promoting uniform state laws, "There is no power vested in Congress to require the states to exercise their police power so as to prevent possible unfair competition . . . . It may be desirable that

such laws be uniform, but our federal government is one of enumerated powers."[18]

The question has been asked whether, if all the states imposed inheritance or state taxes to an extent equal to or greater than the federal rates, the federal tax would not be "uniform" even though it allowed a credit for state taxes; and, upon the assumption that this question would be answered in the affirmative, it is argued that the only valid objection to the constitutionality of the credit provision is that the purpose of the portion of the rates of taxation against which the tax credit is allowed is not the collection of revenue but coercion of the states. But even if all the states imposed taxes up to the amount of the federal credit, it would seem that the allowance of the credit would destroy uniformity in the Constitutional sense. A federal excise is uniform if on its face it applies throughout the United States although in fact the subjects of the tax are not found at all in some of the states; and conversely, a tax is not uniform if it is so laid that it may not always apply uniformly throughout the country even though for the time being, through extraneous circumstances, it operates uniformly. But even if the federal law would be uniform and valid if all the states had uniform state inheritance tax laws, it would cease to be uniform, and therefore become unconstitutional, as soon as one state should change its tax law. A statute which is valid when passed may by change of circumstances become unconstitutional, or *vice versa*.[19]

Some light may perhaps be thrown upon the meaning of geographical uniformity by decisions relating to the power to pass "uniform laws on the subject of bankruptcies throughout the United States." These "uniform laws" must be engrafted upon a system of diverse state laws as to contracts and property. The federal law could not give creditors in all parts of the country precisely the same rights without recasting the laws of the states on the subjects of contracts and property in one uniform mould. That, of course, is not required, and possibly would not even be permitted, by the constitutional power to establish uniform laws on the subject of bankruptcies. The validity of the various claims against the bankrupt estate must be determined according to diverse state laws, and what would be a valid claim in one state might not be in another. So the extent of the bankrupt's property rights must be judged by diverse state laws, and what would

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[18]Hammer v. Dagenhart, 247 U. S. 251, 273, 275, 38 Sup. Ct. 529 (1918). *Cf.* Nichols v. Coolidge, 274 U. S. 531, 540 ("The mere desire to equalize taxation cannot justfiy a burden on something not within congressional power.")

[19]Smyth v. Ames, 169 U. S. 466, 549–50, 18 Sup. Ct. 418 (1898).

be in one state a fee simple might be an estate for life in another, and wholly void in a third. In recognizing such diversities of state laws, a federal bankrupt law does not cease to be uniform.

Similarly, a federal bankrupt act may recognize and enforce homestead and other exemptions existing by the laws of the several states without any infringement of the requirement of uniformity.[20] Moreover, a bankrupt act may properly recognize and enforce the laws of the state respecting dower, validity of mortgages, priorities of payment, conveyances in fraud of creditors, and the like.[21] All these cases related to the Bankruptcy Act of 1898, which recognizes, in the particulars above referred to, the state law existing at the time of the bankruptcy.

A more debatable question arose under some of the earlier bankrupt acts. For example, the Bankrupt Act of 1867 undertook to adopt the exemptions prevailing in the several states, not at the time of the bankruptcy, but at a fixed date in the past. This provision was sustained by the Circuit Court for Missouri in an opinion concurred in by Mr. Justice Miller of the Supreme Court.[22] In 1873, by an amendatory act, Congress went still further and (as the amendment was generally, though not universally, construed) attempted to adopt the exemption laws as they existed on the statute books of the several states on a given date in the year 1871, even though some of those statutes were unconstitutional, null and void. The validity of this amendment was sustained by a number of decisions.[23] On the other hand, the amendment was held unconstitutional in cases which, though somewhat fewer in number, are yet perhaps greater in weight by reason of the fact that in one of them the opinion was delivered by Chief Justice Waite.[24]

Our present subject scarcely justifies an elaborate attempt to make a choice between these two opposing lines of authorities. Both admit that while in some cases Congress may, in enacting a bankrupt

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[20]Hanover Nat. Bank v. Moyses, 186 U. S. 181, 22 Sup. Ct. 857 (1902).

[21]Stellwagen v. Clum, 245 U. S. 605, 614–5, 38 Sup. Ct. 215 (1918); Thomas v. Woods, 173 Fed. 585, 591 (C. C. A. 8th 1909).

[22]*In re* Beckerford, Fed. Cas. No. 1, 209 (1870).

[23]*In re* Everitt, Fed. Cas. No. 4,579 (S. D. Ga. 1873); *In re* Kean, Fed. Cas. No. 7,630 (W. D. Va. 1873); *In re* Smith, Fed. Cas. No. 12,986 (N. D. Ga. 1873); *In re* Jordan, Fed. Cas. No. 7,514 (W. D. N. C. 1873); *In re* Jordan, Fed. Cas. No. 7,515 (N. D. Ga. 1874); *In re* Smith, Fed. Cas. No. 12,996 (N. D. Ga. 1876); Darling v. Berry, 13 Fed. 659 (C. C. Iowa, 1882).

