A

Supreme Court of the United States

October Term, 1936

No. 837

CHARLES C. STEWARD MACHINE COMPANY,

v.

HARWELL G. DAVIS, COLLECTOR

BRIEF AMICUS CURIAE

INTRODUCTION

This brief is tendered in the interests of George P. Davis. In December, 1936, he petitioned this Court for certiorari to the Circuit Court of Appeals for the First Circuit, to review before hearing in the Circuit Court of Appeals a decision rendered against the petitioner in the District Court of the United States for the District of Massachusetts in favor of the defendant Boston and Maine Railroad and of the intervening defendants the Commissioner of Internal Revenue and the Collector of Internal Revenue for the District of Massachusetts.

The body of the brief submitted herewith is the same brief which was submitted in support of the petition for certiorari.

The appeal was argued in the Circuit Court of Appeals in January, 1937, and is now held under advisement by that Court.

The only issue involved is, whether or not Title IX of Chapter 531 of August 14, 1935 (49 Stat. 620) is an Act of The Congress within its powers under the Constitution of the United States. It is believed that it is identical with the question in the case at bar of Charles C. Steward Machine Company against Harwell G. Davis, Collector.

Since the printing of the brief, the British Privy Council, on January 28, 1937, in Appeal No. 101 of 1936 — *The Attorney General of Canada, Appellant* v. *The Attorney General of Ontario and Others, Respondents*, handed down a decision affirming a decision of the Supreme Court of Canada (In the matter of a Reference 1936 Canada Law Reports, Part VII, page 454) and holding that an imposition analogous to that under Title IX of the Social Security Act is not characteristically a tax for a Dominion purpose and is *ultra vires* of the Parliament of Canada. On this subject there is an evident comparability between the organic act for the Dominion of Canada in its relation to the Provinces, and the Constitution of the United States

The Act held to be *ultra vires* purported to make levies on employers and employees, to be paid by revenue stamps, to provide a portion of an unemployment compensation fund of which the balance was to be provided by the Dominion. The seemingly controlling words of the opinion are: —

"That the Dominion may impose taxation for the purpose of creating a fund for special purposes and may apply that fund for making contributions in the

public interest to individuals, corporations or public authorities could not as a general proposition be denied."

* * * * *

"In the present case their Lordships agree with the majority of the Supreme Court in holding that in pith and substance this Act is an insurance Act affecting the civil rights of employers and employees in each Province, and as such is invalid."

(Above quotations not compared with official text.)

SUMMARY OF WITHIN BRIEF

1. The state of being of having employees is not property or a privilege (p. 36) or otherwise subject to excise and nothing like it has ever been held by the Supreme Court to be subject to excise (pp. 28–43).

2. The imposition is a capricious confiscation and not uniform throughout the United States (pp. 26, 44–62).

3. The imposition is not within the taxing powers of The Congress, because it is not to pay the debts and to provide for the common defense and general welfare of the Government of the United States (pp. 63–73).

SUBJECT INDEX

TABLE OF CONSTITUTION, STATUTES, AND CASES

STATEMENT OF THE CASE

The only issue involved in this case either directly or indirectly is whether or not Title IX of Chapter 531 of August 14, 1935, 49 Stat. 620, is an Act of The Congress within its powers under the Constitution of the United States or is violative of the Fifth Amendment thereof, and the only way that that issue is raised is with respect to payments under that Title IX (R. 18). All parties have so stipulated.

On November 7, 1936, the plaintiff began this cause by filing a bill of complaint in the District Court of the United States for the District of Massachusetts as a stockholder in the defendant corporation to enjoin the corporation from making payments under Title IX of the purported Act of The Congress of the United States commonly known as the Social Security Act, and to that end for the judgment of the Court that this Title IX is not an Act of The Congress within its powers under the Constitution so that an enforcement thereof would deprive the plaintiff, the defendant corporation, and others, of liberty and property without due process of law contrary to the Fifth Amendment. (R. 1–10.)

The corporation was the only original defendant. The Commissioner and the Collector on their own application were admitted as parties defendant.

All parties defendant filed answers which disclosed that the essential allegations of fact of the bill of complaint were true.

On November 17, 1936, all parties filed a stipulation confining the issue as first above stated.

After hearing on the merits on bill and answer, the District Court, the Honorable George C. Sweeney presiding, handed down an opinion and entered a final decree on December 7, 1936 adjudging Title IX to be constitutional and therefore denying the prayer for

injunction and dismissing the bill of complaint. (R. 31).

