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THE FEDERAL POWER TO TAX AND TO SPEND

By G. Merle Bergman*

In choosing this topic for an article I hesitated somewhat, fearing that the reader of pragmatic bent might avoid it in the belief that the matter was no longer one of great significance to constitutional litigation. But I ruled in favor of it—I think safely—because the transitory nature of our courts and the great interest which this general topic has always had for constitutional scholars suggests both a future and present utility. Even though the Supreme Court of the United States is not today inclined to make fine distinctions which would impede the taxing and spending powers of the Federal Government, it is not unlikely that the lawyers may presently be called upon to assist the Court in a reorientation of its theories in order to buttress in principle the advances it has made in practice. This article is designed, in part, to suggest to the lawyer the methodology by which this reorientation might be achieved. The analysis which it presents is, admittedly, of a highly technical and academic nature, but I believe that the fundamental concepts which it contains and their delineated relation to the principal cases will more than repay the reader for his enforced concentration.

Unfortunately the interpretation of the Constitution in most of our law schools follows a rather antiquated pattern. The instructor too often dwells upon superficial, trivial, or transitory elements of a case to the exclusion of underlying principles upon which the determination rests. He too often neglects to distinguish between what the courts say and what they do. This failure to see the forest for the trees is a malady to which constitutional law is especially susceptible since it offers innumerable opportunities for distracting metaphysical discussion. Met with this situation it is best to substitute a consideration de novo in light of the language of the instrument and the cumulative effect of the courts' decisions, rather than attempt a piece-meal analysis of the elements of any given case. The resulting concepts are more than likely the very ones which motivated the courts, though unencumbered by the obfuscation which scattered cases and official language so often create.

Applying this method to the present study I turn my attention to Article I, section 8, of the Constitution of the United States which provides inter alia: "The Congress shall have power to lay and collect taxes, duties, imposts and excises, to pay the debts and provide for the common defense and general welfare of the United States; but all duties, imposts and excises shall be uniform throughout the United States."

This passage is commonly referred to as the "taxing" clause. Grammatically speaking it consists of more than one clause. As the vehicle for a grant of power it has been referred to in the singular because it is commonly held to embody but a single power. In the latter sense, as well as in the strict grammatical sense, the passage might more properly be considered in the plural, since it confers two powers upon the Congress instead of one. I doubt that anyone has ever questioned the power of Congress to spend, but it has been generally thought that this power is derived by implication from the taxing power. I believe, however, that evidence about to be set forth tends to prove that the spending power is expressly conferred in the passage quoted above, whereas the taxing power is considerably different from that which is generally credited under this clause. In order to establish my proposition, a major portion of this discussion is necessarily devoted to a consideration of punctuation and grammatical construction; but the distinctions which are about to be made are significant not for the passive observation of a grammatical truth, but rather for the active application of that truth in the history of the Supreme Court of the United States.

Posing a Paradox

The framers of the Constitution surely did not believe that Congress had to have any special grant of power in order to tax for the purpose of carrying out the other delegated powers. It was understood that Congress could do this freely under the necessary and proper clause. A tax could be used to whatever extent it might lend itself as a proper means of accomplishing the end in view, provided only that the tax be laid in conformity with the rules established, and that the end be a legitimate one under the dele-

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1 Text, Department of State, United States Government Printing Office, Publication No. 539 (1934).
2 Article I, section 8, confers upon Congress the power: "To make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof."
3 See Article I, sections 8 and 9.
gated powers. The so-called taxing clause, therefore, would be surplusage if it were designed to confer this power to tax as a means to an end. If this were the sole purpose of the clause there would be no justification for it; and if it were to serve as merely an additional purpose, it is difficult to understand why it should be necessary to confer this power again, even in company with another. Yet most commentators, and probably most judges, regard the so-called taxing clause as the sole source of the Congressional power to tax. They seldom relate the necessary and proper clause to this function, although much of what passes for taxation can be justified under that clause alone. Obviously, if the power to tax does not require a separate grant when serving as a means to a legitimate end, the separate taxing clause must serve some other purpose. It is not difficult to understand that the collection of money may often prove to be a convenient means of accomplishing some desired end. Its nature is compelling, and its subtle presence often prods unwilling hands to seize the burden of an undertaking. But the collection of money may also be an end in itself. It is advantageous for any government to be able to collect money for no other purpose than to fill the treasury in anticipation of the future. This power to collect money for revenue alone, as an end in itself, is quite distinct from the power to collect it as a means to some further end.\textsuperscript{4} I suggest, therefore, that the taxing clause confers this power to tax for revenue alone, distinct from the power to tax as a means to an end which is conferred by the necessary and proper clause.

There will probably be no violent disagreement with the general proposition just set forth. For over one hundred and fifty years, since the writing of the Constitution, men have taken it for granted that Congress has the power, if it so desires, to collect money for no other purpose than for revenue. And they have also taken it for granted that the power is derived from the taxing clause. Such a power is so fundamental to efficient government that it is hard to conceive of any government being without it. Yet under the popular interpretation of the taxing clause, no such power is provided. It is construed as giving Congress the power to collect taxes \textit{in order} 1) to pay the debts, 2) to provide for the common defense, and 3) to provide for the general welfare. Where, then, is the power to collect for revenue alone? If it is to be subsumed under the power to tax for the general welfare, the concept of “general welfare” as used in this passage is also broad enough to

\textsuperscript{4}See note 11, \textit{infra}. 
include the payment of debts and the provision relating to the common defense. Yet these things are mentioned separately, and so there would seem to be no justification for giving any such broad meaning to "general welfare." Clearly, the power to tax for three stated purposes would not include the power to tax for no purpose at all. The very enumeration would preclude a power to tax for revenue only. And yet we all know that Congress has this power. We know that the Supreme Court has upheld the power to tax for no apparent purpose other than the purpose of collecting it. We also know that the Court has invalidated a tax when it expressly professed to be, and clearly was, for the general welfare. The only fair conclusion is that the Supreme Court of the United States pays lip service to one interpretation of the Constitution, and decides its cases on the basis of another. It would be interesting to discover how this paradox came about, why it is perpetuated, and how it can be resolved in terms of the real meaning of the clause.

