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The AAA Decision

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THE AAA DECISION

Invalidation of the Agricultural Adjustment Act by the Supreme Court\(^1\) has again confounded the prophets and spinners of theories. Some of them\(^2\) find difficulty in confusing their remarks within the bounds of decency, and even Mr. Justice Stone\(^3\) veils but thinly, comments which are not examples of Mr. Wodo-house's gift of understatement. The writer would not wish to appear as a self-appointed defender of the majority opinion, but one becomes bored, if not irked, by people who point an accusing finger at the Supreme Court for its rather wholesale toppling of New Deal legislation, as if to say: "Now see what you have done." Their attitude is that the fact that so many recent Acts of Congress have been declared unconstitutional is proof that the Supreme Court is actuated by improper motives. It seems never to occur to such finger-pointers that perhaps Congress has enacted more unconstitutional legislation in the past three years than in any other single period of our history. But then, policemen are never popular, and if they have to arrest more offenders on holidays than on week days, of course the fault lies with the policemen.

The principle upon which the decision turned can be stated rather shortly. The opinion\(^4\) first finds that the processing tax is not exclusively a tax. A tax is "an exaction for the support of government", whereas, the asserted tax here is an indispensable part of a plan of regulation. This would seem to be in accordance with the principles of the Child Labor Tax Case.\(^5\) It was there held that Congress cannot under the guise of a tax regulate local matters. Thus at first glance, it only remained to decide whether or not crop control and reduction of farm acreage is a local matter, and the case is disposed of under the rule of stare decisis. Not so: the opinion concedes that Congress has power to levy a processing tax for the purpose of defraying general public expenditures, and the power to spend public money in order to promote the general welfare of the United States.\(^6\) On the other

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3 Dissenting opinion, \textit{supra} n. 1, at 324.
4 Hereinafter the word "opinion" refers to the majority opinion. The word "dissent" refers to the dissenting opinion.
5 259 U. S. 20, 42 S. Ct. 449 (1922).
6 Query: Should any distinction be made between the general welfare of
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hand, it was said that Congress has no power to provide for the
general welfare independently of the taxing power. That is to
say, it cannot regulate local matters upon the theory that such
regulation promotes the general welfare. It can only tax for the
purpose of spending to that end. Since, then, the Child Labor Tax
Case is not authority upon the question of the power to spend the
proceeds of an admittedly valid tax, it became necessary to go
beyond that case. The real battleground is this: Can Congress
tax and ear-mark the proceeds for the purpose of spending them
in order to provide for the general welfare of the United States,
if there is in addition the object and purpose to regulate local
matters?

One must bear in mind the point of ear-marking the proceeds
of the tax. Both the opinion7 and the dissent8 apparently concur
in the view that Congress has no power to spend even general
revenues for purposes other than providing for the general wel-
fare. But if, in violation of the Constitution it does so, no one
has the right to raise the question.9 The result is, then, that the
taxing power and the spending power are in theory equally ex-
tensive and equally limited. The dissent maintains that this is
the only limitation and that Congress having decided that crop
control is conducive to the promotion of the general welfare of
the United States, the Court cannot substitute its own ideas about the
matter, thereby usurping the legislative function. One could
agree with the dissent if one could accept its premise: that the
taxing and spending power are subject to the one limitation. That,
however, is the very point to be decided. The opinion holds that
the power is subject to a second limitation not to be found within
the general welfare clause itself, but in the Constitution as a whole.
The nature and dual form of our government is opposed to the
idea of an unlimited power of Congress in an unlimited field or
sphere of activity. This in no way conflicts with the complemen-

the United States, and the general welfare of the people of the United States?
Cf. The language of the Tenth Amendment, post n. 10.
7 Congress has the “power to tax and to appropriate, limited only by the
requirement that it shall be exercised to provide for the general welfare of
the United States,” Supra n. 1, at 319.
8 “The Constitution requires that public funds shall be spent for a defined
purpose, the promotion of the general welfare . . . . Expenditures would
fail of their purpose and thus lose their constitutional sanction if the terms
of payment were not such that by their influence on the action of the recipi-
ents the permitted end would be attained.” (Italics supplied.) Supra n. 1,
at 327.
The statutory concept of unlimited power within those specific fields committed to the exclusive control of the Federal government. The basic tenets of the dissent are, it is submitted, unsound because of this failure to survey the Constitution as a whole and the insistence in arguing that because there are no express limitations upon the scope of the general welfare clause it necessarily follows that none are implied. No lawyer would attempt to construe a contract, deed or will upon such principles.\(^{10}\)

The opinion, therefore, is based upon the proposition that the general welfare clause is subject to the inherent limitation that it does not confer power to intermeddle in local matters the control of which is reserved to the states or to the people. It is submitted that this is quite unshakable ground. Despite the derisive observation in the dissent that resort to extreme examples "must leave unmoved any but the mind accustomed to believe that it is the business of courts to sit in judgment on the wisdom of legislative action"; it is further submitted that the opinion is justified in citing possible examples. It is a sound rule of statutory construction to test a principle by its possible applications.

