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COMMENT

UNITED STATES VS. BUTLER ET AL., RECEIVERS OF HOOSAC MILLS CORPORATION

By ERNEST R. BALTZELL*

The importance, in American political history, of the decision of the Supreme Court of the United States in United States of America, Petitioner, vs. William A. Butler et al. Receivers of Hoosac Mills Corporation, will be determined by subsequent events. In constitutional law, it will be one of the leading cases, unless political action renders it academic. The opinions in the case raise the issue as to the proper function of the Supreme Court in passing upon the constitutionality of statutes and, for the first time, give some judicial meaning to the "general welfare" clause of the Constitution.

The United States presented a claim to the receivers for processing and floor taxes on cotton levied under the Agricultural Adjustment Act. The receivers recommended disallowance. The District Court found the taxes valid and ordered them paid. The Circuit Court of Appeals reversed the order. The Supreme Court affirmed the judgment, Stone, Brandeis and Cardozo, J.J., dissenting.

The declared purpose of the Act, i.e., to give to agricultural products the purchasing power which they had in designated periods (as to cotton, between August, 1909, and July, 1914) and thus eliminate the disparity between the prices of agricultural and other commodities, and the means authorized to accomplish this purpose, i.e., a levy of processing taxes and their appropriation to producers of agricultural commodities upon their agreement to restrict production, are common knowledge.

The wisdom or policy of the Act is wholly irrelevant to any consideration of the case. Research is of little value in commenting on the decision.

It will not be denied that, at the time of the enactment, the plight of agriculture constituted an evil affecting the general welfare, and that the statute, whatever its wisdom, attempted a remedy.

The majority opinion disposes of the preliminary issue as to the standing of the respondents to object to the validity of the tax, holding that they may do so because they "resist the exaction as a step in an unauthorized plan" and do not seek, as mere taxpayers, to restrain the expenditure of public funds. The Court is not as wise as Solomon, and finds it impossible to divide the statute into two statutes, one levying an excise tax and the other making an appropriation. The aim of the statute is foreign to the procurement of revenue for the support of the government, and its operation shows the exaction to be, not a tax, but

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the necessary means for the intended control of agricultural production
and a mere incident to its regulation.

The majority next inquire whether the Act is authorized by any other
power delegated to Congress—the "controlling question" in the case—
for the Act may be without authority under the taxing power and
still be constitutional under another delegated power.

The function of the Supreme Court is first explained. The Court
does not assume a power to overrule or control the action of Congress.
It does not possess a veto power similar to that of the President. The
Constitution being the supreme law of the land, all legislation must con-
form to it. All that the Court does is place the statute whose con-
stitutionality is questioned beside the Article of the Constitution in-
voked as a grant of authority, and decide whether the former agrees
with the latter. The Court announces its considered judgment, and
neither approves nor disapproves legislative policy. When it has de-
termined whether the statute contravenes or conforms to the Constitu-
tion, its duty ends. The question is what powers are given by the Con-
stitution to Congress, and not what powers ought to be given to it, each
State having all governmental powers except such as the Constitution
confers on the United States, denies to the States, or reserves to the
people.

The commerce clause is found irrelevant, and it is implicitly ad-
mitted by both opinions that the Act may be justified, if at all, only
under the general welfare clause.

The power "to lay and collect taxes * * * and provide for * * *
general welfare of the United States" does not authorize legislation for
the general welfare, except by means of taxation and appropriation.
Otherwise the federal system of government designed by the Constitu-
tion would be destroyed. The true construction is that Congress has
power "to tax for the purpose of providing funds for payment of the
nation's debts and making provision for the general welfare." The neces-
sary implication is that public funds may be appropriated for the gen-
eral welfare, the power to appropriate being as broad as the power to
tax. But the appropriation must be for the general welfare. On the
other hand the clause is an independent source of power, for it is not
meaningless. The views of Hamilton and Story are thus adopted. Con-
gress may appropriate funds if the appropriation provides for the gen-
eral welfare, whether or not the expenditure is authorized by any other
delegated power.

