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Special Committees on Administrative Law of the American Bar Association

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THE ACHILLES HEEL OF CONSTITUTIONAL GOVERNMENT IN AMERICA*

THE USE AND ABUSE OF THE PUBLIC MONEY POWER

O. R. McGuire**

The Government spending and taxing power in a nation of 130,000,000 people and in a territory of 3,000,000 square miles is a tremendous power, second to none. It has been used in bygone days to enable the people to control their hereditary rulers but we are now engaged in determining whether it is possible for the people to use such power to control themselves. The issue is of particular importance today — not only because of the great changes made in the practice of our governments during the past quarter of a century, largely due to the exercise of the public money power — but because of events beyond the seas.

While we meet today in a land free of marauding foes, there is no gainsaying the fact that there is not perfect understanding and forbearance among our own people. We have but to read our newspapers and listen to our radios to realize that on the battlefields of Europe there are engaged in combat to the death different peoples who are proponents of irreconcilable and antagonistic theories of government. There men, women, and children are daily dying in countless numbers beneath the wheels of juggernauts of war more powerful and destructive than those which have rolled over Europe in ages past under the oriental leaderships of Ghengis Khan and Attila. For these peoples the issue is again drawn. Shall there prevail the democratic way of life, in which their freely elected representatives make and administer the laws for the protection of the life, liberty, property and several pursuits of happiness of both rulers and ruled or shall there prevail the ruthlessness of totalitarianism wherein a few self-appointed rulers operate an administrative absolutism affording no protection of life, liberty, or property from the rapacity of these rulers who have deified themselves as the State? The one theory of government, or ideology, is that governments were made for the people while the other is that the people exist solely for the government.

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* Address delivered at the fifty-fifth meeting of the West Virginia Bar Association, at Clarksburg, West Virginia, on September 30, 1939.
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I remind you that these conflicting theories of government met in the English-speaking world — and there prevailed the rule of law for both rulers and ruled — when Magna Carta, the Petition of Right, the Declaration of Independence, and the Constitution of the United States were written, approved, and placed in operation. The proponents of totalitarianism in the present European struggle — whose leaders sneer at representative government — have not known these beacon lights of human development and happiness. Perhaps, for that reason they should be pitied rather than condemned.

Representative democracy hitherto has prevailed in the recurring onslaughts of totalitarianism. I have no reason to believe that it will be any the less successful in the war now raging in Europe. However, the peoples of the democratic countries will undoubtedly emerge from this latest onslaught broken in body, discouraged in spirit, and badly in need of both spiritual and material assistance; otherwise they may turn in their despair and discouragement to specious "ideas on the wing", in an effort to bind up their wounds and to insure themselves against another holocaust of war. Then America, and her neighbors to the south, will be confronted with their greatest opportunity — an opportunity to turn aside, as Good Samaritans of the twentieth century — to aid in the reconstruction of both spiritual and material values in the war-torn lands of the Old World. Against that day of opportunity for service in the cause of humanity everywhere, it is to be hoped that we in the United States will keep our lamps trimmed and our lights burning. There is no better place in which to sound such a hope than in this proud state, born in a great war, which was once a part, and which shares in the traditions of, Old Virginia — with more than three centuries of continuous representative government. Also, in this city of Clarksburg which has given to the cause of representative government a number of great men measured by any standard.

For the time being, at least, we are the guardians of the gifts of both the Hebrew and the Greek to the cradle of civilization. Through faithfulness in that guardianship we may serve the cause of the gentile Nazarene, by being both ready and willing to bring faith and succor to the survivors of those who are today baring their breasts on land, sea, and in the sky to the onslaughts of the Prince of Darkness. Should we be unfaithful to this guardianship and should we fail to be ready at the call of service to God and to
humanity, we would be false not only to ourselves but to the cause of civilization itself — a traitor in the age-old struggle of men to rise from servitude, servility, poverty, and ignorance to upright positions as free men with forward, unafraid and intelligent vision as their own rulers.