**THE CLAUSE CONSTRUED**

There is something hallowed about an error perpetuated throughout one hundred and fifty years. It seems almost disrespectful to reveal it after the elapse of so much time. Certainly it would be unwise to lay the blame for such a popular misconception upon any one person. But in a general way we may at least speculate upon its origin. If we turn back to the quoted passage of the Constitution at the beginning of this article we note the presence of a comma between the noun series ending with the word "excises" and the phrase "to pay the debts." Surely the clause would not be interpreted as it has been for one hundred and fifty years if the first person called upon to do so had made a careful study of this significant punctuation. The matter of punctuation was exceedingly important to the framers of the Constitution, and we have evidence that they regarded it rather closely. With this in mind it

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5 See discussion of the Butler case on page 343, infra.
6 But one is reminded here of Holmes' famous remark: "It is revolting to have no better reason for a rule of law than that so it was laid down in the time of Henry IV." (The Path of the Law.)
7 Farrand, Records of the Federal Convention, vol. 3, Appendix A, CCCXLIV, 456. The memoirs of John Quincy Adams relates an incident involving a variation between a copy of the Constitution which he edited for the Government and the original enrollment, resulting in a dispute between himself and General Smyth. "... Smyth declared himself satisfied that he had been mistaken in his suspicions, and that the error of punctuation in the volume of the journal of the Convention, consisting in the substitution of a colon for a semicolon ... was not a deliberate and wilful forgery of mine to falsify the Constitution."
might be well to examine the construction of the taxing clause and discover what it was originally designed to connote.

I think it is no exaggeration to say that since the days of the first English grammar it has been an invariable rule of sentence structure and punctuation that a modifier is never separated from the word or phrase it modifies. It would be a new system entirely if adverbial modifiers were separated by a comma from the verbs they modified, or adjectives from their nouns. Yet, this is the system we must advocate if we read the phrase "to pay the debts" as though it meant "in order to pay the debts." The word "to" is employed as the sign of the infinitive. The infinitive, of course, may be used in a sentence as a noun, an adjective, or an adverb. Adjectives and adverbs are modifiers, and whenever the word "to" is used to mean "in order to" it introduces an infinitive form employed as a modifier. Whether it be an adjective or an adverb the modifier can not be separated by a comma from the word or phrase it modifies. In the passage quoted above, "to pay the debts" must modify the preceding noun series if we take it to mean "in order to pay the debts," and since it is used as an adjective in this sense it could not be separated from the noun series which it modifies. It is separated, however, and we can only conclude from this that it is not intended to be a modifier at all, but is, instead, part of a noun series itself. "To tax to pay" is one thing, whereas "to tax, to pay" is quite another. In the first instance "to pay" modifies "to tax" whereas in the second "to tax" and "to pay" are coordinate parts of speech.

Since the days of Shakespeare and before, no author of recognized ability who has employed the word "to" in the sense of "in order to" has set it apart by a comma from the noun or phrase it modifies. Yet we are asked to believe that the authors of the Constitution, who were among the finest grammarians of their day, were unaware of this simple and invariable rule. Or what is worse, we are asked to believe that they, knowing the rule, ignored it. It would be more fitting, and more truthful, to admit that for one hundred and fifty years we have been misreading what they wrote; it is unlikely that the fault is with their writing. With the comma present, the passage can not be read: "The Congress shall have power to lay and collect taxes, duties, imposts and excises. [in

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8I am indebted to Frederic E. Faverty, Chairman of the Department of English at Northwestern University, for confirming my original hypothesis. Professor Faverty, however, is not responsible for the form of this presentation since he was not consulted with reference to the identical problem and has not subsequently been advised of its nature.
order] to pay the debts and provide for the common defense and general welfare of the United States," but should be read: "The Congress shall have power to lay and collect taxes, duties, imposts and excises, [and] to pay the debts and provide for the common defense and general welfare [out of the money collected]." If the words "in order" had actually been inserted in the Constitution following the word "excises," the comma would then have been proper, since the phrase "to pay the debts" would no longer modify the preceding noun series, but instead would be part of a parenthetical phrase introduced by the words "in order."

If the word "to," separated as it is from the preceding noun series by a comma, can not mean "in order to," it must be used to introduce the second in a series of separate clauses. If Congress does not have the power to collect taxes in order to pay the debts etc., it has the power to collect taxes and to pay the debts. This difference is more than nominal, and if clearly understood, serves as a key to the analysis of the many tax cases which have been decided by the Supreme Court. It resolves the paradox which we have found to exist. But before proceeding to an analysis of the cases, we ought to consider further the actual construction of the quoted passage to meet any lurking objections which might be troubling the scholars.

To many, an error of one hundred and fifty years is preferred to a recent discovery of the truth. Thus, a distinguished constitutional lawyer of my acquaintance has suggested that even if the view here presented is technically correct, the profession must give credence to the traditional interpretation. This argument reveals the frailty of human nature in its most polished form, and for that reason alone carries with it much force. But it can hardly satisfy the sincere scholar who is interested in the truth rather than in the antiquity of a misconception. Therefore, when pressed for some better reason, the distinguished gentleman suggested that the matter of the comma could be settled by the simple expedience of admitting that the rules of punctuation have changed since the days of the Constitution. This admission would certainly put further discussion to rest if it embodied the truth, but it does not. The Constitution itself offers proof that the rules of punctuation at that time were no different from our own. In the very same section with which we are concerned Congress is given the power, "To provide for calling forth the Militia to execute the Laws of the Union, suppress Insurrections and repel Invasions." In this passage, the phrase "to execute the Laws of the Union" clearly
means "in order to," and modifies the preceding phrase, but it is not separated by a comma from the phrase it modifies. If there were such a comma, the passage would serve to confer two powers instead of one, since the phrase "to execute" would then become a coordinate part of speech. It seems incongruous that the authors of the Constitution would employ proper punctuation in this passage and yet fail to employ it in identical construction within the same section. The only fair inference is that the constructions are *not* identical, and that the punctuation is proper in each instance.

My distinguished friend has also suggested that if the clause introduced by the words "to pay the debts" is to be construed as the second in a series, as I contend, the word "to" should appear in front of the word "provide." This would be true if the word "provide" introduced the third in the series. But it does not, as I shall presently establish. The powers conferred are not 1) to collect taxes, 2) to pay debts, and 3) to provide for the common defense and general welfare, but are rather 1) to collect taxes, and 2) to pay the debts *and* provide for the common defense and general welfare. The third in the series has yet to appear. In other words, "to collect, to pay and to provide" is one thing, whereas "to collect, to pay and *and* provide" is still another. The omission of the word "to" before the word "provide" clearly implies that paying and providing are parts of a single power which encompasses both paying and providing—namely, spending. If the "to" had been included, it would have indicated that the word "provide" was in its nature different from the word "pay," and that it introduced a separate power. Since the word "provide" is capable of several interpretations, the authors of the Constitution intended to show, by omitting the word "to," that its function in the sentence was identical with that of the word "pay." In short, they indicated that it was to be employed in a monetary sense, and in no other. Just as the debts were to be paid out of the taxes collected, so the common defense and general welfare were to be provided for by an expenditure, and by no other means. An entirely different re-

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9 This same proposition, which was reached on independent grounds, appears in (1923) 36 Harv. L. Rev. 551, in an article by Professor Edward S. Corwin. At page 553 Professor Corwin says, "In the second place, the phrase 'to pay the debts,' which means the debts of 'the United States' at the end of the clause, and which designates a purpose of money expenditure only..." From this and other evidences Professor Corwin is led to conclude that the taxing is limited by the phrase "to pay the debts." He says, "... and we must therefore accept Jefferson's contention, in his Opinion on the Bank, that the power to lay taxes to provide for the general welfare of the United States is
suit, and one never intended, would have been brought about had the words "pay" and "provide" been made to encompass separate powers.