The majority find it unnecessary to define the scope of general wel-
fare, or to determine whether an appropriation in aid of agriculture
falls within it, for the Act "invades the reserved powers of the states." It
is "a statutory plan to regulate and control agricultural production,
a matter beyond the powers delegated to the federal government." The
Constitution gives no power to Congress to regulate agricultural produc-
COMMENT

The power is reserved to the states. Such legislation by Congress is, therefore, forbidden. The Act is objectionable for the same reason that, under the pretext of raising revenue Congress cannot regulate the conduct of manufacturing and trading (*Child Labor Tax Case*, 259 U. S. 20, and *Hill v. Wallace*, 259 U. S. 44), cannot regulate the practice of a profession (*Linder v. United States*, 268 U. S. 5), and cannot impose sanctions for violation of state law respecting the local sale of liquor (*United States v. Constantine*, decided December 11, 1935).

Although the Act purports to effect mere voluntary compliance, it is in fact coercive because compliance is secured by the fear of loss of benefits, the power to confer or withhold unlimited benefits being the power to coerce or destroy. The refusal of a minority to comply does not prove the lack of coercion, for the coercive features of the Bankhead Cotton Act disclose the coercive purpose of the so-called processing tax. Admitting the plan to be one for purely voluntary cooperation, Congress cannot purchase compliance which it is powerless to command. It cannot do indirectly what it cannot do directly, and an emergency is no justification for ignoring constitutional limitations.

If the Act is constitutional, the regulation of all industry throughout the United States may be accomplished in a similar manner, the federal system of government will be destroyed, and Congress will become a parliament of the whole people with only self-imposed restrictions upon its powers, i. e., the leading principle of English constitutional law—the sovereignty of Parliament—will become the sole principle of American constitutional law defining the relation between the state and national governments.

Whatever one may think of the minority opinion written by Mr. Justice Stone, a better criticism of the majority opinion is not likely to be produced.

The minority state certain general propositions which should have controlling effect. 1. The power of the Court to declare a statute unconstitutional is always guided by the principle that "courts are concerned only with the power to enact statutes, not with their wisdom," and by the further principle that, although the exercise of power by the other two branches of government is subject to judicial restraint, self-restraint is the only limitation upon judicial power. 2. The power of Congress to levy an excise tax upon processing of agricultural products is not questioned, and the levy is held invalid by the majority solely because of the use to which the proceeds of the exaction are put. 3. The majority opinion does not deny that there is power in Congress, in the existing emergency, to appropriate public money in aid of farmers by reason of its power to tax and provide for the general welfare. 4. No question of the power to levy a variable tax by fiat of the Secretary of Agriculture or of an unauthorized delegation of legislative power is pre-
sented, the schedule of rates having been adopted and confirmed by Congress and any defect being thereby cured.

The opinion then proceeds to the issue on which the case turns, i.e., is a levy unquestionably within the taxing power of Congress to be treated as invalid because "it is a step in a plan to regulate agricultural production and is thus a forbidden infringement of state power?"

The levy is not any the less an exercise of the taxing power because it is intended to defray an expenditure for the general welfare rather than for any other governmental purpose. It is not stated by the majority that the levy itself effects the regulation, and therefore, the Child Labor Tax Case, 257 U. S. 20, Hill v. Wallace, 259 U. S. 44, Lincoln v. United States, 269 U. S. 5, 17, and United States v. Constantine, decided in December 11, 1935, are not in point, because in each of these cases the levy was the instrument of regulation by reason of its coercive effect on matters left to the control of the states. Here regulation is accomplished by the method in which the proceeds of the levy are expended and would equally be accomplished by the use of any other government funds.

The majority admit the expenditure of public funds to promote the general welfare to be a substantive grant of power and do not deny that Congress may lawfully appropriate funds for the benefit of farmers and in aid of a program of curtailment, but they say there is coercion and, in any case, Congress may not purchase compliance if it lacks the power to command.

There is no coercion, for the threats of loss, not hope of gain, is the essence of economic coercion. The hope of gain is the motive for securing curtailment of production.

There is no infringement of state powers by purchased regulation. Upon the expenditure of public funds there is the limitation that they be spent to promote the general welfare. Their expenditure usually requires payment on such terms that this purpose will be served. "The power of Congress to spend is inseparable from persuasion to action over which Congress has no legislative control." It may not require agriculture to be taught in state universities, but it may aid in teaching by grants, and such grants may appropriately, if not necessarily, be on condition that they be expended for the intended purpose. A contract to use funds for the prescribed purpose is not different. The majority assert these necessary incidents to the authorized expenditure of funds to be limitations upon the power granted, and thus the principle long ago established as to other enumerated powers of Congress is reversed as to the power to tax and provide for the general welfare. "Let the end be legitimate, let it be within the scope of the Constitution, and all means which are appropriate, which are plamly adapted to that end, which are not prohibited, but consist with the letter and spirit of the
Constitution, are constitutional.” *McCulloch v. Maryland*, 4 Wheat. 316, 421.