Let not the cynic say that the legal profession in America lacks the spiritual values to lead in the the new renaissance of the soul; that the lawyers of America can not furnish the leadership and the vision to bring the sons and daughters of men through their slough of despond wherein they are presently beset by ambitions, greed, intolerance, and heartlessness — even in our own country. There can be not the slightest doubt that since the days when Moses brought his code from atop Mount Sinai to this good hour the students of the law — be they priests, rabbis, judges, or practitioners — have held aloft the ideal of order and justice, as contrasted with the lawlessness of an uncontrolled discretion of any man or group of men. It was Thomas Jefferson, the lawyer, who wrote the Declaration of Independence, thereby challenging the divine right of kings, and who wrote the statute of religious freedom, thereby challenging intolerance which again threatens to engulf us in a new Dark Age. Without any disparagement of the members of other professional, business and labor organizations, we may rightfully claim for the members of our profession the position of leadership in the cause of liberty under law. We know, as perhaps they do not, that without law applicable alike to rulers and ruled there is no liberty — there is tyranny and oppression which will sink the people into servitude, as was done through the tyranny and oppression immediately preceding and following the disintegration of the mighty Roman Empire.

In furtherance of our preparation for that leadership we regularly lay aside our daily tasks that we may meet and take counsel with each other; that we may renew our inspiration so that we may be equal to the sacrifice should we be called upon to give our all for the cause of justice under law, as did Malasherbes; and that we may reexamine our governmental course at comparatively short intervals to the end that we may invite the attention of our fellow men to developing departures from liberty under law. By so doing, perhaps departures from the landmarks our fathers have set may be corrected while there is yet time to avoid disaster. The greatest tribute which could be paid to an able and fearless legal profession is the fact that Utopians and dictators ever have been
hostile to lawyers, a hostility resulting from the further fact that
with the fearlessness of a Lord Chief Justice Coke in defying Stuart
tyranny, it ever has been the aim of lawyers to erect and maintain
a standard to which all the wise and the good may repair.

We are told in the Bible — studied alike by Jew, Catholic
and Protestant — that the "love of money is the root of all evil"
and, using such a declaration as my major premise, I propose to
consider with you today the uses and abuses of the public money
power. I have selected as a title for our thinking on this subject
the phrase "The Achilles Heel of Constitutional Government in
America", a phrase whose content greatly troubled the late James
M. Beck, the internationally famous lawyer and my friend, who
spoke to you here in Clarksburg some fifteen years ago when an-
other of my friends, and your fellow member, Clarence Martin,
was president of your association. For the benefit of those now
hearing, or who may hereafter read, these remarks and who may
have forgotten their Homer and their Greek mythology, I should
say that Thetis, the mother of Achilles, was warned by the oracle
that her son would die from the shafts of his enemies unless she
rendered him invulnerable by dipping him into the River Styx.
With that mother's love which passes all understanding, Thetis
graped the baby by the heel and thrust him into the River Styx
but, unfortunately, the heel which she held was not immersed.
This part of his body was not rendered invulnerable and in the fighting
before Troy — not for additional territory, not for an outlet for
surplus population, not for greater revenues, and not for glory,
but for the love of a woman — Achilles was grievously wounded
in that heel and died. If our constitutional form of government in
America has a similar vulnerability resulting from the greed of our
people for public money, or otherwise, it behooves us speedily to
correct the defect if we would preserve our governmental institu-

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1 Proc. W. Va. Bar Ass'n (40th annual meeting 1934) 150-170. See Beck
& Thorpe, Neither Purse nor Sword (1936) 171, quoting an extract from
Washington's farewell address warning against the abuse of the public money
power: "As a very important source of strength and security, cherish public
credit. One method of preserving it is to use it sparingly as possible — avoid-
ing occasions of expense by cultivating peace, but remembering also that timely
disbursements to prepare for danger frequently prevent much greater dis-
bursements to repel it — avoiding likewise the accumulation of debt, not only
by shunning occasions of expense, but by vigorous exertions in time of peace
to discharge the debts which unavoidable wars may have occasioned, not ungen-
erously throwing upon posterity the burthen which we ourselves ought to bear.
The execution of these maxims belongs to your Representatives, but it is neces-
sary that public opinion should cooperate."
tions and if we would be prepared to lend hope and succor in the reconstruction of a war-weary world.

I believe that our governments — national, state and local — do have such vulnerability, as I shall undertake to show with respect to the national government, a vulnerability which did not become of general knowledge until within comparatively recent years though the fact has been known from the first by certain selfish groups. Unlike Achilles who was wounded by one shaft in his vulnerable spot, the Constitution is being constantly wounded by many shafts hurled in increasing numbers by organized minorities seeking largess from the Federal Treasury with threats of reprisals against public men who dare to stand against selfish demands.