[24]*In re* Dillard, 7 Fed. Cas. No. 3,912 (E. D. Va. 1873); *In re* Deckert, 7 Fed. Cas. No. 3,728 (E. D. Va. 1874) (opinion by Waite, C. J.); *In re* Shipman, 21 Fed. Cas. No. 12,791 (W. D. N. C. 1875); *In re* Duerson, 7 Fed. Cas. No. 4,117 (D. C. Ky. 1876).

law, fail to correct a diversity due to divergent state laws, yet whenever it undertakes to legislate for itself, the regulations it prescribes must be uniform throughout the whole country. It is not very material to our present inquiry whether the state laws which Congress may suffer to continue in force must be the valid and constitutional laws of the states or whether they may be whatever for the time being is recognized and *de facto* enforced as law in the states. Our present inquiry does not involve the question how far Congress in enacting bankrupt laws or tax laws may allow diverse state laws to continue to operate, without impairing the constitutionally required uniformity, but rather the question whether Congress in fixing its own tax rates may allow them to be gauged according to laws of the states upon what is and must be a collateral subject. Congress may, of course, in matters of taxation, as in matters of bankruptcy, recognize state laws, and levy its taxes only on so much as remains after state laws have had their operation; but the present question is whether the tax upon whatever Congress selects for the subject of its taxation must be uniform in all the states, or whether it may vary according to the varying laws of the states upon a collateral subject.

It is also noteworthy that the Supreme Court has held that while Congress in regulating interstate commerce may prescribe different rules for different parts of the country,[25] yet when it undertakes to regulate matters of admiralty or maritime law, its regulations must be uniform throughout the states, and therefore cannot give a remedy to maritime employees under the diverse workmen's compensation acts of the several states.[26] In such a case, Congress is not, as in the bankruptcy cases above referred to, merely allowing state laws to continue to operate upon matters with which the states are competent to deal in the absence of federal legislation on the subject, but is by force of its own act attempting to extend the operation of diverse state laws to matters confided by the Constitution to the exclusive and uniform legislative jurisdiction of the United States.

This decision has a real bearing upon our present subject, because Congress in attempting to allow state taxes to be credited upon federal taxes is not merely permitting the state laws to continue to operate—as in the bankruptcy cases—but is attempting to extend the operation of the state laws to matters confided to the exclusive control of Congress. Of course, nothing is more exclusively within the power of Congress, and more completely beyond the power of the states,

[25]Clark Distillery Co. v. Western Md. Ry., 242 U. S. 311, 326–7, 37 Sup. Ct. 180 (1917).

[26]Knickerbocker Ice Co. v. Stewart, 253 U. S. 149, 40 Sup. Ct. 438 (1920). *Accord:* Washington v. Dawson, 264 U. S. 219, 44 Sup. Ct. 302 (1924).

than to fix the amount of federal tax collected from a given subject; and when Congress attempts to declare that state taxes may be credited in reduction of the federal tax collectible from a given subject, it is giving those state laws an operation and effect which *proprio vigore* they could never have.

Mr. Justice Sutherland's *dictum* in *Florida v. Mellon* strangely misapprehends both the effect of the Acts of 1924 and 1926 and the basis of the objection thereto. In answer to the contention of lack of geographical uniformity in the federal tax, he says:[27]

> "Congress can not accommodate its legislation to the conflicting or dissimilar laws of the several states nor control the divers conditions to be found in the various states which necessarily work unlike results from the enforcement of the same tax."

Of course, it can not; and nobody ever contended that it should. But it can, and, it is submitted, must refrain from allowing the several states to fix by their changing laws the rate of a federal tax on any given subject which has been selected without reference to state laws.

The learned justice proceeds:

> "All that the Constitution (Art. I, Sec. 8, C. 1) requires is that the law shall be uniform in the sense that by its provisions the *rule of liability* shall be the same in all parts of the United States."

In this, the learned judge has departed from the rule laid down by earlier cases. That "the rule of liability" shall be the same in all parts of the United States is *not* all that the Constitution requires. In addition, it requires that the *rate of tax* upon the same subject shall be the same in all parts of the United States; and it is in that particular, among others, that the Acts of 1924 and 1926 depart from the constitutional standard.

Congress has fixed as the subject of the tax the net estate passing without deduction for state inheritance or estate taxes. Having done so, the constitutional mandate is that the tax must be levied at the same rate everywhere in the Union upon that subject. The state tax laws do not relate to the subject of the tax, but are purely *collateral.* You might as well allow a credit of fines collected by the states for violations of the prohibition laws, or the amount paid the governor of the state as a salary.

Let us recur to the definition of geographical uniformity given by the Supreme Court in *Knowlton v. Moore,*[28] or by Mr. Justice Miller in his

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[27]273 U. S. 12, 17. [28]*Supra* note 11, at 84.