“\textit{It is a contradiction in terms to say that there is power to spend for the national welfare, while rejecting any power to impose conditions reasonably adapted to the attainment of the end which alone would justify the expenditure.}” The limitation leads to absurd consequences. “\textit{The government may give money to the unemployed, but may not ask that those who get it shall give labor in return, or even use it to support their families.}”

The power of the purse is a great one. Both its magnitude and its existence in every civilized government were well understood by the framers of the Constitution and were recognized by Hamilton and Story whose views of the spending power as standing on a parity with those of other powers specifically granted, have hitherto been generally accepted. The suggestion that the power must now be curtailed because it may be abused does not rise to the dignity of argument. The power has at least three limitations. 1. The purpose must be truly national. 2. The power may not be used to coerce action left to state control. 3. The conscience and patriotism of Congress and the Executive provide further limitations, legislatures being “the ultimate guardians of the liberties and welfare of the people in quite as great a degree as the courts.” Holmes, J., in *Missouri, Kansas and Texas R. R. Co. v. May*, 194 U S. 267, 270.

A tortured construction is not justified by recourse to extreme examples of reckless spending which might occur without the exercise of judicial restraint. “\textit{Such suppositions are addressed to the mind accustomed to believe that it is the business of the courts to sit in judgment on the wisdom of legislative action.}” Concluding, the minority opinion states:

“\textit{Courts are not the only agency of government that must be assumed to have capacity to govern. Congress and the courts both unfortunately may falter or be mistaken in the performance of their constitutional duty. But interpretation of our great charter of government which proceeds on any assumption that the responsibility for the preservation of our institutions is the exclusive concern of any one of the three branches of government, or that it alone can save them from destruction is far more likely, in the long run, to obliterate the constituent members of \textit{an indestructible union of indestructible states} than the frank recognition that language, even of a constitution, may mean what it says: that the power to tax and spend includes the power to relieve a nation-wide economic maladjustment by conditional gifts of money.}”

It is interesting to speculate as to the effect upon the decision in this case of certain remarks relating to “\textit{horse and buggy days},” of the slaughter of little pigs, and of the training, experience, mental attitudes and bents, and political and economic theories of the justices. The science, art or game of psycho-analyzing judicial opinions is, however,
largely speculation, and the comments of lawyers upon the opinions must, in the present state of our knowledge, be restricted to legal reasoning which in itself may at times be abstruse.

It is proper, however, to give impartial impressions from reading the opinions. The opinion of the majority is strained and forced. A new problem is presented, the answer to which is obvious, but the process of reasoning by which the result is to be reached is hard. It is not a studied opinion. It shows haste. It is not a work of art. The logic of the opinion is difficult to ascertain. It is influenced by the results which, it is assumed, will follow any other determination.

The minority opinion, on the other hand, is likely to live as an example of the art of writing judicial opinions, and as one of the great opinions in constitutional law. It is clear, forceful, and studied, and requires no interpretation to ascertain its meaning. It shows that the issues presented to the minority justices were not startling. They fit neatly into principles which are conceived to be well established. The issues are easy to decide. It took no straining of the processes of reasoning to reach the result. The opinion does not give the impression of justifying a result determined upon before the reasons, by which the result is to be reached, are settled.

The opinions raise an issue that is relevant to every case involving the constitutionality of a statute—the proper function of the Court in determining the constitutionality of a statute, or, to put it in another way, the weight that should be given to the judgment of Congress and the Executive upon the constitutionality of the statute in question. The opinion, or attitude, of a judge upon this question determines his decision in most cases of this type. It was determinative in this case.

The issue arises, not from any lack of jurisdiction, a question settled long ago in *Marbury v. Madison*, but because the powers delegated to Congress require construction in cases in which judicial precedent is of little assistance. The issue is somewhat analogous to that of giving effect to administrative rulings and determinations in the construction of statutes. Courts have repeatedly attached great weight to them.

On this issue the opinions are clearly divided. Courts, say the minority, are only concerned with the power to enact statutes, not with their wisdom. The exercise of power by Congress or the Executive is subject to judicial restraint, but the exercise of judicial power is subject only to self-restraint. The responsibility for preserving our institutions rests upon the three coordinate branches of the government and not upon any one of them. It may be concluded from the opinion of the minority

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*The power to declare a state statute unconstitutional presents a different question. Mr. Justice Holmes has said: “I do not think the United States would come to an end if we lost our power to declare an act of Congress void. I do think the Union would be imperiled if we could not make that declaration as to the laws of the several states.”*
that only in extreme cases, in which the power sought to be exercised is too remote from any grant of power, will an act of Congress be given no legal effect.