A century and a half ago, this month, the elected representatives of the people in Congress assembled, having enacted as their second measure a revenue statute to provide funds for the infant government, created the United States Treasury Department. President Washington placed at the head of the treasury his youthful aid-de-camp and military secretary; his fellow member of the Convention of 1787 which had drafted the Constitution; the brilliant collaborator with Madison and Jay in writing the Federalist papers which did so much to convince the people as to the desirability, even the necessity of the Constitution; and the man who had met and routed on the floor of the New York ratifying convention the opposition forces led by the able and astute Governor Clinton, sharing with Patrick Henry, George Mason and others in Virginia grave doubts with respect to the centralizing possibilities of the Constitution. This first secretary of the treasury, Alexander Hamilton, was not only an able soldier, an even better lawyer and a master statesman but he was indubitably the first financial genius of his day in America. Across the little cabinet table, at whose head presided the venerable Washington, Hamilton faced the Sage of Monticello, the Virginia aristocrat with his faith in the capacity of the common man for self-government, even as their political and governmental ideas have faced each other during the intervening century and a half.

Jefferson was not a financial genius, either public or private, but he had the advice of Albert Gallatin, who succeeded to the head of the treasury, and of James Madison. Because of its vast importance it seems to have been inevitable that the first great

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2 1 Stat. 24-27 (1789).
3 Id. at 65.
Conflict between Jefferson and Hamilton should develop over the public money power and was so recognized as "almost the only landmark that divides the Federalist from the Republican." Hamilton's theory that the Constitution conferred upon the Congress unlimited authority to raise revenues and appropriate the money for any purpose of the general welfare, whether enumerated in the Constitution or not, was in keeping with the trend of his famous argument in the Convention of 1787 that all state lines should be abolished and that there should be created a centralized government in America. Jefferson's theory, which seems to have been credited to Madison, that the public money power could not be used, constitutionally except for the express purposes enumerated as grants of authority to the Federal Government or necessarily implied from the express powers, is in accordance with the practices in force in the thirteen colonies at the time of the Revolutionary War and commencing with Magna Carta in England if it be

4 Jefferson in a letter of June 16, 1817, to Albert Gallatin, Warren, Making of the Constitution (1928) 478, says: "Our tenet ever was, and, indeed, it is almost the only landmark that divides the Federalists from the Republicans, that Congress has not unlimited powers to provide for the general welfare, but were restrained to those specifically enumerated; and that, as it was never meant they should provide for that welfare but by the exercise of the enumerated powers, so it could not have been meant they should raise money for purposes which the enumeration did not place under their action; consequently that the specification of powers is a limitation of the purposes for which they may raise money."


6 Poore's Colonial Constitutions (1877). See particular provisions collected in McGuire, Legislative or Executive Control over Accounting for Federal Funds (1928) 20 Ill. L. Rev. 415, 466-467, n. 43a. See also Carmen & McKee, History of the United States (1931) 109-111.

7 The crown does, by its instructions to its governors, order them to require of the legislature a permanent support. This order of the crown is generally, if not universally rejected by the legislatures of the colonies. The assemblies quote the precedents of the British constitution, where the executive power of the crown is immediately administered by the King's Majesty; yet, say, under the circumstances in which they find themselves, that there is no other measure left to them to prevent misapplication of public money, than by annual voting and appropriation of the salaries of the governor and other civil officers, issuing moneys lodged in the hands of a provincial treasurer appointed by the assemblies. In the colonies the treasurers are solely and entirely servants of the assemblies or general courts. In consequence of this supposed necessity, for the assembly taking upon them the administration of the treasury and the revenue, the governor and the servants of the crown, in the ordinary revenue of government, are not only held dependent in the assembly, but all services, where special appropriations are made, are actually executed and done by commissioners appointed by the assembly." Pownall, Administration of the Colonies (1765) 50-55.

granted that the federal establishment bears a similar relation to the American people that the House of Commons had to the kings of England. However, and notwithstanding Jefferson’s theory, Hamilton forced a trade whereby Jefferson and his allies agreed with Hamilton that the Federal Government should assume the Revolutionary War debts of the states in return for an agreement on the part of Hamilton and his allies to locate the Federal Capitol on the banks of the Potomac in what is now the District of Columbia. Also, Jefferson negotiated the purchase of the Louisiana territory, though protesting for a time that the Constitution would have to be amended before taxes could be assessed and appropriations made to consummate the transaction. He finally approved the appropriation without a constitutional amendment and there was so clearly no constitutional enumeration of powers for either of these appropriations that representatives from some of the original thirteen states vigorously protested the purchase of the Louisiana territory.8