"Lectures on the Constitution"—in order that a tax may be uniform, the "same subject", if taxed anywhere in the United States, "must be taxed everywhere, and *at the same rate*", or, in the words of Mr. Justice Miller, must "bear the *same percentage* all over the United States"—and let us try to apply it to the subject in hand. First, then, what is the "subject" of the tax, or "article taxed"? It is, according to the terms of the Act itself, "the transfer of the net estate" —which by force of the definition clause in section 300 means "the net estate as determined under the provisions of section 303"—"of every decedent dying after the passage of this Act";[29] and section 303 expressly provides that in calculating the net estate no "estate, succession, legacy or inheritance taxes" shall be deducted. If that be the "subject" of the tax, or "article taxed", the tax is certainly not imposed everywhere in the United States "at the same rate" or "at the same percentage"; for, upon a "net estate" of $1,000,000, calculated without deducting any estate, succession, legacy or inheritance taxes and passing to a lineal descendant, the "rate" or "percentage" of federal tax is 4.85 per cent in Maryland or Florida, and only 0.97 per cent in New York, North Carolina, Illinois or Wisconsin.

But, it may be said, this is a mere matter of words. In substance, the tax is levied, not upon the net estate computed according to section 303, but upon the estate free of state inheritance, legacy, succession or estate taxes, but before deducting the federal tax. For the sake of argument, so be it; and what is the result? The "rate", or "percentage" of the federal tax to the estate remaining after deduction of the state inheritance, legacy, succession or estate taxes, is 4.41 per cent in Maryland or Florida, 0.99 per cent in Illinois, 2.50 per cent in Kansas, and only 0.88 per cent in New York.

The same inequality of rate or percentage will be found to exist if we assume that the "subject" of the tax or "article taxed" is the transfer of the net estate after deduction of all taxes, state and federal, or the net estate after deduction of the federal estate tax, but without deduction of state inheritance, succession, legacy or estate taxes. On the former hypothesis, the rate varies upon a "net estate" of $1,000,000 from 4.61 per cent in Maryland or Florida to 0.91 per cent in New York; and on the latter hypothesis the rate varies from 4.61 per cent in Maryland or Florida to 0.89 per cent in North Carolina, New York, Illinois or Wisconsin.

The truth is that the tax computed according to the system of "credits" established by section 301 of the Revenue Acts of 1924 and 1926 is levied throughout the country at "the same rate" or "same

[29]§ 301(a).

percentage", with respect to no conceivable "subject" or "article" under the sun, and is therefore not "uniform throughout the United States".

The object of the constitutional requirement of geographical uniformity was of course to prevent discrimination against or in favor of any state or section, and particularly any discrimination against or in favor of any state because of its laws or institutions. The states took the risk of Congress selecting as objects of the tax commodities which are found in some only of the states even though their non-existence should be due not to natural circumstances but to state laws. But the states were jealous, and properly so, lest the power of federal taxation should be so exercised as to penalize one state for failing in respect of its reserved powers to do what Congress might deem wise. Hence, the uniformity clause was inserted.

If such a provision as the credit-clause of the Estate Tax Law can be sustained, then the whole subject of the requirement of uniformity might be frustrated.

Suppose, for example, Congress should conclude that the salaries paid the judges in some of the states are inadequate—as they undoubtedly are—and suppose Congress, in order to remedy the inequality of judicial salaries in different states should exact that there should be credited on the amount of estate taxes collected from the estates of decedents a sum equal to the lowest salary paid a judge of a court of record in the state of the taxpayer's residence up to what Congress may fix as the minimum respectable salary, would anybody doubt that the tax levied by such a law would not be "uniform throughout the United States"? Yet, how would it be possible to distinguish such a case from the "credit" provision of the Estate Tax Law?

Suppose Congress should determine that the calibre of the probate judges—for example in Maryland, where such judges are not required to be lawyers—does not come up to the standard, and in order to improve the quality of these courts, should allow as a credit on estate taxes collected from deceased residents of the several states an amount equal to the annual salary paid the judges of the court in which the estate is administered? Justice Sutherland's reasoning would sustain such a provision. Yet who would hold it valid?

Suppose, for example, Congress should determine that the state ought to be "encouraged" to expend additional amounts on the public schools, and should exact that income taxes due from residents of any state should be "credited" with their respective *pro rata* share of amounts expended by the state upon education. Would it be possible

to sustain such a provision? Yet, if it be invalid how can the "credit" allowed by the Estate Tax of 1924 or 1926 be distinguished?

Yet again, suppose that Congress should conclude, as many tax theorists now do, that the states ought to substitute income taxes for the property taxes now in force, and, under the influence of that theory, should enact that state income taxes paid by any taxpayer should be credited upon the federal tax to the extent of twenty-five, fifty, or eighty per cent thereof. The states would be forced in defense of their citizens to adopt a scheme of income taxation as a substitute for the existing property taxes. Yet if the Estate Tax of 1924 or 1926 be valid there could be no possible constitutional objection to such a law.

Unless the uniformity clause is to become a dead-letter, shorn of all vitality and efficacy, the Federal Estate Tax of 1924, and still more clearly the Estate Tax of 1926, cannot be reconciled with the Constitution.

II

The second restriction upon the Congressional power of excise taxation is that the tax must not be so laid as to burden the exercise by the states of governmental functions reserved to them by the Constitution.