The minority accuse the majority of passing upon the wisdom of the Act. The majority deny this. The function of the Court, they say, is solely to determine whether the Act is justified by any power granted. It is evident, however, that they require more definite proof of a closer relationship between the power exercised and that granted, and are unwilling to give much weight to the judgment of Congress. They require the power to be much less remote from the power granted. They are less willing to share responsibility with Congress.

In support of the minority view many arguments may be urged. Our Constitution establishes a separation of powers of which the judicial is one. This separation is merely a division of the labor of government, and, in reality, is no guaranty of liberty, although it was regarded by political theory at the time the Constitution was adopted as a doctrine of liberty. Each department of government has coordinate responsibility in upholding the framework of the Constitution. Only in the most extreme cases should the judiciary override the judgment of Congress as to its powers. If Congress errs in its judgment, the remedy is in the ballot. If the Supreme Court errs, the remedy is in the cumbersome process of amendment. The constitutionality of an act is passed upon long after it has become legally effective. During the interval it is put into operation, and fundamental changes often ensue. The Constitution was framed in a period before the Industrial Revolution, before the functions of government began to expand, regardless of party, before government was faced with the many intricate problems with which it is now confronted, problems which, if they are to be solved by governmental action, will require, in practice, a new division of powers between state and nation. Yet the Constitution is broad in its language and should be so construed as to permit a flexible adjustment to be made to meet changed conditions. Unless we are to be continually amending the Constitution (a remedy which is so slow that disastrous results may follow before it is exercised), Congress must be given great latitude in deciding its own power. While legislative incompetence has, with many, become a firm belief, the remedy is with the electorate and not the courts. Responsibility will tend to cure unwise and hasty action.

In support of the view of the majority many arguments may also be urged. The duty to declare a law unconstitutional, if it is, should not be evaded. The responsibility is in the Supreme Court, and it should be there because that Court is more capable of deciding the powers of Congress than Congress itself, and because divided authority makes for inefficiency and uncertainty in government. If a power is not granted to Congress, the Constitution can be amended, and the slowness of that remedy is a good thing because it gives the people an
opportunity to consider the desirability of amendment. Experience has shown amendment not to be so difficult when public opinion is strong in its favor. The Constitution conferring broad powers as it does, there should be a check upon unwise and ill-considered action by Congress. While our government is founded upon a separation of powers, it is also founded upon the theory of checks and balances as shown by the veto power of the President and the treaty-making and appointive powers of the Senate.

An opinion upon this great issue should not be based upon whether one is a so-called conservative or a so-called liberal, whether one favors rugged individualism or a planned economy. A conservative Congress may be denied powers by a liberal Supreme Court. That view should be adopted which will make for the general welfare, and the determination by Congress as to what it considers conducive to the general welfare should be given great weight by the Court. The determining factor would seem to be that the development of a machine civilization and the growth of a competitive economic system has made government interference in our economic lives inevitable. The statutes of Congress, and of every state, and of the British Parliament, to name only one foreign government, for the last fifty or more years show this. It is a phenomenon of western civilization not generally appreciated. Governmental functions are inevitably increasing at an accelerating rate, regardless of party. If this is so, greater latitude must be given to the judgment of Congress as to its powers. We are in a period that requires flexibility rather than rigidity. If we have lost faith in the competence of Congress, our democracy has failed, and an immediate remedy should be sought which will prevent the destruction of our civil liberties by the foreign doctrines of fascism or bolshevism.

The divergence of the two opinions upon the scope of the general welfare clause is obvious. They agree that there is no delegated power to legislate for the general welfare and that provision for the general welfare, as such, must be accomplished by means of taxation and the appropriation of public funds. The majority opinion holds, in determining the right of the receivers to object to the invalidity of the levy, that the levy is not a tax because it is a mere incident to the regulation of agriculture, which regulation by means of the expenditure of money is found to be unauthorized. It is not a tax because of the illegality of the appropriation. If the appropriation were legal, it would seem to follow that the tax was unobjectionable. The issue, therefore, is whether the devices adopted by the Act for the expenditure of public funds come within the phrase "provide for *** general welfare of the United States."