On December 7, 1936, plaintiff perfected an appeal to the Circuit Court of Appeals for the first Circuit and has entered this appeal therein and said appeal is now depending therein. The plaintiff respectfully submits that Title IX is not an Act of The Congress within its powers under the Constitution and that the decree of the District Court should be reversed and a decree entered for the plaintiff.

THE PLAINTIFF IS ENTITLED IN THIS COURT TO THE RELIEF PRAYED FOR IF SECTION 901 OF TITLE IX OF THE SO-CALLED SOCIAL SECURITY ACT OF AUGUST 14, 1935, CHAPTER 531, OF THE SEVENTY-FOURTH CONGRESS, FIRST SESSION, 49 STAT. 620, IS NOT WITHIN THE POWERS OF THE CONGRESS UNDER THE CONSTITUTION OF THE UNITED STATES.

This suit, begun November 7, 1936, is by a stockholder against a corporation in terms subjected to a tax by Title IX, Section 901, which the defendant corporation proposes forthwith to pay as the terms of this section provide. The plaintiff stockholder alleges that this section is beyond the powers of The Congress under the Constitution of the United States. This constitutional question is the only one in the case. The plaintiff does not allege and prove a case unless he alleges and proves that this section is not permitted by the Constitution of the United States.

United States Code, Title 28, Section 41, Judicial Code, Section 24, gives jurisdiction to the District Court of such a suit if it "arises under the Constitution or laws of the United States." It has been held and said repeatedly by the Supreme Court, and with none of its decisions to the contrary, that in such a situation the suit arises under the Constitution or laws of the United States.

Gully v. *First National Bank in Meridian,* (November 9, 1936) 299 U. S. —, 57 S. C. R. 96, (dictum).

First National Bank v. *Williams,* 252 U. S. 504, 512.

Louisville & Nashville R. R. Co. v. *Western Union Telegraph Co.,* 237 U. S. 300 (dictum).

Siler v. *Louisville & Nashville R. R. Co.*, 213 U. S. 175, 191.
Patton v. *Brady*, 184 U. S. 608, 611.
Miller's Executors v. *Swann*, 150 U. S. 132 (dictum).
Osborn v. *United States*, 9 Wheaton, 738.

A stockholder suit properly invokes this jurisdiction if the Act is unconstitutional.

Carter v. *Carter Coal Co.*, 298 U. S. 238 (semble).
Ashwander v. *Tennessee Valley Authority*, 297 U. S. 288 (semble).
Brushaber v. *Union Pacific Railroad Co.*, 240 U. S. 1, 9.
Ex parte Young, 209 U. S. 123.
Pollock v. *Farmers' Loan and Trust Co.*, 157 U. S. 429.

A person in terms obliged by an attempted invalid Act, to pay money to go into the Treasury of the United States has a right to a decision.

United States v. *Butler*, 297 U. S. 1.

SOCIAL SECURITY ACT, TITLE IX, SECTION 901, DESCRIBED.

Title XI, Section 1105, of Chapter 531, August 14, 1935, 49 Stat. 620, 648, United States Code Title 42, Chapter 7, provides that "This Act may be cited as the 'Social Security Act'. This citation is misleading. This attempted Act is not social. It is anti-social. It attempts to put Society's burden on a fraction capriciously picked. It does not provide security. In Section 901 (U. S. C. Tit. 42 Ch. 7, Sec. 1101) it is not an Act of The Congress within its powers under the Constitution of the United States. The reasons for this assertion are deferred until the section has been described. It is the only section whose validity is involved in this suit. The invalidity is intrinsic in this section, when judged by itself, and also when judged in the setting in which it occurs.

The singularity of the Act is shown by the fact that it begins as "AN ACT To provide for the general welfare by establishing a system of Federal old-age benefits, and by enabling the several States to make more adequate provision for aged persons, blind persons, dependent and crippled children, maternal and child welfare, public health, and the administration of their unemployment compensation laws; to establish a Social Security Board; to raise revenue; and for other purposes." and then proceeds in eleven titles, and ends with the provision that "This Act may be cited as the 'Social Security Act'."

It is not an Act to provide general revenue for the Government of the United States.

Sections 901 to 907 are: —

"IMPOSITION OF TAX

Section 901. On and after January 1, 1936, every employer (as defined in section 907) shall pay for each calendar year an excise tax, with respect to having individuals in his employ, equal to the following percentages of the total wages (as defined in section 907) payable by him (regardless of the time of payment) with respect to employment (as defined in section 907) during such calendar year:

(1) With respect to employment during the calendar year 1936 the rate shall be 1 per centum;

(2) With respect to employment during the calendar year 1937 the rate shall be 2 per centum;

(3) With respect to employment after December 31, 1937, the rate shall be 3 per centum.

