governmental activities. Such a condition no longer exists. The government's immediate credit is unlimited: sounder than that of any business. The government can well afford to delay the collection of a tax until its constitutionality has been judicially declared.

One step in the direction of disgarding the restrictions surrounding tax refunds which have co-existed with the statutory denial of injunctive relief, and which are based upon similar considerations, is the abandonment of the requirement that a tax be paid under protest if the taxpayer is ever to recover it back. This change has been effected by an Act of Congress applicable to internal revenue taxes generally.[70]

Time alone will reveal the effect and scope of the instant decision. It is noteworthy, however, that the meaning of an apparently succinct and unambiguous statutory expression is, after a judicial battle of 69 years, still in doubt.

WALTER FREEDMAN '37.

NEW LIMITATIONS ON THE POWERS OF CONGRESS THE A. A. A. DECISION

The United States Supreme Court in the recent case of *United States v. Butler*[1] held the Agricultural Adjustment Act[2] unconstitutional on the grounds that: a) it did not in reality provide for a tax but for an exaction which was regulatory and b) the expenditures in the act were made in such a way as to amount to regulation of matters in which the sole regulatory powers were reserved to the states.

The case arose in the District Court of the United States for the District of Massachusetts under the title of *Franklin Process Co. v. Hoosac Mills Corporation.*[4] The receivers for the Hoosac Mills Corporation presented a report recommending that a claim of the United States for $81,694.28 representing accrued processing taxes and flour taxes assessed pursuant to sections 9 and 16 of the Agricultural Adjustment Act[3] be dismissed. The District Court refused to adopt the report[4] and held that the claim should be allowed. On appeal to the United States Circuit Court for the

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[70] 26 U. S. C. A. sec. 1672-1673. Subsection (3) "Such suit or proceeding may be maintained whether or not such tax, penalty, or sum has been paid under protest or duress." This provision was adopted June 6, 1932. 47 Stat. 286.

[1] (1936) 80 Law. Ed. Adv. Op. 287.

[2] May 12, 1933, Chap. 25, 48 Stat. at L. 31, U. S. C. A. Tit 7 sec. 601.

[3] Supra, note 1.

[4] (1934) 8 F. Supp. 552.

First Circuit, this decree was reversed[5] and the case came to the Supreme Court on certiorari to review that judgment.

The Agricultural Adjustment Act of 1933[6] stated in section 1 that the purpose of Congress was to eliminate the disparity between the prices of agricultural products and of other products in order to increase the purchasing power of the farmer. The method by which this purpose was to be achieved was by establishing and maintaining such balance between agricultural production and marketing conditions that the farmers would have a purchasing power equal to that they enjoyed during the "basic period."[7] Section 8 gave the Secretary of Agriculture the power to make contracts for reductions in acreage of basic agricultural commodities[8] by means of "rental or benefit payments"; to enter into marketing agreements with processors; to issue licenses permitting processors and others to engage in handling in interstate and foreign commerce the agricultural commodities covered by the act or products thereof or competing commodities. Section 9a provided for the levying of processing taxes to obtain revenue for the extraordinary expenses caused by the provisions of the act, and provided that the tax should take effect when the Secretary of Agriculture should determine that rental or benefit payments were to be made with respect to any basic agricultural commodity. Section 9b fixed the tax at the difference between the current exchange price and the fair exchange value to be determined from the basic period. Section 12b made all taxes collected available to the Secretary of Agriculture to carry out the purposes of agricultural adjustment.[8a]

The Secretary of Agriculture made cotton a basic commodity in July, 1933, and calculated processing and floor taxes to be effective at the beginning of the market year—August 1, 1933.

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[5] (1925) 78 F. (2d) 1.

[6] Supra, note 1.

[7] August, 1909 to July, 1914 is declared by the act to be the basic period.

[8] Wheat, cotton, field corn, hogs, rice, tobacco, and milk and its products are declared "basic agricultural commodities" to which the act is to apply.