Unlike the requirement of uniformity this is not express but implied. It is not found in the letter of the Constitution, but is a deduction from its general spirit, purpose and scope. It is purely judge-made, and is therefore both more elastic, and more uncertain in its application, than the literal restriction as to uniformity.

The instances to which it has been applied include—(1) a tax on the salary of a state officer,[30] (2) a tax on the dividends or interest paid to a municipal corporation on its investments in railway securities acquired in order to aid in construction of railways serving its people,[31] (3) a tax on the interest or profit received by persons contracting with a state or a municipal corporation by lending it money,[32] and (4) a tax on the bond required of a state officer as a condition precedent to qualifying.[33]

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[30]Collector v. Day, 11 Wall. 113 (U. S. 1870).

[31]U. S. v. The R. R., 17 Wall. 322 (U. S. 1872); Stockdale v. The Ins. Cos., 20 Wall. 323, 330 (U. S. 1873).

[32]Mercantile Bank v. N. Y., 121 U. S. 138, 162, 7 Sup. Ct. 826 (1887); Pollock v. Farmers' L. & T. Co., 157 U. S. 429, 583-6, 601-4, 652, 15 Sup. Ct. 673 (1895).

[33]Bettman v. Warwick, 108 Fed. 46 (C. C. A. 6th, 1901), composed of Lurton, Day and Severens, J. J.

There is no reason to suppose, however, that such instances by any means exhaust the list of taxes prohibited by this principle. As the prohibition is implied from the objects and purposes of the Constitution, and from the dual nature of the sovereignty which it sets up or recognizes, certainly the prohibition must be co-extensive with the reason for its existence.

Now the federal tax which we are here considering does not burden the operation of the state governments in the same way as a tax on the salaries of state officers or a tax on the income or profits derived from contracts made by the state in its governmental capacity. But on the other hand, such a tax as the Estate Tax of 1924, and still more so the tax of 1926, does in fact much more seriously burden and obstruct the operation and independency of the states than an income tax levied at the same rate upon the salaries of state officers or interest on state or municipal bonds, and upon all other income "from whatever source derived." As then the latter is held to violate the general purpose and scope of the Constitution in providing for a union of states, each independent within its proper sphere, should not the former, *a fortiori*, be held subject to the same constitutional objection?

The effect of such a federal statute as the Estate Tax Law of 1924 is to force the hands of the states, and make them in the exercise of their reserved rights mere puppets, not autonomously acting upon their own will and initiative, but moving according to the congressional beck and nod. In effect the tax is levied upon the action of the states in refraining from the passage of inheritance tax laws of sufficiently onerous character to meet the congressional approval. In *Veazie Bank v. Fenno*,[34] Chief Justice Chase, speaking for the Supreme Court, said:

> "It may be admitted that the reserved rights of the States, such as the right to pass laws, to give effect to laws through executive action, to administer justice through the courts, and to employ all necessary agencies for legitimate purposes of State government, are not proper subjects of the taxing power of Congress."

And again on the first hearing of the Income Tax Case, the Supreme Court said, the Court being unanimous on this point:

> "The Constitution contemplates the *independent exercise* by the Nation and the States, severally, of their constitutional powers."[35]

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[34]8 Wall. 533, 547 (U. S. 1869).

[35]Pollock v. Farmers' L. & T. Co., *supra* note 32, at 583-584. Italics the writer's.

The same principle, if regard be had to actual results rather than to names, would invalidate the credit provision of the Estate Tax Law of 1924 or 1926, even without regard to the lack of uniformity which it produces.

If this objection to the "credit" provision of section 300 of the Acts of 1924 and 1926 be sound, it might be thought that the state of Florida should have been allowed to file its bill to enjoin the enforcement of those Acts—unless indeed the maintenance of the suit was barred by the Revised Statutes section 3224 prohibiting any suit to enjoin the collection of a federal tax—and that therefore *Florida v. Mellon* is on this particular point an actual decision and not a mere *dictum*. But although the state of Florida did undoubtedly assign this invasion of her sovereign—or, according to Mr. Justice Sutherland, "quasi-sovereign"—prerogative as a ground for invoking the original jurisdiction of the Supreme Court, yet that tribunal did not so understand her contention. As already stated, Mr. Justice Sutherland seems to have grasped as the only two grounds on which jurisdiction was invoked—(1) the fear that wealthy men would be induced by the operation of the federal tax to remove from Florida and thus reduce the state's revenues, and (2) the status of the state as *parens patriae* toward her citizens. The far more arguable position that the state had a right to complain of the federal tax because it amounts in effect to an ill-disguised effort to coerce the state into legislating in a particular way on matters expressly reserved to her uncontrolled discretion by the Tenth Amendment, was overlooked or purposely ignored by the Court. It is very provoking to counsel to have his position misrepresented by a court; but at least such misrepresentation has the advantage that the decision is a precedent, even by way of *dictum*, only upon the case as stated by the court, and not upon the case as made by the record, or as the court *ought* to have stated it.