The significance of this distinction can best be appreciated after considering another objection which has been raised. It is argued that if the taxing-spending clause is to be read as though the words "to pay the debts" introduced the second in a series, the power to provide for the general welfare is so broad that Congress would be empowered to do anything under it, and the significance of our federal system would be destroyed. As already noted, however, the power to provide for the common defense and general welfare is, taken along with the power to pay the debts, a spending power. It is significant that the authors of the Constitution did not give Congress the power to "promote" the general welfare, although this word is used in the preamble to the Constitution. The fact that the word is employed in one place and not in another where the construction is similar, should at once suggest that the omission is significant. The word "promote," unlike the word "provide," does not readily suggest the same purpose as the word "pay." Had the word "promote" been used in place of the word "provide" the result would have been to confer upon Congress a power of unbounded extent. When we take together the fact that the word "provide" was judiciously selected, that it was not preceded by the word "to," and that the entire phrase "to pay the debts and provide for the common defense and general welfare" immediately follows the clause in which Congress is given the power to tax, the only fair inference is that the power to provide is only a power to spend that which the preceding clause authorizes to be collected. In other words, whatever can not be provided for by spending, may not, under this clause, be provided for at all.

If the construction here set forth is proper, some explanation as to why the word "and" does not appear after the word "excises" seems to be in order. I have already suggested that the word "provide" does not introduce the third in the coordinate

the power "to lay taxes for the purpose of providing for the general welfare." Professor Corwin's conclusion appears to me to be a non sequitur, but it is not difficult to understand why he reached it. Unquestionably he conceives the only alternative to be an admission of a plenary power derived from general welfare. His own explanation, however, that it is limited to a monetary sense would seem to refute such a notion. Professor Corwin, like the rest of us, has been accustomed too long to regard this whole problem as an "either-or" proposition. The notion is that either "general welfare" limits the taxing power, or it is itself an unlimited power. Neither is correct, however, since there is a third possibility. It is an intrinsic part of a separate spending power, and is limited in that power to its monetary function.
series. In a series of three, the word "and" is a proper conjunction joining the second and third parts of the series. It is habitually omitted between the first and second parts of the series. The conjunction, therefore, is employed as a device to indicate the conclusion of the series. The fact that it is omitted after the word "excises" merely indicates that the following member of the series is not the final member. It is true that the second enumerated power in the series is introduced by the words "to pay the debts," and it is also the final power in the series; but it is not the final clause in the series. The series, in this case, consists of two powers and one restriction. Normally a group of powers will be included in one series and a group of restrictions in another. It is a rare occurrence when both powers and restrictions are included in the same series. But when powers and restrictions concern subjects as intimately related as those in the passage with which we are concerned, it is perfectly proper to join them in a single series. In such a case, it is the subject matter, rather than the identity of the several parts, which unifies the series. The infrequency of such an arrangement, however, has led some to believe that it never occurs. Consequently, when it does occur it runs the risk of being completely ignored; and in the present case it has been successfully overlooked for one hundred and fifty years. This has probably been brought about in part as well by the fact that the final clause of the series is introduced by the word "but." Yet when we consider that the nature of the final clause is a restriction, this does not seem at all strange. The word "but" is especially appropriate to introduce a restriction. No other conjunction performs the function as well. The fact that this word is rarely used to introduce the last in a series of coordinate clauses is proof of nothing except its rarity. It is a perfectly proper conjunction joining the final clause with the preceding clause, and it is rarely employed in a series only because a series rarely includes both powers and restrictions. The use of the semicolon between the second and third parts of the series, whereas a comma suffices to separate the first and second parts of the series, merely indicates that the suc-

\[1\] It is of no little significance that several drafts of the Constitution show a semicolon in place of the disputed comma. The use of the semicolon, of course, merely confirms what has been set forth in the text, and effectively refutes any argument on behalf of the notion that what follows the semicolon modifies what precedes it. Madison, in his Journal of the Constitutional Convention, vol. 2 at 753 et seq. sets forth his version of the final draft of the Constitution as it was signed by the members of the Convention. It is striking to observe that here a semicolon appears in place of the comma. His "memo," Letters and Other Writings of James Madison, vol. iv, 131-133 discusses
ceeding member of the series is to be regarded somewhat different-
ly from the preceding members. At the very most the semicolon may
be looked-upon as a warning device, and certainly was never in-
tended to be read as a period, as some have done. It is perfectly
ture, of course, that the authors of the Constitution were not
limited in their choice. They could have treated the restriction
separately from the powers by closing off the series with the word
“and” after the word “excises.” In such a case the series would
have consisted of two powers, rather than of two powers and a
restriction. They recognized, however, the close relationship be-
tween the powers and the restriction, and made their choice ac-
cordingly. Having decided to treat the restriction along with the
powers as part of a single series, their choice of punctuation and
sentence structure could not have been more perfect. Some might
think a semicolon would be preferable after the word “excises,”
and this may indeed have been the original punctuation, but the
comma may be used interchangeably without affecting the funda-
mental construction. The use of punctuation after the word “ex-
cises” and the omission of the word “and,” is unquestionably proper
if the passage be construed as a series. Construing it in this man-
ner, the sentence should be regarded for what it is—the purposeful
selection of accomplished artists.

There remains only one objection to meet, and this analysis
of the grammatical construction of the passage will have been com-
pleted. The objection stems from the fact that the restriction in the
taxing-spending clause applies to the taxing power, and yet, if
the interpretation which I suggest is correct, it follows the spend-
ing power. The argument is made that it should logically follow
the taxing power, which it restricts. And if that be admitted, the
next step is to force an admission that the clause which I regard
as a separate vehicle for the spending power is really only the tag
end of the taxing power, as is traditionally urged. The flaw in this
reasoning is with the primary assumption that a restriction on the
taxing power must necessarily follow the taxing power. This is
not true if the final clause is one among a series, as I contend. In
a series consisting of two powers and one restriction it is only
this practice of employing commas and semicolons interchangeably. Madison
indicates that the meaning of the clause is identical with commas vice semi-
colons, but is troubled when a colon is substituted. In the most important
draft reported by Madison there is a semicolon in place of the comma; the
meaning is the same as if the comma were there, but the semicolon strengthens
our argument since it shows in bold relief how ridiculous it is to argue that the
several parts of the sentence are anything but coordinate parts of speech.
logical for the restriction to follow the powers. It would break the logical sequence and symmetry to have first a power, then a restriction, and then a power. Certainly no one would contend that the restriction should precede the powers; before there can be a restriction there must be that which it restricts. Nor would it be logical for the spending power to precede the taxing power.\(^1\) The taxing power creates the instrumentality which the spending power employs, and must therefore come first in the sentence structure as well as in logic. If, therefore, the powers should precede the restriction, and the taxing power should precede the spending power, it is difficult to see how the restriction could be put anywhere except after the spending power. The fact that the restriction on the taxing power must follow the spending power if the passage be given the interpretation I favor, should influence no one to believe that the spending power is not separate from the taxing power. All of the evidence which we have examined in the construction of the passage indicates that it expressly confers two