[8a] While the A. A. A. makes the funds derived from the taxes "available" to the Secretary of Agricultural in such a way as to satisfy the court that these taxes are to be used for that purpose alone, it would seem that a much more definite provision in this regard could have been made. It is interesting to note that there was no complete separation in the treasury, that there were no provisions for the contracts made with the farmers to be paid only out of these funds even if they proved insufficient, and that there were no provisions for the funds derived hereunder not being used for other purposes. It is also interesting to compare the provisions of the act with regard to this point with those of the Social Security Act where an express trust fund is created in the Treasury of the United States of the proceeds derived from the tax provided in that act. (Aug. 14, 1935, 49 Stat. 640, U. S. C. A. Tit. 42 sec. 1104.) It would seem that the "expropriation" question dealt with later on would be much more acute with regard to the latter legislation.

The United States presented a claim to the respondents as receivers of the Hoosac Mills Corporation for processing and floor taxes. The receivers refused to consider it a valid claim, and the issues were formed.[9]

THE TAX QUESTION

The first question to be treated by the court was whether or not the exaction could be considered a true tax. As has been stated, the court decided that it was merely a device used in the regulation of agricultural production. If the decision of this question had been that it was a true tax,[10] the court would have felt itself bound by the rule in *Massachusetts v. Mellon*[11] and would necessarily have held that the respondents had no standing in court. However, as the court held that it was not a true tax, but a part of regulation, the rule of that case had no application, and the respondents had a right to contest the validity of the regulation.[12] It is elementary, in this connection, that there are the two types of taxes suggested in this decision. The first is correctly designated a true tax and involves the exercise by the taxing authority of the taxing power or the power to raise revenue. The second type could be more properly called an "exaction," and is one of the elements present in a plan of regulation involving an exercise by the government of its police power.[13] Thus, when a court holds an exaction to be merely a device in regulation, it is essential to its validity that the body adopting regulation have the power to so act.

In considering whether or not the exaction on processing was a true tax, the court took into consideration several facts. In the first place, the court felt that the avowed purpose of the act[15] was not to provide revenue for the government, but was to restore the "purchasing power of agricultural products to a parity with that prevailing in an earlier day; to take money from the processors and bestow it upon the farmers who will reduce their acreage for the accomplishment of the proposed

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[9] Note that the case arises under the original act and the amending act of August 24, 1935 is of no effect. The citation of the amending act is Public Acts No. 320. 74th Cong. 1st session. U. S. C. A. Tit. 7 sec. 602.

[10] Which was one of the contentions of the dissenting opinion.

[11] (1923) 262 U. S. 447—where it was held that neither a federal taxpayer nor a state on behalf of federal taxpayers within its jurisdiction had a sufficient interest in expenditures by the federal government to justify a suit by it to question the validity of such expenditures.

[12] Supra, note 1, l. c. p. 291.

[13] See: Morton v. Mayor, etc., of Macon (1900), 111 Ga. 162, 36 S. E. 627. Child Labor Tax Case (1922) 259 U. S. 20; Hammer v. Dagenhart (1918) 247 U. S. 251; United States v. Doremus (1919) 249 U. S. 86.

[14] Ibid. See also: Packet Co. v. Keokuk (1877) 95 U. S. 80; Packet Co. v. St. Louis (1879) 100 U. S. 423.

[15] Supra, note 2, see sections 1 and 2 of the A. A. A.

end—."[16] The court was further influenced by statements of the Agricultural Adjustment Administrator to the effect that it (the exaction) is "the heart of the law."[17] The provisions of the act for the tax to go into effect when the Secretary of Agriculture determines that rental or benefit payments shall be made; for the tax to cease when such payments are stopped; and for the basis of the tax to be the difference in purchasing power of the farm commodity all affected the court's decision. However, there seems small doubt that the element of the act most seriously relied upon by the court was the provision for the entire revenue derived by the tax to be reserved for the Secretary of Agriculture in aid of the program described in the Agricultural Adjustment Act itself. The court's own language most clearly explains its emphasis on this point:

> "It is inaccurate and misleading to speak of the exaction from the processors prescribed by the challenged act as a tax, or to say that as a tax it is subject to no infirmity. A tax, in the general understanding of the term, and as used in the Constitution, signifies an exaction for the support of the government. The word has never been thought to connote the expropriation of money from one group for the benefit of another. We may concede that the latter sort of imposition is constitutional when imposed to effectuate regulation of a matter in which both groups are interested and in respect of which there is a power of legislative regulation."[18]

Instances of advance appropriation of funds in the same Act which raises the revenue are rare and in reaching the conclusion shown in that statement, the court relied on the *Head Money Cases*[19] as authority for its argument. In those cases, suits were brought to recover money paid under an act of Congress[20] providing for a tax of fifty cents a head on aliens coming into any United States port from a foreign port. The money was appropriated by the same act to constitute an Immigration Fund to defray expenses of regulation of immigration. The question of whether it was a true tax or not was not considered, since it was conceded by both parties to be a matter of regulation.