Moreover, strange as it may seem, it is very doubtful whether the fact that the Act in question thus operates *in terrorem* upon the states in the exercise of their reserved rights is sufficient to give the states as such any *locus standi* to challenge its validity. Before *Florida v. Mellon*, the case of *Massachusetts v. Mellon*,[36] was an authority against the right of the state to interfere on such a ground; and if the state of Florida had had the right to question the constitutionality of the credit provision on this ground, the proper course would have been to allow the bill to be filed, and then decide against her on the merits. The question, therefore, would be still open, notwithstanding *Florida v. Mellon*, at the suit of an individual interested.

[36]*Supra* note 9.

III

A third restriction upon the federal power of levying excise taxes is that the so-called tax must be levied, at least in part, for the purpose of raising revenues for the federal government, and must not appear on its face to be a mere attempt under the guise of taxation to legislate upon matters reserved exclusively to the states.

Upon this ground, the act of Congress levying a tax of ten per cent on the earnings of persons employing child labor was held unconstitutional,[37] and on the same principle the act imposing a tax of twenty cents a bushel on contracts for the sale of grain for future delivery except sales on boards of trade complying with certain conditions and regulations, was held invalid.[38]

No critic can justly charge the Supreme Court with excess of zeal for state rights in the application of this principle, as witness the decision upholding the clearly prohibitive tax on oleomargarine artifically colored so as to resemble butter,[39] and the decision sustaining, with a blindness worthy of Justitia herself, the obvious constitutional fraud of the Harrison Drug Act.[40]

That the Estate Tax Laws of 1924 and 1926 are intended to effect some other purpose as well as the raising of revenue is not, under these decisions, sufficient to bring them as a whole within the ban. As said by the Supreme Court in sustaining the Harrison Drug Act:

> "The act may not be declared unconstitutional because its effect may be to accomplish another purpose as well as the raising of revenue."[41]

And again in the same case:

> ". . . from an early day the court has held that the fact that other motives may impel the exercise of federal taxing power does not authorize the courts to inquire into that subject. If the legislation 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."[42]

So long as the "credit" for state taxes is limited to 25 per cent or even 80 per cent of the Federal levy, it may be difficult to maintain that the *sole* motive or purpose of the Estate Tax Law *as a whole*

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[37]Child Labor Tax Case, 259 U. S. 20, 42 Sup. Ct. 449 (1922).

[38]Hill v. Wallace, 259 U. S. 44, 42 Sup. Ct. 453 (1922). See also Trusler v. Crooks, 269 U. S. 475, 46 Sup. Ct. 175 (1926).

[39]McCray v. U. S., 195 U. S. 27, 24 Sup. Ct. 769 (1904).

[40]U. S. v. Doremus, 249 U. S. 86, 39 Sup. Ct. 214 (1919).

[41]*Ibid.* 94. [42]*Ibid.* 93.

appears on its face to be something other than the raising of revenue. If, indeed, the credit should be raised to 100 per cent, as some enthusiasts have proposed, then the law would seem to pass beyond the pale of the constitutionally permissible. But so long as the "credit" is appreciably less than 100 per cent, so that the Act will produce some revenue, even after accomplishing its purpose of compelling the states to impose inheritance or estate taxes with rates at least as high as the federal rates, the constitutional objection to the Act as a whole must be, not the fact that it is intended to produce some other result as well as the raising of revenue, but the fact that the other purpose is to influence the legislative action of the states in the exercise of their reserved powers.

In a word, the objection to the Federal Estate Tax of 1924 or 1926, *as a whole*, is not that its purpose is *something* other than the raising of revenue for the United States, but that this something is the influencing of state legislation. Decisions of the Supreme Court establish that a federal excise may be laid in part, though not exclusively, with a view to influencing the action of individuals—for example, to discourage them from selling oleomargarine colored so as to imitate butter; but no case has yet held—if *Florida v. Mellon* be excepted—that a federal excise tax is valid which shows on its face that even one of its purposes is to influence the action of the states in the exercise of powers reserved to them as independent sovereignties by the Constitution.

Unquestionably the Estate Tax Law of 1924, and still more clearly the Act of 1926, shows on its face that one of its purposes, in addition to the raising of revenue, is to induce the states to levy higher inheritance or estate taxes; and unless the Supreme Court is willing to hold, not merely that a federal tax law may have as one of its professed objects something other than the raising of federal revenue, but that this non-fiscal object may be to induce, and virtually to compel, the state legislatures to exercise one of their reserved powers according to the wishes of Congress rather than according to the wishes of their own people, then it must hold the credit provision of the Estate Tax law of 1924, and *a fortiori* the credit provision of the Act of 1926, to be unconstitutional, even apart from the lack of uniformity.

This argument, however, is merely a reinforcing of the contention set forth in the former part of this article.

But while the estate tax *as a whole* cannot be said to be invalid because its object is in part something other than the raising of revenue, yet it is certainly true that the Estate Tax consists of two clearly separable parts, one of which is intended to raise revenue and the

other of which is intended for the sole purpose of coercing the states into levying progressive inheritance taxes. One-fourth of the Estate Tax of 1924 and four-fifths of the Estate Tax of 1926 have no revenue object whatsoever. Their sole object—and that too, an object apparent on the face of the act—is to force, or, if you choose, to tempt, the states, to levy at least equivalent inheritance or estate taxes in every case.