\(^1\)This, however, was originally the case, and apparently the change was effected in order to improve the style and logic. Madison in his Journal, vol. 2, at 596 reports that the Convention agreed to an amendment of the clause to read: "The Legislature shall fulfil the engagements and discharge the debts of the United States; and shall have the power to lay and collect taxes, duties, imports and excises." From this it seems clear that the genesis of the clause is such as to preclude any notion that the payment of the debts was meant to limit the collection of the taxes. Moreover, in the draft reported for Monday, August 6th, the taxing clause immediately precedes the commerce clause and is independent of any limitations:

"The Legislature of the United States shall have power to lay and collect taxes, duties, imports and excises;

"To regulate commerce with foreign nations, and among the several states;"

This is reported in Farrand, op. cit., vol. 2, 181, and seems to substantiate the argument that originally the taxing power was intended to create a general treasury unlimited in extent by any designated purpose. In Farrand, op. cit., vol. 2, 152, we are given a further clue as to the subsequent development of the clause by means of the Report of the Committee of Detail which sets forth the general legislative powers with their exceptions and restrictions for purposes of guides in future drafting of specific grants. The clause appears in these terms: "To raise money by taxation, unlimited as to sum, for the (future) past (or) [&] future debts and necessities of the union and to establish rules for collection." Now it is apparent that the reference to debts did not serve as a limitation upon the collection of funds, since there was special provision for this, indicating thereby that the members of the Convention regarded any limitation on the collection as separate from the payment of debts. Obviously, the reference made to the debts and necessities of the union was to serve as the basis for a separate spending power. It indicated the purposes for which the treasury was to be spent, not the purpose for which it was to be collected. The statement that there was to be no limit upon the amount of money which could be raised clearly supports this interpretation. The concern of the fathers was not to limit or to put breaks upon the acquisition of funds, but to make certain that they would be put to a proper use.
separate powers upon the Congress. The first is the power to lay and collect taxes, duties, imposts and excises. This power is unlimited for revenue purposes and is not restricted by the words which follow. The second power is a power to pay the debts and provide for the common defense and general welfare out of the money collected. The final clause in the passage is a restriction on the taxing power, requiring that all duties, imposts and excises be uniform throughout the United States.

The relationship of the powers and restriction included in the series of the quoted passage can, perhaps, be better understood by the use of an illustrative sentence. Suppose that an agent were to receive authority in the following terms: “You are authorized to mine gold from this land, to pay the operating costs and obtain

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22 Nothing serves to illustrate this better than the following excerpts from Madison's letter to Andrew Stevenson, in which he refers to the activities of the Committee of Eleven. The report is in Farrand, op. cit., vol. 3, Appendix A, CCCLXXII, 484: “On the 21st of Augst. this last committee reported a clause in the words following ‘The Legislature of the U. States shall have power to fulfil the engagements, which have been entered into by Congress, and to discharge as well the debts of the U. States, as the debts incurred by the several States, during the late war, for the common defence and general welfare’; conforming herein to the 8th. of the Articles of Confederation, the language of which is, that ‘all charges of war and all other expences that shall be incurred for the common defence and general welfare, and allowed by the U. S. in Congress assembled, shall be defrayed out of a common treasury’ &c.

“On the 22d. of Augst. the committee of five reported among other additions to the clause giving power ‘to lay and collect taxes, duties & excises,’ a clause in the words following ‘for payment of the debts and necessary expences’, with a proviso qualifying the duration of Revenue laws.

“This Report being taken up, it was moved, as an amendment, that the clause should read ‘the Legislature shall fulfil the engagements & discharge the debts of the U. States.’

“On the 23d. of August the clause was made to read ‘the Legislature shall fulfil the engagements and discharge the debts of the U. States, and shall have the power to lay & collect taxes, duties, impost & excises’ the two powers relating to taxes & debts being merely transposed.”

The fact that these “two powers”—paying the debts and taxing—were transposed time and again until the committee on style finally decided that the taxing power should precede the spending power, would indicate conclusively that they were two powers instead of one. If it were only a taxing power restricted by the payment of debts there could be no transposition. Aside from the fact that Madison specifically refers to them as “two powers,” their genesis and transposition leaves no room for any other conclusion.

23 The question of a separate taxing and a separate spending power should not be confused with the question of whether “general welfare” added anything to the powers of Congress. The dispute between Madison and Hamilton on this point is well known, and it seems obvious that Hamilton's contention that “general welfare” included something other than the delegated powers is more logical than Madison’s notion. If Hamilton were not correct the phrase would be pure surplusage, but in any event his view prevailed. It is significant that Hamilton in his discussion of this subject always referred to the “spending power,” and there is nothing to indicate that he ever looked upon the term as a limitation on the taxing power.
food for all the men working here; but not more than half the
gold in the mine may be taken out.” It is at once evident that the
agent is not authorized to mine gold in order to pay the operating
costs and obtain food for the men. Such would have been the mean-
ing if there had been no comma after the word “land.” With the
comma present, however, the agent is authorized to mine gold and
to pay the costs and obtain food. Moreover, the use of the words
“pay” and “obtain” as coordinate parts of a single power indicates
that their function is identical. In other words, the agent is not
authorized to steal food or to barter away the mining property to
obtain it. He must employ the same means of obtaining food as he
does in paying the costs. Finally, the fact that this power follows
that which authorizes the mining of gold indicates that the second
power is to be carried out by means of the instrumentality created
in the first. In other words, the agent is authorized to mine gold
and then to use the gold to pay the costs and obtain food. The
final restriction on the amount of gold which may be mined bears
the same relationship to the preceding powers as the tax restric-
tion bears to the powers to tax and to spend. It is the third of a
series, and as such it is properly placed. Because it is a restriction
it is introduced by the word “but” and is preceded by a semi-
colon. Logic and grammar lead inevitably to a single conclusion
that which I have already amply drawn.