The break in the dike which commenced in the earliest days of our national history and which was necessarily sanctioned by Jefferson and his followers, gradually widened with the passing of the years,9 though the issue was not authoritatively settled in favor of the Hamiltonian view and past practices until approximately four years ago.10 Right up to the date of that settlement some eminent lawyers continued to believe that when the Supreme Court of the United States met the issue, which it could no longer avoid, it would be required to adopt the Jeffersonian, or Madisonian theory of the public money power.11 That is to say, the proponents

8 Caxton, The Purchase of Louisiana in History of the American Frontier 130-139, c. 15.
10 Butler v. United States, 297 U. S. 1, 56 S. Ct. 312, 80 L. Ed. 477 (1936).
11 The late James M. Beck, former Solicitor General of the United States, in a letter to the writer dated January 28, 1935, in regard to my paper, The New Deal and the Public Money, supra n. 9, said: "Mr. Newton D. Baker and I, in a long supplemental opinion concerning the Tennessee Valley Authority, which has not been made public, have discussed the same question, and we do not, in all respects, accept your conclusions. We both accept Madison’s theory of the taxing clause of the Constitution. In fact, I have always done so, although portions of my brief in Massachusetts v. Mellon, which I did not write, might indicate that I accepted the Hamilton view. I think you and others give to Massachusetts v. Mellon a conclusiveness that may not hereafter prove justified. I think it conclusive that a taxpayer, as a taxpayer, cannot bring suit to test the constitutionality of an appropriation. I am
of the restricted power of the Federal Government in the uses of public money can not hide behind the ramparts of constitutionalism and Madison stated in his veto of the 1817 bonus bill that such an unlimited general power of legislation through the uses of public money would "embrace every object and act within the purview of the legislative trust." Parenthetically it may be here stated that so dangerous did the southern leaders who attempted to form the southern confederacy view the public money power to tax and spend for the general welfare that they wrote into the Confederate constitution a prohibition against the exercise of that power. 

Let us see where the acceptance of the Hamiltonian theory has led us. During the first full fiscal year of Hamilton's administration of the treasury the total ordinary receipts were $4,418,913; the total expenditures were $4,269,027; and the total public debt—much of it incurred in the seven long years of the War for Independence—was $75,463,478. May I remind you at this point, by way of emphasis, that the Commodity Credit Corporation, one of the vast number of federal agencies, lost $119,000,000 last year in its loans made on cotton, corn, and wheat. In other words, the losses by this single agency were more than twenty-five times greater than the combined expenditures of the entire Federal Government in the fiscal year 1790. At the commencement of the sesquicentennial year on July 1, 1939, of the Treasury Depart-
ment, the total ordinary receipts of the treasury were $5,668,-
000,000; the total expenditures were $9,210,000,000, both during
the preceding fiscal year; and the total public debt was $37,191,
000,000.16 During the fiscal year 1939 for which statistics are
now available, the total federal, state and municipal tax collec-
tions aggregate $14,811,000,000 and as stupendous as is this total,
the tax collections were approximately $3,000,000,000 less than the
total expenditures. The tax collections, insufficient as they were
to balance the expenditures, aggregated 21.8 per cent, or almost
one-fourth of the total national income, from all sources, and con-
stituted an annual charge of $114.09 against every man, woman
and child in America.17

The Treasury Department has stated that the most impor-
tant single expenditure during the fiscal year which ended on June
30, 1939, was for relief, welfare and social security—accounting
for $3,085,000,000, or approximately one-fourth of the total ex-
penditures of all governments in the United States.18 This enor-
mous amount to house, clothe, and feed people at the expense of
their fellow citizens paying the taxes is more than the aggregate
expenditures for the entire Federal Government for any fiscal
year prior to 1918, or a short twenty-one years ago, when this
nation was engaged in the World War.19 But this is not all. We
recently have had a political campaign waged and won in a great
state of this union on the slogan "thirty dollars every Thursday",
and even as I speak there is a campaign being waged in that state
to write such a provision into its constitution; we are confronted
with a demand for old age pensions at the ridiculous rate of $200
a month and the ink had hardly become dry on the old age pension
provisions of the federal security act when there was enacted into
law a "liberalizing" amendment; and it has been seriously urged
by others that we should tax, borrow, and spend ourselves into
prosperity. Municipalities and other local taxing units have, in
many instances, found themselves unable to carry their improvi-
dent bonded indebtedness, and the federal bankruptcy act has been
amended so as to permit them to escape from some of their press-
ing financial difficulties;20 states are mendicants with cap in hand