This object is apparent enough on the face of the acts. It becomes if possible clearer on inspecting the committee reports on the bill which finally became the Revenue Act of 1926. The chairman of the Ways and Means Committee of the House reporting the Revenue Bill of 1926 naively admitted that the object of 80 per cent of the Federal Estate Tax was not to produce revenue but to induce the states to pass inheritance or estate tax laws in accordance with the Congressional will:

> "The loss during the calendar year 1927 will probably be from ten to twenty million dollars. Thereafter the annual loss will continue to increase, as advantage is taken of the 80 per cent. credit, and in a few more years it is probable that the annual return to the Government under the estate tax will not exceed $50,000,000. The returns may even be less than this amount."

The hearings before the Ways and Means Committee which preceded the introduction of the bill of 1926 set forth its purpose with equal or greater clearness. Even if such evidence is not directly material upon the question of constitutionality, at least it is useful in illustrating the danger of abuse of any such power in Congress. Take, for example, the following colloquy between members of the Committee and Governor McLeod of South Carolina, appearing as spokesman for the State on whose behalf Calhoun once thundered and Wade Hampton fought:

> "Mr. Rainey: If something can be done which would compel the States to occupy this field and occupy it by imposing taxes, would you not favor some arrangement of that kind, if it can be done?
>
> Governor McLeod: I think I would, if it was fair in its distribution of this inheritance tax.
>
> Mr. Rainey: If we compelled every State to levy the same minimum?
>
> Governor McLeod: If it was fair and equitable in its distribution to the States.
>
> Mr. Rainey: And let the States occupy the field entirely and apply the revenue entirely to the liquidation of their own expenses, provided we devised some means of compelling the States to do it; would you not favor it?

Governor McLeod: I think so.

Mr. Garner: If there was an arrangement by the Federal Government under which, when a citizen of the United States died, there could be deducted the amount due the State of South Carolina of taxes he had to pay in the State, sending the balance to the Federal Government, it would not injure your exchequer?

Governor McLeod: No, sir; except that I would—

Mr. Garner (interposing): He would have no occasion to flee from your State to Florida, or even to a warmer climate to avoid the inheritance tax due your State?

Governor McLeod: That is true, but speaking—

Mr. Garner (interposing): You will agree that the plan suggested that the Federal Government devise some scheme whereby we could have the inheritance taxes uniform as far as possible throughout the Republic, is desirable, will you not?

Governor McLeod: In that case the Federal Government would be established as a disbursing agency for the State governments.

Mr. Garner: Not at all. Your citizens would have deductions allowed under certain conditions. Now there are deductions both for the estate and income taxes, and a great many deductions are made. But he would simply deduct from the amount what he would owe the Federal Government whatever he would pay your State.

Governor McLeod: How would you justify the Federal Governmet levying taxes merely for that purpose unless those taxes are needed for the expenses of the Government?

Mr. Hull: But there would be uniformity.

Mr. Carew: We are going to use this power to effect a great reform."[42a]

Dr. Thomas S. Adams of Yale, perhaps the most influential of the expert advisers of the Committee, with the assurance of the expert who would regulate the orbits of the planets and the courses of the stars, was not content with compelling the states to impose some sort of taxes, but wished to go further and dictate the particular kind of taxes they should impose:

"I would do this: I would reduce the maximum rate of the Federal tax to 15 or 20 per cent, and I would give an 80 per cent or 100 per cent credit. I would put the credit in that case on the basis of estate taxation rather than inheritance taxation by the States; putting the operation of that limitation into effect two years after, so that the States might take advantage of it.

[42a]Hearings on Revenue Revision Before the Committee on Ways and Means, October 19th to November 3rd, 1925, 370–1.

I believe that the State tax would be much better if it were in the form of an estate tax rather than an inheritance tax."[43]

The tax imposed by the Act of 1926 consists of two separable parts, (1) a tax equal to 20 per cent of the rates mentioned in section 300(a), which is imposed ostensibly for the purpose of raising revenue, and (2) a tax equal to 80 per cent of those rates which is on its face imposed not for any such purpose but solely for the purpose of inducing the states to impose estate or inheritance taxes of at least an equal amount. This portion of the so-called tax will from the outset raise no revenue at all in states whose laws conform to the Congressional will, and if it becomes permanently a part of our system of federal jurisprudence will ultimately raise no revenue anywhere.

May it not, therefore, be contended that the Estate Tax of 1926 consists of two clearly separable parts—20 per cent for the purpose of raising revenue, and 80 per cent for the purpose, not at all of raising revenue, but of inducing the states to impose inheritance or estate taxes at least equivalent in amount, and that this latter portion is not properly a tax at all, any more than the tax on articles produced by child labor, and is therefore null and void?