The Clause Applied

It is not necessary, however, to rely upon logic and grammar
alone to establish my hypothesis. The inherent propriety of the
construction for which I contend is copiously reflected in the deci-
sions of our courts and in the thinking of our people. If the Con-
stitution gave Congress the power to tax “to provide for the gen-
eral welfare,” as is commonly supposed, the Federal Government
would no longer be one of delegated authority. As already sug-
gested, a tax can be a powerful means to an end, as well as an
end in itself. It can regulate, coerce, destroy, and in varying de-
grees control the item or activity against which it is directed. The
term “general welfare” is not one which may be defined with any
precision. Consequently, if the Federal Government could really
tax to provide for the general welfare it could, in every instance,
accomplish whatever it set out to do regardless of whether or not
the specific activity had been delegated to it. The overpowering
force of this simple truth did not escape the Supreme Court of the
United States. It has considered itself obligated by usage to pay lip service to the proposition that Congress can tax for the general welfare, but at the same time it has consistently decided that Congress can not. It has ruled time and again that a tax which is not for revenue purposes or which is not justified as a means to carry out some other delegated power of the Congress violates the Tenth Amendment and is void. If there were a power to tax for the general welfare the Tenth Amendment could have no significance as long as Congress were exercising that power. By this deft device—the hocus pocus of the Tenth Amendment—the Supreme Court has clearly demonstrated that there is no power to tax for the general welfare, but only a power to tax for revenue or to carry out one of the delegated powers. This is precisely what I have argued the Constitution expressly provides.

Of further significance is the fact that the Court, although denying the right of Congress to tax for the general welfare, has upheld its right to spend for the general welfare. This fully conforms to my reading of the Constitution. It also conforms to the inherent nature of the spending process which motivated the authors of the Constitution in the first instance to confer such a power. The power to spend is limited by the amount of money which Congress has to spend. Although we have come to regard our nation as the proverbial horn of plenty, Congress, nevertheless, is prevented by political considerations from exceeding the public conscience in its expenditures. Moreover, there is a limit to the amount of compliance which money can purchase. In short, the power to spend, unlike the power to tax, can not be looked upon as a coercive measure, and may be readily bestowed without fear of upsetting the delicate balance of our federated government. This being true, the Court is not justified in searching for motives behind Congressional appropriations. If on the face of it the expenditure is for the general welfare, Congress is clearly exercising a power bestowed upon it, and the courts of the nation would be hard put to explain how a valid exercise of power can be anything but valid.

Before proceeding to an analysis of the cases it is of great importance that we understand and appreciate the significance of this phrase “on the face of it.” The Supreme Court has frequently stated that it will never look behind the act itself in order to discover the purpose for which it was adopted, but will perform

\[\text{Cf. the Child Labor Tax case on page 346, infra, with the case of Helvering v. Davis on page 352, infra.}\]
its judicial function "on the face of it."\textsuperscript{15} Scholars are often prone to greet this pronouncement with cynical disbelief. They argue that the Court has often looked beyond the immediate purpose of the act as expressed on the face of it to discover another purpose partially hidden, thus giving the lie to its pure intention. But the critics of the Court have merely failed to distinguish between the faithful observance of a judicial rule, and variation in the findings of fact. When the Court declares that it will look only to the immediate purpose of the act as evidenced on the face of it, it is simply announcing adherence to a common sense rule. We all are aware that every purpose and consequence is followed by others. Purpose engenders purpose, and effect engenders effect. No one can limit in his own mind the single purpose of a spoken word. In uttering the word one purpose probably stands out as preeminent, but a hundred others are submerged and may ultimately be recognized. And who can foresee the consequences of a single act? A gesture of friendship may be mistaken and ultimately envelop the entire world in war. But surely a man is not to be held to account for all that follows when his first purpose is peace. The human mind is not so constructed that it can anticipate the manifold consequences of an act, or swear before God that it embodies but a single purpose. Knowing this, the Supreme Court has allowed for human limitations and is not prepared to hold Congress to a fuller accounting than it would hold itself. The Court recognizes that it is incapable of ferreting out the many purposes and consequences of a single Congressional act. An act of Congress on the face of it purports to a single accomplishment. Yet we all know that if we were to scrutinize the circumstances which gave it birth a hundred other purposes would unfold. And from our knowledge of things we know that a thousand we never suspected are very real forces in the background. But is each of them to be anticipated from the very start? Is the Court to set itself up as an Almighty Judge? If the Court were to look beyond the single immediate purpose expressed on the face of the act, where would it call a halt? There could be no stopping, of course, and this is a very good reason why the Court has said it will not look beyond the expressed purpose of the act. And what the Court has said it would not do, it has not done.\textsuperscript{16}

\textsuperscript{15}See Sonzinsky v. United States on page 348, infra.

\textsuperscript{16}Hart, Processing Taxes and Protective Tariffs, (1936) 49 Harv. L. Rev. 610, professes to see a departure from the Court's avowed policy. But Mr. Hart confuses purpose as it appears on the face of the act with motives
The charge of inconstancy to the policy which it has avowed is levelled against the Court largely because the different members who have professed to look only to the act itself to discover the purpose, have found different purposes as a result of their search. The majority at different times has discovered different purposes in what appears to be the same situation. This, however, demonstrates no unfaithfulness to the principle which the court has enunciated; it merely proves what we already know—that men do not see the same set of facts in the same way. Suppose we tell A that B is about to phone him and offer him an excellent job. We then ask A to explain the immediate purpose of B’s call. He might reply, truly, that B’s purpose was to talk to him. Or if his thought were attuned to a different element he might answer, with equal truth, that B’s purpose was to offer him a job. And if A’s optimism were properly stimulated he might be induced to say that the real and immediate purpose of B’s call was to open the way to a bright new world. If a single man can view a few simple facts in so many forms, depending upon his mood and conditioning, imagine the variation there may be when a complicated set of facts is viewed by different men! When the Court says that it looks only to the immediate purpose as it is expressed on the face of the act, there is no cause to doubt the sincerity of this avowal merely because the several justices differ in their estimation of the immediate purpose. Nor is there any cause for doubt even when the same set of circumstances is differently interpreted by the same justice at different times. Facts must be viewed through human eyes and none is immune from occasional myopia. Where complicated enactments embody the facts which must be judged, the wonder is not that justices differ in their estimates, but rather that they ever agree.

For example, consider the situation which was presented in United States v. Butler. In that case a tax had been levied upon the processors of cotton. If nothing more had appeared on the face of the act it would be difficult to understand how it could be regarded as anything other than an excise for revenue purposes. And, indeed, it was so held by the dissent. But associated in the act was an expenditure which purported to be for the general welfare. The Secretary of Agriculture was authorized to employ

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17(1936) 297 U. S. 1, 56 S. Ct. 312, 80 L. Ed. 477.