10 Bull. Tres. Dept. (Aug. 1939) containing an analysis of receipts and
disbursements, composition of the public debt, and other data.
17 Id. at 1.
18 Id. at 2.
19 BECK & THORPE, op. cit. supra n. 1, at 256-257.
20 50 STAT. 654 (1937), as amended 52 STAT. 940 (1938); United States v.
Bekins, 304 U. S. 27, 58 S. Ct. 811, 82 L. Ed. 1187 (1938).
at the doors of the federal treasury; and the Federal Government, by the stroke of a pen, has cut the value of its dollar almost in half and repudiated its solemn promise to pay in gold its outstanding obligations. Further, by such devaluation the people have been forced by their government to lose a large part of their insurance, savings, and investments.

Now what has all this money been used for? I have mentioned relief, old age pensions, and social security as well as losses in lending and subsidy payments to states and local governmental units — many of which subsidies require the state and local taxpayers to match the federal grants and subsidies in some proportion, thus appealing to their cupidity and greed to further increase their local rates of taxation or local indebtedness. I have mentioned the Tennessee Valley Authority, which may be used as an example. A short time ago that authority handed to a representative of the Commonwealth and Southern Utility Company a check for $44,728,300 and thirty-five Tennessee municipalities also handed to the utility representative checks aggregating the balance of the total of $78,425,000 paid for the Tennessee Electric Power Company properties in that state. The United States has purchased since 1933 a total of 9,000,000 acres of submarginal land which have been added to national parks, national forests, and wild life refuges. Some $1,500,000,000 was voted last session of the Congress for the purpose of making benefit and other payments to the farmers. The federal loan administrator assures us that more than "600 new homes have been started every day of this year under the FHA mortgage insurance plan, and this number could be doubled;" that "the PWA and RFC have proven the soundness and desirability of lending for the construction of public projects that are self-liquidating" and that "more than a billion dollars have been loaned for these purposes"; that the Electric Home and Farm Authority, another government agency,

21 See U. S. Code and annual appropriation acts for various subsidies to schools, roads, old age pensions, etc. The Treasury reported (supra n. 16) that "Federal expenditures in the form of grants to state governments amounted to $658,000,000; those to local governments $172,000,000. The bulk of these totals was accounted for by grants for education, highways, and public welfare."


23 NEWSWEEK, Aug. 28, 1938, p. 38; TIME, Aug. 28, 1939, p. 53. Also, there is not to be overlooked both loans and subsidies to private industries — many of which loans will result in losses either in whole or in part.

24 WALLACE'S FARMER, Aug. 12, 1939, p. 6.

25 Id. at p. 8.
"aids householders in buying gas and electric household appliances on the installment plan, by financing more than 3,000 business enterprises that deal in these appliances"; and that the federally owned mortgage companies "will buy any FHA insured mortgage wherever situated, and allow a fair compensation for servicing the loan."28 It has been stated that the travel expense of the multitude of officeholders who go out of Washington amounted to $76,000,000 in one year, "a sum equal to one-sixth of the total passenger revenues of all the railroads"27 during the same period.

Time does not permit me to enumerate all of the purposes for which the United States is now raising revenue and making expenditures for the "general welfare", or the controls being exerted thereby either directly or indirectly by the Federal Government upon the people, but it cannot be gainsaid that now "the National Government sits at every fireside".28 This is no new phenomenon in the history of the world. At the beginning of the disintegration of the Roman Empire and the commencement of serfdom,