The court felt that it was the only other case of which it had

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[16] Supra, note 1, l. c. p. 291.

[17] Supra, note 1, l. c. p. 292.

[18] Supra, note 1, l. c. pp. 292 and 293. The court in making this statement is using expropriation in a limited sense and means that the same act provides for a tax on one group with benefits on another.

[19] (1884) Head Money Cases, 112 U. S. 580.

[20] Act of Aug. 3, 1882, 22 Stat. at L. 214, chap. 376, entitled An Act to Regulate Immigration.

cognizance in which there had been an appropriation in advance to a particular fund embodied in the act that levied the tax, it should be some authority for holding a similar act a matter of regulation. This reasoning of the court seems a bit weak in view of the importance of the decision; but it must be considered a rule of law, since this case, that a reservation of the revenue from an exaction to a specific fund in order to carry out purposes outlined in the same act is to be a basis for determining whether or not the exaction is a true tax.[21]

The other bases which have been used by the courts may be discovered by a review of the cases in which the problem has been dealt with. There seemingly has been no other definite statement as to what would constitute an exercise of the taxing power and what would constitute an exercise of the police power; each case has been decided on its own facts. The court has varied its attitude in dealing with these cases and has drawn fine distinctions. In cases involving the Narcotic Act,[22] it has been quite liberal in its construction. The first case to arise was that of *United States v. Jin Fuey Moy*[23] where the court upheld the act as an exercise of the taxing power. The Narcotic Act provided for registration of the amounts of opium and its derivatives which were in the possession of the person who had them for sale, for records to be kept of the sales, the amounts sold, and to whom sold, and for penalties for the violation of the provisions of the Act. Jin Fuey Moy had in his possession some opium which had not been registered as required by the act. In defense to a prosecution by the government for violation of the Act, he contended that the Act was unconstitutional as a regulation of matters not within the powers of Congress. Mr. Justice Holmes, in holding the act constitutional stated:

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[21] It would appear that in cases where state and county taxing power is involved, the mere expropriation of money from one group to another does not make the exaction a matter of regulation. Thus, taxes have been levied on the state in general and appropriated by the same act to municipalities for the purpose of building roads. However, in view of the loose language and fact that exactions are called taxes even when involved in regulation, it is not absolutely definite that the court did not mean tax in the sense of a regulatory tax in these cases. See: 61 C. J. 125 and cases cited. Kinney v. Astoria (1923), 108 Ore. 514, 217 P. 840; State v. Thayer (1897), 69 Minn. 170, 71 N. W. 931.

It is to be noted in this connection that if the majority in making this statement was looking at the effect of the tax and appropriation, the statement would not be justified as that is the effect of all taxes. However, it is the belief of the writer that the court in making the statement was referring not to the effect but to the form in which the appropriation and tax were placed.

[22] Dec. 17, 1914, c. 1; 38 Stat. 785. 789.

[23] (1916) 241 U. S. 394.

> "Only words from which there is no escape could warrant the conclusion that Congress meant to strain its powers almost if not quite to the breaking point . . . in order to make . . . citizens who have opium in their possession criminal . . . and subject to the severe punishment made possible by Section 9. It may be assumed that the statute has a moral end as well as revenue in view, but we are of the opinion that the District Court in treating those ends as to be reached only through a revenue measure and within the limits of a revenue measure was right."

It is hard to reconcile that statement with the strict attitude taken by the court in the present case. This liberal attitude was continued in the case of *United States v. Doremus*[24] That case also arose under the Narcotic Act. The defendant, a doctor, was indicted thereunder, and the District Court held the act unconstitutional on the ground that it was an attempt by Congress to exert a power not delegated to it but reserved to the states. The Supreme Court reversed the decision of the lower court and held that the act was constitutional. The Court stated that so long as legislation has a reasonable relation to the taxing authority conferred by the Federal Constitution upon Congress, it cannot be invalidated because of the supposed motives that induced it nor because the effect of the act may be to accomplish another purpose as well as to raise revenue. The question as to the validity of this act was again raised in the case of *Linder v. United States*,[25] which arose after the *Child Labor Case*[25a] in which the stricter attitude began to be displayed. In the *Linder* case, there was a prosecution of a doctor for supplying a "dope" addict with sufficient "dope" to satisfy her cravings without the written order therefor, required by the Act. The court recognized that it had held the same Act constitutional in the two cases above; but it stated that its provisions must be limited to the primary purpose of enforcing the tax, and that since the doctor was acting within the field of professional conduct, the law could have no application as Congress had no right to interfere in that field.