Cushman, Social and Economic Control Through Federal Taxation, (1934) 18 MINNESOTA LAW REVIEW 759 at 777 for a proper statement of the distinction.
the proceeds of the tax for the purpose of removing surplus agricultural products from the market. This was to be accomplished by payments to the farmers in return for their cooperation. The inclusion of this provision led the majority to conclude that the immediate purpose of the act was to regulate agriculture. The dissent pointed out that the tax itself was not regulatory, and argued with a great deal of cogency that agriculture was not affected by the mere levying of a tax upon the processor. The dissent felt that the appropriation could not alter the nature of the tax as a revenue measure. It was included in the same act with the tax in order that the tax might serve as a convenient measure of the appropriation. This view was adopted in *Cincinnati Soap Co. v. United States,*\(^1\) in which Mr. Justice Sutherland explained that the tax in question was "purely an excise tax upon a manufacturing process for revenue purposes, and in no sense a regulation of the process itself. . . . If Congress, for reasons deemed by it to be satisfactory, chose to adopt the quantum of receipts from this particular tax as the measure of the appropriation, we perceive no valid basis for challenging its power to do so." In the *Butler* case, however, the Court ruled that the immediate purpose of the act was not revenue, but rather the regulation of agriculture. Either position is tenable, depending upon what one looks to in order to discover the immediate purpose. The dissent looked only to that part of the act which dealt with the tax. The majority examined the expenditure as well. Both looked to the face of the act, and each found something different.

Once having judged the facts, however, the Court is then called upon to apply their findings to the principles of the law which they consider applicable. If the Court believes, as the majority did, that the immediate purpose of the tax was to regulate agriculture, the tax could not be sustained. Under such a view it would have been a means to an end, and since the end was not one within the scope of the delegated powers of Congress, the means could not be justified under the necessary and proper clause. Since the tax was not for revenue purposes it could not be justified under the taxing clause (given the interpretation here set forth). If the Court actually believed that Congress could tax for the general welfare (the interpretation to which it has paid lip service), it should have sustained the tax. The maintenance of a safe level of farm commodities could surely be classed under the "general welfare." From these evidences, the logical conclusion is that the

\(^{1}\)(1937) 301 U. S. 308, 57 S. Ct. 764, 81 L. Ed. 1122.
Court acknowledges the power to tax only for revenue purposes or as a means of carrying out one of the delegated powers. The decision of the Court in every case must rest upon its determination of the purpose for which the tax is levied. No tax can be valid which is not for revenue or in pursuit of a delegated power, however closely it may be concerned with the general welfare.

In the Butler case there was some discussion concerning the "coercive" nature of the tax. The dissent, after pointing out that the tax was in no way coercive, suggested that the decision ought not to rest upon that feature even if it were. The argument is made that if Congress has the taxing power it has the power also to employ coercion to carry it out. This argument is true as far as it goes. But in this instance, if coercion is used at all, it is used in the form of a tax. It is certainly true that a tax may be used as a coercive means of regulating commerce or of performing any one of the several delegated powers, but a tax can seldom be used as a coercive means of collecting a tax. When a tax is coercive it is a means rather than an end in itself, and when a tax is a means to an end, the end product is usually not the tax itself. Armed force, physical detention, or social ostracism may all be excellent coercive means for the collection of taxes, but it is a little difficult to understand how a tax itself can compel the collection of a tax. Therefore, there is a great deal of significance in labeling a particular tax as coercive. As soon as this fact is established the tax can be identified as a means to an end rather than an end in itself. As such it can not be justified under the taxing clause. It must be justified, if at all, under the necessary and proper clause as an appropriate means for the accomplishment of a delegated power.19

In the case of Steward Machine Co. v. Davis26 the Court was confronted with a problem similar to that in the Butler case. Here the tax was imposed upon employers of eight or more employees. The funds were to be used under the Social Security Act for the alleviation of old age unemployment—clearly to benefit the general welfare. The situation, in essence, was no different from that of the Butler case. But the Court held that in this instance the tax was clearly an excise for revenue purposes. Having so held, the tax could be justified under the taxing clause. It is notable that although the Court talked a great deal about the general welfare, taking pains to establish the fact that the expenditure involved

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19 Schultz, Regulatory Taxes, (1939) 17 Taxes 515 at 515 et seq.; (1936) Brown, When is a Tax not a Tax?, 11 Ind. L. J. 399.
was for such a purpose, the tax itself was sustained solely because it could be justified as a revenue measure. As in the Butler case, there was no logical reason why the Court could not just as readily have decided that the immediate purpose was to provide security for the aged, which was a state problem. Having so decided, it could then resort to its old stand-by, the Tenth Amendment, and rule that the tax violated that sacred precinct. More properly, of course, it could rule that the tax was not justified under the necessary and proper clause. In any event the case turned upon a finding of fact, and the Court chose to interpret the facts one way rather than another. Either interpretation could have been sustained in so far as logic is concerned, but the significance for our purpose is that in either case the Court rejects the general welfare theory of the taxing clause.

Differing considerably from the Butler and Steward Machine cases is the Child Labor Tax Case. Here there is no possibility of deciding that the tax is for revenue purposes. It is clearly a coercive tax (although the element of coercion could be removed by proper drafting of the legislation) put upon employers who knowingly employ children. In the absence of scienter the tax is remitted. This identifies the tax as coercive, and leaves no room for argument that it is not. As already noted, as soon as a tax can be identified as coercive it must be justified under the necessary and proper clause or not at all. This simplifies the task of the Court, since the revenue purpose is immediately ruled out. On the face of the act, then, it is not difficult to discover that the immediate purpose is the regulation of child labor. This is not among the delegated powers of Congress. Since it is not among the delegated powers any means of attaining it is unlawful and the tax must fall. By the ruling of the Court the tax did fall, and there is no room for disagreement if we concede that the taxing clause does not give Congress the power to tax for the general welfare. If we still cling to the contention that it does, however, it is difficult to understand how a tax to prevent child labor is anything but for the general welfare. If Congress could tax for the general welfare this would be a perfect instance where it ought to be permitted to do so. The answer, of course, is that Congress can not tax for the general welfare. If any hardy reader thinks otherwise he should be thoroughly acquainted with the error of his ways by the time we reach the conclusion of this article. Perhaps I would apologize for my

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zeal in calling the obvious to the reader's attention, were it not for the well-known testimony of Abraham Lincoln that such a technique is highly efficacious.

In the case of *Hill v. Wallace* the tax involved was imposed on every bushel of grain sold under a contract of sale for future delivery, but with an exemption of sales by members of a Board of Trade designated by the Secretary of Agriculture as a contract market. The exemption clearly marked this tax as a penalty. In other words, it was a means to an end. As such it had to be justified under the necessary and proper clause or not at all. The Court found that agricultural control was the immediate purpose of the tax. This was clearly beyond the powers of Congress, and therefore the means employed to accomplish it—the tax—could not be justified. This case falls within the same category as the *Child Labor Tax Case* and is perfectly consistent with the instant thesis that the taxing clause only confers a power to tax for revenue purposes. It can not be consistent with or justified under the notion that Congress has the power to tax for the general welfare. If Congress had such a power the tax should have been upheld, since agricultural stability is for nothing if it is not for the general welfare.