CREDIT AGAINST TAX

Sec. 902. The taxpayer may credit against the tax imposed by section 901 the amount of contributions, with respect to employment during the taxable year, paid by him (before the date of filing his return for the taxable year) into an unemployment fund under a State law. The total credit allowed to a taxpayer under this section for all contributions paid into unemployment funds with respect to employment during such taxable year shall not exceed 90 per centum of the tax against which it is credited, and credit shall be allowed only for contributions made under the laws of States certified for the taxable year as provided in section 903.

CERTIFICATION OF STATE LAWS

Sec. 903. (a) The Social Security Board shall approve any State law submitted to it, within thirty days of such submission, which it finds provides that —

(1) All compensation is to be paid through public employment offices in the State or such other agencies as the Board may approve;

(2) No compensation shall be payable with respect to any day of unemployment occurring within two years after the first day of the first period with respect to which contributions are required;

(3) All money received in the unemployment fund shall immediately upon such receipt be paid over to the Secretary of the Treasury to the credit of the Unemployment Trust Fund established by section 904;

(4) All money withdrawn from the Unemployment Trust Fund by the State agency shall be used solely in the payment of compensation, exclusive of expenses of administration;

(5) Compensation shall not be denied in such State to any otherwise eligible individual for refusing to accept new work under any of the following conditions: (A) If the position offered is vacant due directly to a strike, lockout, or other labor dispute; (B) if the wages, hours, or other conditions of the work offered are substantially less favorable to the individual than those prevailing for similar work in the locality; (C) if as a condition of being employed the individual would be required to join a company union or to resign from or refrain from joining any bona fide labor organization;

(6) All the rights, privileges, or immunities conferred by such law or by acts done pursuant thereto shall exist subject to the power of the legislature to amend or repeal such law at any time. . . .

UNEMPLOYMENT TRUST FUND

Sec. 904. (a) There is hereby established in the Treasury of the United States a trust fund to be known as the 'Unemployment Trust Fund,' hereinafter in this title called the 'Fund'. The Secretary of the Treasury is authorized and directed to receive and hold in the Fund all moneys deposited therein by a State agency from a State unemployment fund. Such deposit may be made directly with the Secretary of the Treasury or with any Federal reserve bank or member bank of the Federal Reserve System designated by him for such purpose.

(b) It shall be the duty of the Secretary of the Treasury to invest such portion of the Fund as is not, in his judgment, required to meet current withdrawals. Such investment may be made only in interest bearing obligations of the United States or in obligations guaranteed as to both principal and interest by the United States. . . .

(c) Any obligations acquired by the Fund (except special obligations issued exclusively to the Fund) may be sold at the market price, and such special obligations may be redeemed at par plus accrued interest.

(d) The interest on, and the proceeds from the sale or redemption of, any obligations held in the Fund shall be credited to and form a part of the Fund.

(e) The Fund shall be invested as a single fund, but the Secretary of the Treasury shall maintain a separate book account for each State agency and shall credit quarterly on March 31, June 30, September 30, and December 31, of each year, to each account, on the basis of the average daily balance of such account, a proportionate part of the earnings of the Fund for the quarter ending on such date.

(f) The Secretary of the Treasury is authorized and directed to pay out of the Fund to any State agency such amount as it may duly requisition, not exceeding the amount standing to the account of such State agency at the time of such payment."

Section 905 provides for the payment of the tax into the Treasury of the United States as internal revenue collections and for returns.

"INTERSTATE COMMERCE

Sec. 906. No person required under a State law to make payments to an unemployment fund shall be relieved from compliance therewith on the ground that he is engaged in interstate commerce, or that the State law does not distinguish between employees engaged in interstate commerce and those engaged in intrastate commerce.

DEFINITIONS

Sec. 907. When used in this title ——

(a) The term 'employer' does not include any person unless on each of some twenty days during the taxable year, each day being in a different calendar week, the total number of individuals who were in his employ for some portion of the day (whether or not at the same moment of time) was eight or more.

(b) The term 'wages' means all remuneration for employment, including the cash value of all remuneration paid in any medium other than cash.