On this issue the opinions diverge only after agreeing that the clause embodies an independent substantive grant of power and that the authority to spend need not be justified under any other enumerated power.
The majority say it is unnecessary to define the scope of the clause because the Act encroaches on the powers reserved to the states, and this is so whether the Act is coercive, which they believe it to be, or purchases compliance, for Congress cannot purchase that which it has no power to command. What are the powers reserved to the states? They are the powers not delegated to Congress. The majority is thus forced into a dilemma which the opinion does not altogether solve. Assuming the power to appropriate for the general welfare to have meaning and to be an independent one as the majority do, then one is forced to decide whether the Act comes within the limits of that power, or abandon the clause as an independent source of power. In effect they do define a limit to this independent power—the destruction of the lines between state and federal government and the reconstitution of Congress into a parliament. This limit, which is indeed a proper one, for otherwise the specific delegation of powers to Congress would be meaningless, the majority find the Act to reach. Impliedly, they say the Act goes far beyond anything which the application of the doctrine of implied powers established by *McCulloch v. Maryland* would justify. The opinion as written is unfortunate.

If this is the true logic of the opinion, the decision obviously rests upon sound judgment as to the effect of the Act and other possible acts of a similar nature.

Without approving the wisdom and policy of the Act, one is forced to the conclusion that the power of the purse, although great, does not embrace the power to obliterate any division of powers between the state and federal governments. Congress can never become the British Parliament by this process. Neither in legal theory nor in practice is the power to purchase the power to command. The power to purchase is limited by its source—the purse. The ability to collect taxes or borrow money has very definite limitations. The power of the purse can be used for regulation only in unusual instances. That its use may invade the customary division of powers is true. A similar invasion has been made with the sanction of the Supreme Court in the exercise of power to regulate interstate commerce. Neither custom nor the failure to exercise power granted is any limitation upon the authority of Congress.

The minority admit that, if the Act is coercive, it is unconstitutional. They deny that it is, for regulation is accomplished by the hope of gain rather than the fear of loss. Thus judges occasionally are compelled to be psychologists, and the minority opinion may be said to turn upon human motives. This is not the place for the discussion of free will. One is inclined to believe that the Act was founded upon the hope of gain and was not coercive. At any rate it does not provide the usual sanctions, which are associated with coercion—fine, imprisonment, or both, or some form of penalty. In the
present confused state of the science of psychology, it is somewhat
dangerous, especially in the field of constitutional law, to draw con-
clusions based upon human motivation. Forms of coercion have been
known to the law since ancient time, and it is too uncertain a matter
to say that there is or is not coercion unless some form of coercion
known to the law, or similar to it, is or is not used.

The minority opinion proceeds with clear logic, starting with the
premise that the power to appropriate for the general welfare is an
independent source of power. It simply applies the doctrine of implied
powers established by *McCulloch v. Maryland*. Although their judg-
ment in applying it would seem to be sound, it is not at all clear that,
as they say, the doctrine has been reversed by the majority in its
application to the welfare clause. In reality the majority did recognize
it as applicable to the clause but found the Act to go beyond any
implication of power in it. In the exercise of judgment upon this
point it is evident that the majority and minority were both controlled
by their divergent views upon the function of the Court. The ma-
jority may have been influenced by the wisdom of the Act as a solution
of the farm problem. The minority judges were in conference with
the majority on this case. We were not. They also read the majority
opinion before the minority was written. The majority were certainly
influenced by the type of legislation of which the Act was an example.

The decision, moreover, cannot be said to prohibit all forms of
regulation in connection with the expenditure of money for the general
welfare. There is a vast difference between regulation of the type
effected by the Act and other regulation cited in the minority opinion,
as for example, grants in aid of agricultural education on condition
that it be so used. The majority would have no difficulty in upholding
such a grant.

This case alone will probably not lead to any amendment of the
Constitution which will expand or make definite the powers of Con-
gress, for the spending of money to procure regulation is limited in its
scope. An amendment will only come as a result of a strong public
opinion to give to Congress the power by *command* to regulate agri-
culture and industry. It is more likely to lead to restrictions upon the
powers of the Supreme Court.

**RECENT CASE NOTES**

**Trial—Informing Jury of Liability Insurance—Curing of Prejudice.—**
In tort action against motorist, plaintiff recovered $3,400.00 for death of twelve
year old girl. Appellant assigns alleged misconduct of plaintiff's counsel in
eliciting testimony from his witness on redirect examination that insurance
agent had investigated accident after questioning prospective jurors on voir