In *United States v. Constantine* we are met with a case which gives considerable latitude of decision on the facts. In this instance the Congress imposed a tax of $25 on the business of a retail dealer in malt liquor, but stipulated that there was to be a tax of $1,000 if the business were conducted contrary to state law. The Court held that the larger tax was clearly a penalty employed to enforce the state law. Since the Congress had no broad police power it could not employ the tax to carry out such a purpose. The dissenters, on the other hand, argued that it was entirely reasonable to put one tax on a lawful business and a larger tax on an unlawful business. They reasoned that the collection of excises from an unlawful undertaking required greater governmental expense and that since the government had to expend large sums suppressing crime it was only proper that the wrong-doers themselves should pay a larger share of the operating cost of government. In short, the dissent concluded that the tax was clearly for revenue purposes, since the larger tax was a reasonable classification under the excise powers rather than a means of enforcing the state law. Obviously, the position of either the majority or the dissent is

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tenable. If one decides that the classification is unreasonable the larger tax is clearly a penalty. If it is a penalty it is a means to an unlawful end and can not be justified. On the other hand, if one believes that the classification is reasonable, as the dissent did, the tax is solely a revenue measure and can be justified under the taxing clause.

In *Sonzinsky v. United States* the Court again affirms its policy of examining only the face of the act in determining the immediate purpose of Congress. The Court declares that it will not go beyond the face of the act to reach its decision. In this instance the National Firearms Act of 1934 imposed a $200 annual license tax on dealers in firearms. The Court explained that the "tax is productive of some revenue" and added, "we are not free to speculate as to the motives which moved Congress to impose it or as to the extent to which it may operate to restrict the activities taxed. As it is not attended by an offensive regulation and since it operates as a tax, it is within the national taxing power." Nothing could be plainer than this to show that the Court in its own mind is satisfied that the taxing clause confers a power to tax for revenue purposes, and for no other purpose whatsoever.

At this point we should consider the case of *McCray v. United States*. A large tax was placed on yellow oleomargarine and the argument was made that the natural consequence would be the complete restriction of production. If this were true, the end result would be that Congress could derive no revenue from this source; and it would seem that such a tax would not be justified as revenue. The Court upheld the tax, however, on grounds that the face of the act revealed only a revenue measure. A tax of ten cents on every pound of oleomargarine could not be regarded as a penalty unless the Court were willing to take into account marketing conditions and its own knowledge of competition. This the Court was not willing to do. If the act had contained anything on the face of it which would indicate that the immediate purpose of such a tax was the destruction of the product, the Court might have decided otherwise, as it did in the *Child Labor Tax Case*. But since the act itself was, on its face, a revenue measure, the Court's decision was consistent with its avowed policy, and also consistent with its practice of limiting the taxing clause to revenue measures.

Although the Constitution does not confer a power to tax for

24(1937) 300 U. S. 506, 57 S. Ct. 554, 81 L. Ed. 772.
25(1906) 195 U. S. 5, 24 S. Ct. 769, 49 L. Ed. 78.
the general welfare, it does confer a power to spend for the general welfare. This power, as already noted, is limited by its own nature. It contains no suggestion of coercive power whatsoever. There are some who argue that it is reasonable to infer from this power to spend for the general welfare that Congress also has the power to use force in order to carry out the spending power. They contend, for example, that since Congress has the power to appropriate money under the spending power for a national park, it also has the power to employ eminent domain to compel land owners to accept the Congressional appropriation. This latter power, however, is not fairly implied from the power to spend for the general welfare. Congress can not condemn land for a national park under the pretense that it is merely exercising its spending power. Such condemnation proceedings can reasonably be inferred from the war power, the power to acquire military sites, and other delegated powers, but not from the spending power. When Congress was given the power to spend the money collected as revenue and allocated to the general fund, i.e. not earmarked for any particular purpose under the necessary and proper clause, it was a power having to do with the control of the money involved and was not intended to be a power over private individuals or their property.

A homey illustration may serve to establish this point more firmly. Suppose that A gives his son some money and tells him that he may use it to buy candy. A's son learns that the little boy next door has just come into possession of a fine bag of candy, and he decides that he wants to buy some of it. The boy next door is not willing to sell it, but A's son, armed with his father's permission to use his money to purchase candy, as well as a good right arm, compels the neighbor boy to accept his money in return for the candy.

Now A will be called upon to explain to his son that his authority

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26 Willis, The Constitution of the United States at the End of One Hundred Fifty Years, Bloomington, Indiana, 1939, at 39: “The Congress shall have the power of eminent domain for the benefit of . . . its spending power.” Mr. Willis cites James v. Dravo Contracting Co., (1937) 302 U. S. 134, 58 S. Ct. 208, 82 L. Ed. 155, for this proposition. The Dravo case, however, rests its decision upon Article I, section 8, clause 17, by construing locks and dams as “needful buildings” within the meaning of this clause. In the case of United States v. Gettysburg Electric Ry. Co., (1896) 160 U. S. 668, the language of the court might seem to give some support to the sweeping contention of Mr. Willis. Mr. Justice Peckham, referring to the use of land as a national cemetery declared: “Such a use seems necessarily, not only a public use, but one so closely connected with the welfare of the Republic itself as to be within the powers granted to Congress by the Constitution for the purpose of protecting and preserving the whole country.” The decision was based on the war powers, however, and like every case to date falls far short of declaring the power of eminent domain to be a necessary and proper adjunct of the spending power.
did not extend to control over the boy next door, but only to control of the money. Inherent in the power to spend, which A granted, was a natural limitation set by the vendor's willingness to sell. The situation is no different with respect to the power to spend for the general welfare, which the founding fathers conferred upon the Congress. They fully intended that this power should be a power over the money involved and should be limited by the available market. There is no fair implication that Congress may employ coercive means to effectuate this power. In fact, since the power involves nothing more than an appropriation of money, the authors of the Constitution must have conceived of it as fully executed at that point, without need of any further means in its accomplishment. The power is a purely legislative one, and can not be augmented or diminished by any subsequent conditions. Whether the money appropriated is finally spent, or remains unspent because there is no seller's market or because a government gratuity is not accepted, is important only in determining what funds are available for future appropriation. In no event can the government reasonably conclude that the power to spend gives it the right to compel the acceptance of its funds. The Supreme Court recognizes this and is willing, therefore, to uphold mere appropriation in every instance as a valid exercise of the Congressional power. But when Congress attempts to go beyond appropriation and compel the designated recipients to accept the funds which it has appropriated, the Court will not then uphold the enactment under the spending power, and will invalidate it unless it can be justified under one of the other delegated powers.