(c) The term 'employment' means any service, of whatever nature, performed within the United States by an employee for his employer, except ——

(1) Agricultural labor;

(2) Domestic service in a private home;

(3) Service performed as an officer or member of the crew of a vessel on the navigable waters of the United States;

(4) Service performed by an individual in the employ of his son, daughter, or spouse, and service performed by a child under the age of twenty-one in the employ of his father or mother;

(5) Service performed in the employ of the United States Government or of an instrumentality of the United States;

(6) Service performed in the employ of a State, a political subdivision thereof, or an instrumentality of one or more States or political subdivisions;

(7) Service performed in the employ of a corporation, community chest, fund, or foundation, organized and operated exclusively for religious, charitable, scientific, literary, or educational purposes, or for the prevention of cruelty to children or animals, no part of the net earnings of which inures to the benefit of any private shareholder or individual.

(d) The term 'State agency' means any State officer, board, or other authority, designated under a State law to administer the unemployment fund in such State.

(e) The term 'unemployment fund' means a special fund, established under a State law and administered by a State agency, for the payment of compensation.

(f) The term 'contributions' means payments required by a State law to be made by an employer into an unemployment fund, to the extent that such payments are made by him without any part thereof being deducted or deductible from the wages of individuals in his employ.

(g) The term 'compensation' means cash benefits payable to individuals with respect to their unemployment."

The eventual 3% imposition under Section 901 is additional to the 6% imposed by Title VIII, Sections 801 to 804.

The one act is in eleven divisions fully interconnected. The sub-titles are: —

Title I.	Grants to States for old-age assistance.
Title II.	Federal old-age benefits.
Title III.	Grants to States for Unemployment Compensation Administration.
Title IV.	Grants to States for aid to dependent children.
Title V.	Grants to States for maternal and child welfare.
Title VI.	Public Health work.
Title VII.	Social Security Board.
Title VIII.	Taxes with respect to employment.
Title IX.	Tax on employers of eight or more.
Title X.	Grants to States for aid to the blind.
Title XI.	General Provisions.

Most of the contents of the various Titles need not be described. The only Titles now involved are the general one, and Titles III, VII, and IX.

Title III — "Grants to States for Unemployment Compensation Administration" — purports to make an appropriation (Sec. 301) for the purpose of assisting the States in the administration of the States' own unemployment compensation laws. It makes these assistance payments only in those States which have an unemployment compensation law approved by the Social Security Board established by Title VII as provided in Title IX. The amounts are such as the Board determines to be necessary for the proper administration of the law by the State. The Board is furnished these elements for the basis of its determination — the population of the State, an estimate of the need of persons covered by the State law and of the cost of the proper administration of such law, and "such other factors as the Board finds relevant". The Congress has not indicated how the population of the State, or the number of persons covered by the State law, shall affect the Board's determination or given any guide to the Board by which the Board may determine what is the proper cost of the administration of the State law, or any suggestion which may advise or lead the Board in determining what factors should be taken into consideration, or what weight should be given to those factors. Except for the prohibition that the total

certifications shall not exceed the total appropriation, the legislative question of how much of this administration appropriation shall be paid to each State is left to the judgment of the Board.

The Board may not approve the law or certify for payment to a State unless the Board finds that the State law includes these features, namely:— (1) methods of administration which the Board finds to be reasonably calculated to insure full payment of unemployment compensation when due; (2) payment of this compensation solely through public employment offices in the State or such other agencies as the Board may approve; (3) opportunity for a fair hearing before an impartial tribunal before individual claims for compensation are denied; (4) all monies of the State fund are forthwith on receipt to be paid to a person who is not an officer of the State, namely, to the Secretary of the Treasury of the United States, to be merged in the Unemployment Trust Fund of the United States; (5) the expenditure of all money requisitioned by the State agency from this Fund in the payment of unemployment compensation exclusive of expenses of administration; (6) the making of such reports by the State as the Board may from time to time require with no indication by The Congress of the content of the reports on which the Board in the exercise of its legislative judgment may insist; (7) making available to any United States agency charged with the administration of public works or assistance, the name and other information about the unemployment compensation received.

If the Board, after notice and hearing, finds that the State is denying compensation to individuals entitled to it, or is failing, in the opinion of the Board, to comply with any other of the above provisions, the Board is required to stop further payment certification to the State.

A Federal Board thus determines the destiny of the State in the administration of the State's functions, and the State may not keep its own fund except at the penalty of getting no administration assistance such as other States get, and of depriving its citizens of any relief from the impositions later described.

Title VII, Section 701, provides for the establishment of a Social Security Board. This is to perform the duties imposed by the Act, including, among others, "the duty of studying and making recommendations as to the most effective methods of providing economic security through social insurance, . . . " [Sec. 702].