The wide difference between a tax which is laid in such a way as while producing revenue yet also to accomplish some other purpose—a tax laid "with a political view", to borrow a phrase from our Maryland Declaration of Rights—and a so-called tax which is not imposed in any degree for the raising of revenue, but solely for some other purpose, and is therefore void, may be emphasized by an illustration. The estate tax laws from the beginning, and the income tax laws since 1916, have allowed charitable or religious bequests or gifts, with certain qualifications, to be deducted in determining the taxable estate or income, as the case may be. Now this practice undoubtedly tends to encourage charitable or religious contributions. The taxpayer knows that every dollar he gives to charity goes net, and that he does not have to pay anything to the government by way of tax on the money so given. But on the other hand, he does not save anything in tax on his other estate, or other income, and therefore is under no pressure or inducement to make a gift unless his inclinations prompt him to do so. But suppose Congress instead of declaring that charitable or religious contributions shall be deducted in ascertaining the taxable estate or the taxable income, should enact that they should be *credited* on the tax. As a result, everybody would be virtually forced to contribute to charity. He would have the op-

[43]Hearings on Revenue Revision before the Committee on Ways and Means, October 19th to November 3rd, 1925, 463.

tion between giving the money to the federal government and giving it to God; and most persons, for the good of their souls, would choose the latter alternative.

Indeed, if this system of "credits" be once firmly established, there is absolutely no limit to the powers of Congress.

For instance, suppose Congress should determine that fathers should be prevented from disinheriting their children. The purpose could be accomplished by the simple expedient of providing that a certain proportion of every estate bequeathed or descending to a child shall be *credited* on the estate tax.

Or again, suppose Congress decides that wages paid day-laborers should be increased. All it need do is to provide that the income tax of every corporation or other employer of labor shall be credited with amounts paid laborers up to, say, $10 per day apiece.

Is it not clear that the only alternative to allowing virtually unlimited powers to be concentrated in Congress is to hold that wherever Congress attempts to allow as a credit against a federal tax any payment that depends upon the volition of the taxpayer or of the state, the statute, at least to the extent that the credit is allowed, ceases to be a revenue measure and becomes an unconstitutional attempt on the part of Congress to legislate on matters which are beyond its powers?

IV

After *Florida v. Mellon* it would perhaps require some legal boldness to ask a re-examination—or more properly, in view of the casual nature of the opinion of Mr. Justice Sutherland—an examination of the constitutionality of the credit provision of the Estate Tax Laws of 1924 and 1926. Nevertheless, to acquiesce in the validity of those provisions is fraught with such momentous consequences, and would be a precedent of so pernicious a character, that this paper cannot be concluded without briefly considering what would be the effect of holding the provisions unconstitutional, and what methods may be available for contesting their constitutionality.

If the credit provisions of the Acts of 1924 and 1926 are invalid, one of three consequences must follow. Either—

(1) Section 301(b), which contains the provision for a credit should be eliminated from the Act, leaving the rates based by section 301(a) in force without any provision for credit, or—

(2) The tax must be severed and held valid to the extent of 75 per cent in the case of the Act of 1924, and 20 per cent in the case of the Act of 1926, and invalid only as to so much thereof as the credit can apply to.

(3) The whole of the Estate Tax provisions of the Acts of 1924 and 1926 must fall.

The first of these three possible views is absolutely untenable. The legislative history of the enactments, the reports of congressional committees, and the like, as well as the text of the Acts themselves, show beyond peradventure that Congress never intended to impose the high rates of section 301(a), unless the credit provided for by subsection (b) should be allowed. It is superfluous further to elaborate this point. Any competent lawyer can readily convince himself, if the text of the Acts leave him in any doubt, by examining the Congressional Record and the Committee reports.

The second of the three possible views—namely, that 75 per cent of the tax imposed by the Act of 1924 and 20 per cent of that imposed by the Act of 1926 should be held valid, and only the portion against which the credit is provided stricken down—has more to be said in its favor.

If it be tenable, the constitutionality of the credit provisions can be raised easily and in a very satisfactory way. All that is necessary is in any case where there is no state inheritance tax—for example, in any case in Maryland where the entire estate passes to lineal descendants —to pay the federal tax and, after filing a claim for refund, sue the Collector to recover back 80 per cent of the amount paid.

Thus to split up what was intended as one entire tax would certainly seem a novel exercise of judicial power. Yet the result would be equitable, and probably in accord with what Congress would have wished. It is certainly possible to segregate in this way the clearly constitutional portion of the tax from the portion which, if the views above expressed be sound, is unconstituional. It would carry out, too, the spirit of the following section of each act:

> "If any provision of this Act, or the application thereof to any person or *circumstances*, is held invalid, the remainder of the Act, and the application of such provision to other persons *or circumstances*, shall not be affected thereby."[44]

The remaining view—namely, that if the credit provisions of section 301(b) are invalid, the whole of the Estate Tax must fall with it, —may seem to many lawyers easiest of the three to sustain. On this hypothesis, either (a) there has been no constitutional federal estate tax in force since 1924, and all such taxes collected on estates of decedents dying since that time should be refunded, or else (b) the Estate Tax of 1921 continues in effect.

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[44]Act of 1924, 43 Stat. 231, § 1103 (1924), and Act of 1926, 44 Stat. 130, § 1213 (1926). Italics the writer's.