The Butler case may seem to be a contradiction of what has just been said, but careful analysis proves that it is not. The Court decided that the tax in question was not a revenue measure, but was rather a means of achieving agricultural regulation. The tax was held to be invalid for this reason. In the same act Congress had provided for an appropriation equal to the amount of the tax. This appropriation was for agricultural purposes and clearly within the concept of the general welfare. The dissent argued that the appropriation should be upheld regardless of whether or not the tax be judged valid. They reasoned, much as in the manner set forth above, that appropriation for the general welfare is clearly within the powers of Congress and can not be invalidated by the fact that farmers may or may not feel themselves compelled by circumstances to accept the funds. If there were any coercion involved in the acceptance thereof it was not due to any act of Con-
gress, but rather to external conditions in the nation at large, and Congress could not be penalized for this. This was sound reasoning and the majority did not try to meet it. The majority spoke a great deal about the fact that the expenditure involved was part of an unlawful plan revealed on the face of the act, which was to regulate agriculture, but their decision was based on the notion that since Congress could not collect the money in the first place there was no money for it to appropriate. They expressly refused to consider whether agriculture fell within the concept of general welfare. They were correct in stating that this was not pertinent to the ruling, since they had already decided that the funds appropriated by Congress could never be brought into being. Moreover, if the argument of the dissent be accepted that the tax was merely a convenient means of measuring the extent of the appropriation, that extent could not be measured, since the tax was void, and mere physical law would compel one to conclude that the appropriation, too, must fall. Clearly, therefore, the decision did not rest upon the general welfare concept, but rather upon the factual situation which made it appear to the majority that Congress was attempting to spend something which it did not have. However one may disagree with the conclusion, the logic of the position taken by the majority, once one accepts their major premise, is unassailable. There are those who scoff at this reasoning because, under it, the difficulty could have been resolved had the taxing measure and appropriation measure been set forth in separate acts. The argument is made that it is ridiculous to suppose that the factual situation would have been any different as the result of such an expedient. But this argument completely ignores the limits which the Court has set for itself. The significance lies not in the fact that the actual purpose of the Congress would be altered, but simply in the fact that the evidences of that purpose would no longer be present. The Court has said that it will not look beyond the face of the act to determine the purpose of Congress. Obviously, if the appropriation measure is not in the taxing act the Court can not look to the appropriation in order to discover a clue as to the purpose of the tax. And if the taxing measure is not coupled with the appropriation, the Court can not look to the tax in order to discover that the funds do not exist. Certainly the factual situation remains the same, but the Court does not have the same evidences before it, and can not arrive at the same conclusion. The Court could, of course, reach the same result itself by regarding the facts as they appear on the face of the act in such a way that their effect is the
same as though embodied in separate acts. Thus, although both tax and appropriation are present on the face of the act the Court can look only to the tax in settling the tax issue and only to the appropriation in deciding the question of the expenditure. This is precisely what the Court did in the�Steward Machine case, and it could have done so in the makeover case if it were so inclined. The advantage of separating the measures, however, is to insure that this practice will be the only possible one. The assurance can fail only if the Court repudiates its policy of looking to the face of the act for the purpose involved, and it is safe to say that there is little danger of such a repudiation, since the difficulties which it would introduce are too many for the Court to entertain.

The self-imposed separation of tax and expenditure which the Court evidenced in the Steward Machine case is repeated in its companion case Helvering v. Davis. Mr. Justice Cardozo, who delivered the opinion of the Court, made a half-hearted attempt to distinguish the Butler Case on its facts, but it is perfectly clear to even a casual reader that in the Helvering case the opinion simply embodies the minority finding of fact in the Butler case. It may be that Mr. Justice Cardozo, who was in the minority in the Butler case, attempted the distinction out of respect for the feelings of his less astute brethren, but one can not escape the conclusion that he purposely condemned the argument by his faint support of it. The Helvering case involved the expenditure of the tax which had been controverted in the Steward case. The appropriation was to relieve old age unemployment and was unquestionably for the general welfare. The right of Congress to spend money for this purpose was upheld, notwithstanding the ultimate effect it might have had upon the states' control of the old age problem. In the Steward case the tax has been upheld as a revenue measure. It was only natural, therefore, that the expenditure in the Helvering case should be regarded as an appropriation for the general welfare and valid under the spending power. In the Butler case the Court had found that the funds could not be raised in the first instance, and were compelled by logic to conclude that the non-existent funds could not thereafter be spent. In the Helvering case the Court contented itself with a procedure entailing separate examination of the taxing and appropriation measures, and had no difficulty in discovering by this means that the tax could be collected, and that the money could be spent. Through self-discipline it avoided the possibility of the kind of result it achieved

27(1937) 301 U. S. 619, 57 S. Ct. 904, 81 L. Ed. 1307.
in the Butler case where the invalidity of the tax meant that, as a matter of logic, the Congress could not expend what it did not possess.

**Conclusion**

Probably the most accurate conclusion of any such work as this would be one which left the door open for the reader to draw his own. But my experience with readers in general has taught me that they are exceedingly lazy in this respect, and I prefer to draw a conclusion which is necessarily tentative, rather than submit to the indignity of none at all.

I think we may conclude from the general discussion and the cases which have been examined, that the Supreme Court of the United States is as much bound by the formal language and inheritances of antiquity as is the rest of human society. If it exhibits this characteristic with better grace than the rest of us it is only because the rest of us are slow in discovering it. The Supreme Court considers itself obliged to follow the avowed interpretation of the taxing-spending clause as it has been followed throughout one hundred and fifty years—by devoted movement of the lips. Once this perfunctory service has been accomplished, however, the Court's conscience is clear and it feels free to decide its cases in conformity with the actual construction of the instrument and with those principles which antedate it. It is to be hoped that as the Court acquires a fuller appreciation of the basic considerations which impel it to a certain conduct, the explanations which it offers will accord more closely to the decisions it makes. But this is of small moment as long as we recognize the human foibles of the Court and discover for ourselves the real distinctions which underly its decisions. This we must do even at the expense of discarding age-old shibboleths. The reward is not alone our complete understanding of the problems which confront us, but also in the heritage which we hand down to future generations of legal scholars.

It may be that by our repeated efforts to separate words from actions, and by delving beneath the superficial and apparent explanation of things, we shall create a generation of legal scholars.

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28For a stimulating analysis of the factors which create a divergence between a court's words and its actions in another field of law, see Leon Green, Judge and Jury, Kansas City, Mo.: Vernon Law Book Co., 1930. Dean Green demonstrates throughout this work an excellent understanding of the extra-judicial elements in any legal opinion. Even allowing for over emphasis this book illustrates how misleading it is to take too literally a judge's official estimate of the considerations which have determined his judgment.
instilled with an element of the doubting Thomas. This might alarm us if doubting were for the sake of doubting and nothing more, since that would be a fatuous pursuit of remedy. But surely it is for the sake of the constructive analysis which any keen mind feels called upon to make in the presence of doubt, and therefore is to be encouraged by all sincere students of the law. Sciolists have too long retarded the forward march of our profession by indolently adhering to the past without any greater justification than that others before them so believed. This attitude toward the logic of legal study serves only to compound the emptiness of such an offering. If there is any fair conclusion which we may reach at this point, it is that the future of law, as in every field of human endeavor, is most swiftly advanced through the reexamination of established concepts and their realignment in our working system.