20 Radio address by Mr. Jones over the Columbia Broadcasting Company network on Aug. 30, 1939.
28 Taft, Government Enroachment upon Private Enterprise, INVESTOR AMERICA, Sept. 1939, p. 6. Contrasting spending of public and private funds, Walter E. Spahr, secretary-treasurer of the Economists' National Committee on Monetary Policy, stated in an address of July 18, 1939, at Dartmouth College that: "... in an economic democracy wasteful expenditures ... in programs of public construction and of relief, and in subsidies to special groups could not exist for the reason that individuals would not spend or vote their own dollars in any such manner. Aside from donating what they can or will to the needy for humanitarian reasons, they would demand a quid pro quo in exchange for their dollars. The individual in an economic democracy would not pay an employee more than his service is worth; therefore such wasteful expenditures as those often found in connection with federal relief measures could not exist. He would not pay more for a commodity than it costs in the open market; therefore a subsidy to silver producers could not exist. He would not pay more for cotton or wheat than it costs in the open market; therefore the artificial prices caused by our farm program could not exist. He would not willfully reduce the purchasing power of his dollar; therefore devaluation of the dollar could occur only as a consequence of absolute necessity growing out of the exhaustion of the country's gold reserves, (currency inflation would meet his most vigorous opposition for similar reasons); he would not spend his money to keep in office those politicians who serve their own interests or the interests of others which are opposed to his own; therefore money could not be obtained not utilized to maintain in power those who now use public funds for such purposes. He would not spend his money for boondoggling, or for foolish and useless art projects, or for silly or propagandistic plays in theatres, or hire people to lean on spades, or to pay people to sit around when work is offered to them, or to enable government officials to set up corporations to compete with him or to destroy his business and investments or to bedevil him; he would not buy the political junketings of office holders, or government political propaganda. In general, he would not spend his money for anything for which he would not receive satisfactory value in return."
which was to last for more than one thousand years, we are told by the historian that "‘Trajan’s rural credits, charities, and colonization in Italy, Hadrian’s supervision of municipal administration in Italy may only point to mistaken ideas of how to keep the center of the Empire strong’" but:

"We must note that the government was expanding its obligations far more widely than before and raising its tax assessments accordingly. Under Nerva and Trajan a very large sum (perhaps a hundred million dollars) went to Italian charities. From Vespasian’s day to Hadrian’s very much road building was undertaken in Spain, Africa, Gaul, the Danube country, Anatolia, and Syria, and the government was also aiding cities with public buildings as never before. Lavish sums were of course expended in capitals like Rome, Athens, and Carthage, but this was not enough. Hadrian’s biographer states that there was hardly a city of the Empire which was not beautified by the great traveller, and excavations throughout all of the provinces have proved this statement true. The civil service bureaus were also becoming very costly." 29

Even though our tax collections, enormous as they are, failed to meet the expenditures by some $3,000,000,000 during the last fiscal year, a comparison of the taxes paid by 105 American corporations for 1932 and six years later for 1938, shows that these taxes jumped from $681,459,204 to $1,192,574,930, or an increase of 89 per cent, and consumed 61.6 per cent of the net earnings (before taxes) of these corporations. The taxes paid in 1938, are stated to have been equivalent to $2.73 per share of common stock, or more than double the amount available for dividends. 30 Another student of public finance states that during the period from September 22, 1938, to March 31, 1939, there was a total of 250 business concerns which gave up trying to get along and that 224 of them had indebtedness of less than $1,000,000 each when they decided to liquidate, "‘being unwilling to take a chance with business’." 31

Nothing appears to be overlooked in this mad scramble for sources of taxation. The federal revenue act of 1928, for instance,

29 Frank, Economic History of Rome (1927) 479-480. In the management of public finances the instinct of the Roman "for efficiency was neutralized, as happens in all democracies, by the pressure of friends seeking special privileges, by lack of a stable and durable policy in the ever-changing government, by want of any scrutinizing and controlling supervision, and by a popular demand for amiable rather than officious magistrates." Id. at 188.

30 Investor America, Sept. 1939, p. 13 (tabulation of named corporations).

31 Riley, Annalist, Aug. 10, 1939, p. 171.
placed a tax of three cents per pound on whale oil produced with the aid of foreign whaling ships and it seems that this tax is largely due to farm and fish lobbies because whale oil competes in a small way with domestic oils and fats in soap-making.\(^{32}\) The states are imposing tolls and taxes upon truck transportation across their borders at such rates that a thoughtful editorial has declared that: "Capitalism can’t flourish, democracy can’t prevail, and business can’t exist under a so-called Federal system which is tending toward a regime of forty-eight sovereigns."\(^{33}\) It is further stated that telephone bills paid in one year have concealed therein an average of \$9.91 in taxes; that one-sixth of everybody’s electric light bills went for similar taxes; that the price of a bottle of magnesium contained 94 manufacturers’ taxes and 68 retailers’ taxes; that the sales slip for a cotton dress covered 125 different taxes; that a pair of workingman’s overalls carried 148 taxes; that out of every dollar expended for gasoline, 32 cents went to the state or to the Federal Government in duplicated fuel taxes; and that hidden taxes follow us to the grave.\(^{34}\) And yet, as shown by the Treasury Department statistics published in 1939, to which I have called attention, these taxes were insufficient by approximately \$3,000,000,000 to equal the expenditures of the national, state and local governments. An economist has stated that:

"‘Heavy taxes mean that the power of each individual to vote his dollars is impaired. He has fewer dollars with which to record his preferences; the Government has more with which to make effective its preferences. Prices of goods and services reflect less the desires of individuals and more those of government officials. Economic democracy grows weaker while governmental autocracy grows stronger. This impairment of economic democracy invites, in turn, a further impairment of political democracy.’\(^{35}\)

Again, this is not all: Due to the great increase in taxation subsequent to the adoption in 1913 of the income tax amendment to the Constitution and the revenue acts implementing that amendment, such revenue has poured into the treasury as to test the greed and cupidity of men. Every single one of the myriad regulatory agencies of the Federal Government, with the exception of the Interstate Commerce Commission (and its powers have been greatly enlarged), has been created since the income tax amend-


\(^{33}\) *Editor & Publisher*, Aug. 26, 1939, p. 22.


\(^{35}\) Spahr, supra n. 28.
ment was ratified and it has been since that date that there have been introduced into the statutory law of the land restrictions on the jurisdiction of the courts to review and reverse decisions of many administrative tribunals because their findings of facts were not such as would support the judgment of a court on evidence tried by the court without a jury. I do not have the time now to develop this proposition but I have done so within the year before a number of state bar associations, including California, Georgia, Oregon, and New York. In fine, some of the raids on the public treasury or upon other groups of our fellow citizens could not be made effective if the courts were permitted to review administrative action as fully and as completely under such statutes as they reviewed administrative action in proceedings against officers of the United States before the turn of the present century.

With a staggering indebtedness, the greatest in our entire national history; with almost equal staggering taxation, likewise the greatest in all our history—which may have had something to do with the Supreme Court of the United States overruling precedents of more than a century; and with an administrative absolutism unknown to American soil until the past twenty years or so, it is worse than childish for us in a representative democracy to attempt to place the entire blame on our elected representatives. The informed individual is worse than a hypocrite to take the attitude of the Pharisee and render thanks to Heaven that he is not such an individual as his representatives in Congress, in state legislatures, and in the common councils of his municipalities. The blame lies at the door of selfish, greedy, and avaricious groups of American people intent upon obtaining personal benefits from the public treasury—even though the taxation necessary to raise the funds may dry up all business activities which could produce wealth and thereby furnish employment and sources of taxation for the reasonable and proper expenses of government. Yes, even though such a course of conduct may bring on national bankruptcy, civil uprisings, and the destruction of our constitutional form of government. Let the doubting Thomases study the history

of the fall and decline of the Roman Empire; the events prior to the French Revolution; and the situation in America during the period immediately antecedent to the adoption of our Constitution—a situation which has gone down in our history as the “critical period”. These facts must be seared into the consciousness of every man and woman in America. I have dared here today to try and sound a warning—with the same spirit of defiance on my lips for selfish, greedy and avaricious groups as that possessed by Patrick Henry for his King when he declared that “If this be treason make the most of it.”

But, you will exclaim, is there not some way out? That question was asked by John C. Calhoun nearly a century ago in his Disquisition on Government, a profound study which has not received the consideration that it warrants at the hands of students and practitioners of government. This essay might well be made the compulsory study of every university student in America. The women’s clubs could well spend at least two sessions each year studying and restudying this profound paper, which undoubtedly came from the heart of a man whose motives have never been questioned, however much we may disagree with his conclusions on the secession issue. Calhoun stated in this study of government:

“... nothing is more difficult than to equalize the action of the government, in reference to the various and diversified interests of the community; and nothing more easy than to pervert its powers into instruments to aggrandize and enrich one or more interests by oppressing and impoverishing the others; and this too, under the operation of laws, couched in general terms; — and which, on their face, appear fair and equal. Nor is this the case in some particular communities only. It is so in all; the small and the great, — the poor and the rich, — irrespective of pursuits, productions, or degrees of civilization; — with, however, this difference, that the more extensive and populous the country, the more diversified the condition and pursuits of its population, and the richer, more luxurious, and dissimilar the people, the more difficult it is to equalize the action of the government, — and the more easy for one portion of the community to pervert its powers to oppress, and plunder the other.”

38 1 Works of Calhoun (Orale ed. 1851) 107.
39 Id. at 15. Cf. Spahr, supra n. 28, wherein he stated: “The purest form of representative government is that in which the representatives of the people consider all the interests of all the people . . . . Such a system enables the people, both economically and politically, to gain most from their resources, productive organizations, and abilities.