Whatever was the cause for this change in attitude by the Court, it has tended steadily since these early cases in the direction of construing the alleged exercise of the taxing power more strictly than it had previously done. This fact is best illustrated in the *Child Labor Tax Case*[26] and in the distinctions which the court draws in that case when discussing the cases above and other cases involving the point. In 1922, an act of Congress

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[24] (1919) 249 U. S. 86.
[25] (1924) 268 U. S. 5.
[26] (1922) 259 U. S. 20.

levied a ten percent income tax on all business employing child labor knowingly.[27] The Court in considering the constitutionality of the act had to consider the question of whether it was a true tax or not. The Court stated the rule to be that where the legislation was on its face an attempt to regulate and the tax element was a mere incident thereto, it was to be considered a matter of regulation and had to come within the regulatory powers of Congress. The legislation in question was held to be a matter of regulation on its face and an invasion of states' rights. The Court relied on the element of scienter[28] which was made a prerequisite for conviction of violating the act, and stated that that element was more closely connected with penalties than it was with taxes. The Court distinguished the case of *Veazie State Bank v. Fenno*[29] where it had been stated that the power to tax may be exercised oppressively and that the responsibility therefor was to the people and not to the courts, on the ground that the tax in that case was merely excessive and there was nothing on the face of the legislation to show that it was a matter of regulation. The same basis was used to distinguish the case of *McCray v. United States*[30] where an excise tax was placed on oleomargarine when colored yellow; and from the case of *Fint v Stone Tracy Co.*[31] where an excise tax was placed on the doing of business by corporations, joint stock associations, etc., by Congress. The Court had a more difficult time distinguishing the case of *United States v. Doremus*[32] but did so on the ground that in that case the court felt that the element of regulation was reasonably adapted to the collection of the tax and not solely to the regulation of a matter within the police power of the states. The court relied, on the other hand, on the case of *Hill v. Wallace*[33] where the Future Trading Act[34] was held invalid as a matter of regulation within the reserved powers of the states, and where it was clear on the face of the act that regulation was the purpose. Thus, the court opened a way for a new and less liberal construction of such legislation.

That the stricter view would be applied to the Agricultural Adjustment Act was prophesied by the case of *United States v. Constantine*[35] decided by the court a few months previous to

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[27] Feb. 24, 1919, c. 18; 40 Stat. 1057, 1138.

[28] The act made it necessary for the employer to know that he was employing child labor.

[29] (1869) 8 Wall. 533.

[30] (1904) 195 U. S. 27.

[31] (1911) 220 U. S. 107.

[32] Supra, note 24.

[33] (1922) 258 U. S. 44.

[34] Aug. 24, 1921, c. 86, 42 Stat. 187.

[35] (1935) 296 U. S. 287, 56 Sup. Ct. 223.

United States v. Butler.[35a] In that case, there was an indictment for failure to pay an excise tax of $1,000 on persons carrying on the liquor business contrary to the laws of any state or territory. The court held that the tax was a part of regulation and that the act was unconstitutional.

> "If in reality it is a penalty, it cannot be converted into a tax by so naming it, and we must ascribe to it the character disclosed by its purpose and obligations regardless of the name. Disregarding the name of the exaction and viewing its substance and application, we hold that it is a penalty for the violation of a state law, and as such, beyond the limits of the Federal power."[36]