Again, the failure of the dissent to recognize the principle of inherent limitations accounts for its reliance upon an analogy to the power to regulate commerce. The argument runs in this wise: The power to regulate interstate commerce is not limited by the fact that its exercise has had a coercive and regulatory effect upon intrastate industries. Therefore, exercise of the power under the general welfare clause likewise is not limited by its coercive and regulatory effect. The conclusion does not follow. The commerce clause confers unlimited power within a limited field. It may interfere with local activities of the states or of the people because they have by delegation consented thereto. This is no argument to show that by delegation of power under the general welfare clause the states or the people have made a similar concession, because the nature of the two powers is essentially different. The commerce clause is a delegation of unlimited power within a comparatively circumscribed field of activity. The general welfare clause cannot be so interpreted because there is no way of circumscribing its field which, by very definition, is general.

After condemning the Act as a compulsory regulation, the

\(^{10}\) *Cf.* The Tenth Amendment to the Constitution: "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."
opinion states an elaborate dictum to the effect that even if the plan were one for purely voluntary cooperation it would be unconstitutional for the reason that "contracts for the reduction of acreage and the control of production are outside the range" of the power of Congress. By this language it is apparently meant that Congress has no contractual capacity. There is no contract for want of parties; or perhaps the analogy of *ultra vires* more nearly approximates the concept. At any rate, the dissent would seem to have the better of the argument.

If it for one moment be conceded that Congress has the power to make a *gift* of money for non-federal purposes and objects, there is no stopping place. The opinion so concedes at least to the extent that no one has the right to question the propriety thereof. If it may make the gift, it would seem to follow that it may take the further step and insert a condition either that the recipient use the money for a specified purpose or perform some other act. This would seem to be true although the contemplated use or act were non-federal in object and purpose, or even positively subversive — not because the action of Congress would be within its powers, but because no one can contest it. Why may it not then, with similar objects and purposes, substitute for the condition a promise? Stated another way, this means that while the power to make a gift without strings is unlimited, the attachment of strings (in the form of a return promise) limits the power.

That is why the doctrine of *Massachusetts v. Mellon*¹¹ is of such vast import. While that decision stands there is apparently nothing to prevent Congress from spending the general revenues of the government in order to accomplish any and all ends deemed economically desirable or politically expedient, regardless of any realistic relationship with the granted powers. The writer has previously pointed this out in connection with veterans' legislation.¹² If, however, such expenditures have for their object regulation of local matters by economic coercion, it is not without the bounds of possibility that a non-complying citizen could enjoin the payments because he would be able to show an individual injury to his rights of property or of person, which was lacking in *Massachusetts v. Mellon*.

Assume in any type of case a competent complainant. We are still confronted by the majority's concession of the power of

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¹¹ *Supra* n. 9.

Congress to spend general revenues in order to promote the general welfare of the United States. Three possible limitations could be applied: (1) That while Congress has exclusive authority to determine whether or not a given expenditure is in fact reasonably calculated to promote the general welfare, it cannot be made if there is in addition either the purpose or the effect of regulating local matters. (2) The theory of Hamilton and Story, which the majority approves: that the power is limited to objects and purposes general and not local. Aside from historical reasons which would seem to be weighty, it is submitted that this theory is impossible of application by the courts without invading the legislative field. Whether or not crop control is a means reasonably calculated to promote the general welfare of the United States is a question upon which minds may differ, and is purely for legislative determination. (3) Madison’s view, that the spending power is limited “to the enumerated legislative fields committed to Congress.” This was, in form, rejected by the majority upon the ground that so construed the general welfare clause is “mere tautology”. For example, the enumerated power to build post offices and post roads necessarily implies the power to tax and spend for that purpose.

The point which stands out with almost startling clarity is that while the court has in form approved the views of Hamilton and Story, in substance it is the view of Madison which has prevailed. The first interpretation, above stated, which the Court practically puts into effect, while formally approving the second interpretation, above stated, is really only a negative way of phrasing the third interpretation. To say that Congress cannot spend if it thereby exercises powers which are not delegated to it independently of the general welfare clause, is to say that Congress can only spend if it thereby exercises powers which are delegated to it independently of the general welfare clause. This is precisely the principle for which Madison contended. The Tenth Amendment recognizes no twilight zone wherein Congress may spend without encroaching upon fields reserved to the states or to the people.

—Robert T. Donley.