“But our Representative government falls far short of this highest type, and, in recent years, it has revealed a marked tendency to sink to a noticeably low
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Calhoun goes on to point out that the struggle inevitably develops into one between those who pay the taxes and those who are to benefit from them, saying:

"The necessary result, then, of the unequal fiscal action of the government is, to divide the community into two great classes; one consisting of those who, in reality, pay the taxes, and, of course, bear exclusively the burden of supporting the government; and the other, of those who are the recipients of their proceeds, through disbursements, and who are, in fact, supported by the government; or, in fewer words, to divide it into tax-payers and tax-consumers.

"But the effect of this is to place them in antagonistic relations, in reference to the fiscal action of the government, and the entire course of policy therewith connected. For, the greater the taxes and disbursements, the greater the gain of the one and the loss of the other, — and vice versa; and consequently, the more the policy of the government is calculated to increase taxes and disbursements, the more it will be favored by the one and opposed by the other.

"The effect, then, of every increase is, to enrich and strengthen the one, and impoverish and weaken the other. This, indeed, may be carried to such an extent, that one class or portion of the community may be elevated to wealth and power, and the other depressed to abject poverty and dependence, simply by the fiscal action of the government; and this, too, through disbursements only, — even under a system of equal taxes imposed for revenue only. If such may be the effect of taxes and disbursements, when confined to their legitimate objects, — that of raising revenue for the public service, — some conception may be formed, how one portion of the community may be crushed, and another elevated on its ruins, by systematically perverting the power of taxation and disbursement, for the purpose of aggrandizing and building up one portion of the community at the expense of the other.

Representatives have shown themselves to be afraid to defend and foster the interests of our people in general. This is because none of them is elected by the people in general. Since they are elected by communities, and since most of these representatives wish to be reelected, they consider who it is that exercises most influence at the polls. The controlling forces at the polls are the pressure groups in the fields of production and distribution. In one section it may be the silver producers, or potatoes growers, or cotton or wheat farmers, or manufacturers seeking tariff protection, or laboring groups seeking aid, or Townsendites or war veterans seeking pensions and so on.

"Appreciating the power of these pressure groups in production and distribution, and being fearful of their voting power, the representatives of the people become representative of such pressure groups. The consequence is that these groups are voted subsidies, are given high prices, and are granted favors at the expense of the general welfare. The operations of economic democracy are thwarted, government ceases to be genuinely representative, political democracy gives way to the politics of pressure groups, and the national well-being suffers."
That it will be so used, unless prevented, is, from the constitution of man, just as certain as that it can be so used; and that, if not prevented, it must give rise to two parties, and to violent conflicts and struggles between them, to obtain the control of the government, is, for the same reason, not less certain.\textsuperscript{40}

Gentlemen of the West Virginia bar, I have stated the issue, however inadequately, which confronts constitutional government in America today — the use and abuse of the public money power. If there are any people in this country who may reverse the abuse of the public money power and save our liberties, our property, and our means of earning a livelihood these people are the lawyers. The profession of the law is aligned with no pressure group; we represent all classes of citizens, rich and poor, powerful and weak, labor and business, capitalist and paupers, and our duty to humanity demands that we stand united against the forces of disintegration — disintegration which will bear most heavily on the poor and the weak. No man or group of men can long be successful in American politics against the united front of the lawyers. I would that my fellow members of the bar should heed the wise words of President Washington as he declined reelection for a third term and gave his farewell address to the people, warning them, among other things, against both the dangers of political faction and the burden of public debt. If I mistake not, the American people are on the eve of a great renaissance of the soul; I hope to the adoption of the Biblical philosophy that we should do unto others as we would that others do unto us. As they near the precipice, they will spurn the demagogue and the false prophets that many of the people shall live off of the earning of others; these people will demand leaders who will stand for right and justice for all alike regardless of the consequences to themselves. When that day comes we must bear in mind that we are mountaineers; that the great captains of the ages have been unable to conquer the souls of mountain men and that:

"Mountain folk snug in their little stilted houses,
    Have to stoop their shoulders to let the clouds go by;
Living on a lofty place so very close to Heaven
    They get a different slant on how to live and love and die;
The very earth beneath their feet is higher than the steeples
Of churches in the cities where formal laws are made,
But God, who made the mountains, makes the laws for
mountain peoples
And He lets them go their separate ways untouched and
unafraid."\textsuperscript{40}

\textsuperscript{40} CALHOUN, op. cit. supra n. 38, at 21.