From a review of these decisions, it is apparent that the fact that the same act made the revenue collected available for certain purposes had never been used as a basis for holding the exaction a device in a plan of regulation. There is little doubt that the court would have been justified in holding the exaction to be such a device without relying on this ground. The Act was, by its stated purpose, an attempt to regulate agricultural production in order to increase the purchasing power of the farmer. Most of the provisions dealt with regulation, and the tax was declared to be necessary to meet the extraordinary expenses caused by the legislation.[36a] On the bases of the *Child Labor Tax Case*[36b] and the rule that the court laid down in that case, this tax was a part of regulation as that purpose was clear on its face and as the regulation was not merely incidental to the collection of the tax as shown by the fact that it was collected from an entirely different group. It is only to the latter extent that "expropriation" as a basis is connected with the prior cases.[38] In this instance, precedent without doubt was largely reinforced by fear of the too great enlargement of the powers of Congress by a liberal interpretation of this question and a strict adherence to the rule in *Massachusetts v. Mellon*.[37]

[35a] Supra, note 1, l. c. p. 295.

[36] It is interesting to note that Stone, Brandeis and Cardozo dissented in that case as well as in the present one. The theory behind the dissent was that the mere fact that a business was illegal did not mean that the Federal Government could not tax it—indeed it might even prove a more fertile field of taxation and revenue than a legal business—and the tax was not to be looked upon as granting a right to carry on the business in contravention of state law. This shows the extremely liberal attitude taken by these three Justices in questions of this character.

[36a] Supra, note 2, section 9.

[36b] Supra, note 26.

[37] Supra, note 11.

THE APPROPRIATION QUESTION

While we have seen that the court had guide posts from the past decisions to aid in the decision of whether the exaction was a tax or not, the question of whether or not Congress had the authority to appropriate as it did is strikingly barren of authority.[39] With the exception of dicta in the case of *Gibbons v. Ogden*[40] to the effect that Congress is not empowered to tax for those purposes which are within the exclusive province of the states, both the majority and the dissenting opinions had to rely upon statements of Hamilton and Story.[40a] The government contended that even though the respondents were given a right to contest the validity of the appropriation, the latter should be upheld as authorized by Article 1 Section 8 of the Federal Constitution which confers upon Congress the right 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."[41] This contention would seem to make it necessary for the court to decide whether the appropriation was for the general welfare of the United States or not. However, as will be seen, the court side-stepped the decision[42] of this question although it did construe the meaning of the clause. It was conceded by the government that the phrase is used to qualify the taxing power and grants no authority to provide for the general welfare independently of the taxing power.

> "The true construction undoubtedly is that the only thing granted is the power to tax for the purpose of providing funds for the payment of the nation's debts and making provisions for the general welfare."[43]

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[38] No consideration of the case of United States v. Butler would be complete without a review of the dissenting opinion by Mr. Justice Stone in which Mr. Justice Cardozo and Mr. Justice Brandeis concurred. With regard to the tax question, these Justices were able to distinguish this case from all preceding ones on the ground that in this case there was no regulation effected through the means of the tax itself. While at first glance this appears to be an able argument, it takes no account of the view that the act cannot be separated into distinct parts but must be considered as a whole, nor of the fact that while the tax may not effect a regulation, still the appropriation does amount to a regulation, and the act appropriates all the money derived from the tax to the aid of the appropriation—thus, making the tax a step in the regulation.

[39] It is to be remembered by the reader that the decision that the exaction is not a true tax but is a device in the regulation of agricultural production does not make the act invalid, but merely has the effect of giving the respondents standing in court to contest the validity of the appropriation and regulation.

[40] (1824) 9 Wheat. 1 (199).

[40a] Supra, note 1.

[41] U. S. Const. Art. I, Sec. 8.

[42] The court has never felt itself called upon to decide whether a particular appropriation was for the general welfare or not.

[43] Supra, note 1, l. c. p. 294.

The court having decided upon an interpretation of the clause, felt itself bound to take a stand on what the limitations were on the power to authorize expenditure. It was a question of how to construe the phrase "to provide for the general welfare of the United States."[44] The court points out that there have been two general theories as to just what the limitations imposed by the phrase constitute. Madison had felt that it amounted to a reference to the other powers enumerated in the subsequent clauses of the same section, and that the taxing power and the power to appropriate were, therefore, limited to those legislative fields in which Congress had been delegated powers. The court refused to adopt this strict view, and adopted the view of Hamilton and Story; thus, coming to the conclusion that the power of Congress to authorize expenditures is not limited to the direct grants of legislative power found in the Constitution, although it is subject to the limitation that it must be for the national, as distinguished from the local, welfare. It would seem that there was no reason for the court to discuss all these points if it was not going to decide the case on this ground. Since it refused to decide the case on the basis of this provision and declared it was not necessary for it to decide whether the appropriation was for a matter of general welfare or not, it would seem that all those statements were dicta. It is especially unfortunate that the court concerned itself to such an extent with this point as the man on the street has become convinced that it decided that appropriations for the benefit of agriculture were not for the general welfare, and much of the present objection to the theory of judicial review is based upon that conviction. However, the case was decided on entirely different grounds.[45]