Section 1200 of the Act of 1924 (a) repeals the estate tax provisions of the Act of 1921; but subsection (b) provides that those provisions shall nevertheless continue in force "until the corresponding tax takes effect under the provisions of this Act." If this means the date which under the terms of the Act of 1924 its estate tax provisions were to take effect—*i. e.* [under section 1100(a)] "upon the enactment of this Act", or in other words on June 2, 1924—then the Act of 1921, in so far as it levied an estate tax, expired on that date, whether or not it was replaced by another valid tax.

If, on the other hand, section 1200(b) means that the Act of 1921 shall continue in force until its place is taken by another valid estate tax, then the estate tax provisions of the Act of 1921 have never been repealed.

The Act of 1924, as originally passed, in section 300(a) levied rates which were approximately 25 per cent higher than those imposed by the Act of 1921, and while the law was in this state, it would have been a simple matter, on the hypothesis we are now considering, to raise the question of the constitutionality of the Act of 1924. Where the tax under the Act of 1924 would be higher than the tax under the Act of 1921—and in Maryland whenever the whole estate passed to a widow or children, this was bound to be the case—the excess could be paid under protest; and a suit brought to recover it back would raise the question of the constitutionality of the Act of 1924.

But the Act of 1926 retroactively reduced the tax imposed by section 301(a) of the Act of 1924 to the level of the rates imposed by the Act of 1921. After this was done, few cases could arise in which it would be more beneficial to an estate to be taxed under the Act of 1921 than under the Act of 1924 as retroactively amended. The ordinary taxpayer, therefore, had no longer any interest in contending that he should be taxed under the Act of 1921 instead of under the Act of 1924.

The Act of 1926 for the future increases the exemption and, in some cases, still further reduces the rates, while increasing the credit from 25 per cent to 80 per cent. If the whole of the estate tax sections of the Act of 1924 are invalid, *a fortiori* the same thing is true of the corresponding provisions of the Act of 1926; but the taxpayer would, in most cases, be out of the frying pan into the fire. There may indeed be some exceptional case in which it would be less burdensome to an estate to be subject to the Act of 1921 than to that of 1926. For instance, the *prima facie* presumption raised by the Act of 1921 that any transfer of a material part of a decedent's estate, without fair consideration, within two years prior to his death, shall be taken to

have been made in contemplation of death, is made conclusive by the Act of 1926. Now, if we suppose a case in which a gratuitous transfer of a large part of the estate was made within two years before the decedent's death, but in which the motive of the transfer can be proved to have been something other than contemplation of death, then (if it be constitutional to create in such a case a conclusive presumption—which after *Schlesinger v. Wisconsin*,[45] and *Nichols v. Coolidge*,[46] must be regarded as very doubtful) it might be better to be subject to the Act of 1921 than to that of 1926. But save in some such very exceptional circumstance, any estate would be better off under the Act of 1926 than under the Act of 1921, and nobody would have any standing to contend that the Act of 1921 continues in force.

Even upon this hypothesis there is one way in which the constitutionality of the credit provision can be raised. As already mentioned, a number of states—such as New York—have passed laws levying estate taxes equal to 80 per cent of the federal levy to continue in force only so long as the federal law allows a credit of at least 80 per cent for state taxes. Now, if this provision in the federal statute purporting to allow the credit is unconstitutional, null and void, there is no federal law in force allowing the credit, and the state tax is uncollectible. In any such case, any estate can by contesting the imposition of the state tax, raise the question of the constitutionality of the credit provisions of the Federal Act. From a decision of the highest court in the state, the question could be carried to the Supreme Court of the United States. But it would take a very patriotic taxpayer to raise the question in this way; for even if successful, any money he might save in state taxes would, if the Act of 1921 is still in force, have to be paid to the federal government in increased federal tax; and he might even be worse off than if he had accepted the federal statute as valid to its full extent.

Therefore, unless the estate tax provisions of the Acts of 1924 and 1926 are wholly void, and unless the Act of 1921 is not thereby continued in force, it would seem that the most practicable way of attacking the validity of the credit provision of the federal law is to contend that the effect is to invalidate the federal tax of 1924 to the extent of 25 per cent, and that of 1926 to the extent of 80 per cent, confining the federal tax legally collectible to 75 per cent and 20 per cent respectively of the nominal rates. Any careful lawyer would hesitate to assert that the chances of success in any such contest would be worth to any estate of ordinary size the expense of the litigation. And

[45]270 U. S. 230, 46 Sup. Ct. 260 (1926).
[46]*Supra* note 10.

yet as a matter of patriotic duty the *dictum* in *Florida v. Mellon* surely ought not to be accepted as the final word. The power of the purse is throughout Anglo-American history the only means by which liberty and independence have been achieved or preserved. In an attempt to snatch it from the people Charles I lost his head; and rather than surrender it, the American Colonies reluctantly severed connection with a mother country which they loved. If our states have yielded it up, in respect to their internal affairs,—if Congress can by a cunning device dictate to them what taxes they shall levy for local purposes—then they are no longer states but satrapies. The Supreme Court has not hesitated more than once to overrule prior decisions if convinced of their error. Is it too much to expect of the patriotism and fair-mindedness of a great court to disregard the hasty *dictum* in *Florida v. Mellon*?