The court decided that the act was, in effect, a regulation of agricultural production, and as such, was an invasion of the rights of the states. Under the 10th Amendment powers not delegated to Congress nor prohibited by the Constitution to the states are reserved to the states or to the people. The court stated that: "None to regulate agricultural production is given, and therefore, the legislation by Congress for that purpose is forbidden."[46] The broader power to tax was no aid in this case as the tax had already been held to be a mere part of regulation, and thus, there had to be a power to make the regulation. The government's chief contention here was that the act was not an

[44] The question as to the construction in the last paragraph is as to the taxing power and whether there were any limits on that power. The question here arises as to the specific limitations present in the qualifying phrase.

[45] This confusion comes from the fact that the court is dealing with the appropriation in the part of the opinion which deals with unconstitutional regulation.

[46] Supra, note 1, l. c. p. 296.

attempt to enforce regulation but was a mere matter of voluntary cooperation. The court was of the opinion that the fact that there was a material benefit to be derived only by making a contract with the government amounted to economic coercion.[47] The court easily distinguished this case from others where conditions had been imposed on appropriations on the ground that in those cases there had been no standing in court to contest the validity of the appropriations.[48] The ultimate conclusion is that as Congress had not the power to regulate agricultural production directly, it could not do so indirectly by means of purchasing acquiescence and compliance with its desires.

Thus, appropriations to be paid only after there has been a contract made by the government and other parties, binding the latter to acquiesce in the wishes of Congress as expressed by legislation, is held to be regulation. Does this mean that if it were not for the rule in *Massachusetts v. Mellon*,[49] the Federal government could only appropriate money on condition where it has the power to regulate?[50] The court did not decide that appropriations on condition are constitutional, but merely holds that so far no one has been able to contest them because of lack of standing in court. It is not within the scope of this article to decide whether such an attack could validly be made in the future, and it is sufficient to say that, at present, there is no apparent means of such an attack. The question naturally arises as to why there should be such a limitation on the power to appropriate if the true construction of this constitutional provision is that adopted by the court earlier in the decision. It appears that the answer is to be found only in this: an appropriation may be made in such a manner that it amounts to a

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[47] It would appear from the statements of various farmers as to the possibility of not complying with the act that the view of the majority of the court was correct. The dissenting Justice felt that there was no coercion as there was no threat of loss but merely a hope of gain. While there is no available data on this point, it would appear that the distinction made by the dissent was not warranted in practice.

[48] Supra, note 11.

[49] Supra, note 11.

[50] The dissenting Justices failed to see that there was an element of regulation present and considered the case from the angle of the appropriation alone. The combination of the appropriation and the method of payment thereunder did not in their minds make the matter one of regulation. See supra, note 1, l. c. 305—"If the expenditures . . ., etc."—where the dissent points out the necessity for appropriations to be made on condition. The dissenting Justices agree that the taxing power may not be used to coerce action in matters left to state control, and hence, that neither can the power to appropriate be so used. The difference between them on this point is as to whether there was coercion present or not, and the majority of the court would seem to have been justified in holding that there was.

regulation of the matters involved, and when it is so made, it is to be governed by the limitations on the power to regulate. The chief discord in the court was over this question and resulted from a failure on the part of the dissenting Justices to discern that the appropriation did amount to a regulation. The court was justified in overlooking the mere name "appropriation" and going to the essence of the effect of such provisions, but the case could have been decided on other grounds had the court been feeling in a more diplomatic instead of revengeful mood where the new theories of economics were concerned.[51]

HENRY W. LUEDDE '36.

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[51] For the classification of the other grounds relied on by counsel for the parties in this case, see supra, note 1, l. c. p. 293 note. It would also be advantageous to consider why such a strict view should be taken by the court in light of the trends pointed out by Dean Isidor Loeb in "Constitutional Interpretation in a Transitional Period," supra, p. 95.