The employers within a State **cannot avoid** the impositions of Section 901 by inducing their legislators to pass **the kind of an unemployment law which the State wants.** The only escape is by conforming to the will of the Social Security Board exercised in conformity to the rules which the men in a legislative body foreign to the State, — that is, The Congress of the United States, and in the Presidency, — have attempted to dictate.

If the legislators of the State bow to the will of the Board, and of the men for the time being in Congress and in the Presidency, eventually the employers of eight or more in industry not within the exceptions pay one-tenth of three percent and the employers in a State whose legislators decline so to yield, pay three percent. The State is a non-conformist unless it sends its entire unemployment fund as fast as received, to the Secretary of the Treasury of the United States regardless of whatever reasonable provisions may have been made by the constitution of the State as to where its funds shall be kept.

The State is a non-conformist if it attempts to have the unemployment benefits payable at once in this period of hardship, without waiting two years.

The State is a non-conformist if it exercises its judgment to be that the benefits should not be paid to those offered a position vacant because of a strike, lock-out, or other labor dispute; or that an employee should in such time of stress work under less favorable conditions than those prevailing in the locality; or that employment should not be degraded because it would involve membership in a company union or temporary non-unionism. The **State legislators are not left free to exercise their judgment** as to the wisdom or folly of these requirements. In the exercise of their sovereign functions they must take the dictates of the men chosen to exercise the governing functions of another sovereignty.

This attempted statute is not one to provide revenue. No one reading the statute alone, in the light of the common knowledge of the day, and of the proclamations of purpose that have gone out through the community, if the reader was willing to impute honesty of purpose to The Congress, could fail to observe from his reading that the imposition in Section 901 is not made to swell the general revenue of the United States. To let that money or its representative equivalent go eventually away from the purposes of the particular statute would be a nauseating breach of government faith. The men in Congress ordered that this Act be named the "Social Security Act." The citizen of the United States, untutored in the refinements of legal phraseology and having, himself, an intellect which works honestly, could entertain no

doubt but that Congress meant by the phrase, "to raise revenue," revenue for the ends set forth in the rest of the Title. If the men in Congress could be polled on the subject it is confidently asserted that no one of them would say that he really meant this levy to swell the general revenues of the United States disconnected with the purposes in this Title. This is obvious from the text of the attempted Act. This is emphasized by the circumstances and reports during its course through Congress. The reports make this explicit.

Section 901 is not to raise revenue at all. It is not in contemplation that it will produce substantial net revenue. It does not provide for any unemployment compensation to anyone. The employers in the non-subservient States must pay the imposition but the employees get no benefits from the imposition either through the States or directly from the United States. No benefits go from the fund. The State must provide these.

If the imposition was intended to produce revenue to furnish unemployment insurance benefits and not as a penalty on recalcitrant States, it would have been devoted to paying unemployment benefits and not to leaving without benefits the unfortunate employees in an unyielding State, which would not succumb to the importunities for this legislation, coming from its own unemployed citizens or dwellers.

This Section says to the States: Do as I tell you, or pay 100% for your recalcitrancy.

The attempted statute formulates an abracadabra to ward off an imposition by the United States. It is formulated in the hope that the sovereign States will submit to exercise their sovereignty to utter the formula in the fear that there is no other way in which certain employers within the States can ward off this heavy imposition.

The Report [No. 964] of Select Committee of Senate to Investigate Unemployment Insurance in the 72nd Congress, 1st Session, in the course of reporting adversely and dealing with the constitutional questions, says: — "We are quite aware there is perhaps a way for Congress to circumvent this constitutional barrier" (p. 49).

"We have already outlined some of the objections which to us are apparent and which have led us to the conclusion that the subject of unemployment insurance is not within the sphere of congressional action" (p. 51).

This same Report calls attention to the fact (p. 30) that the foreign unemployment insurance plans are based on an entirely different concept of the relation of the central state to the people.

The way in which the States have yielded to the pressure of the penalty which the men in Congress have attempted to impose, is well illustrated in the final report of June 4, 1935 to the General Court of Massachusetts [House No. 2225] by the Special Commission appointed to make an Investigation of Unemployment Insurance, Reserves and Benefits. The Resolve of May 24, 1935 reviving the Commission, contained these recitals: —

"*Whereas,* There is reason to believe that the Congress of the United States will, at its present session, and while the general court of this Commonwealth is in session, enact a law providing for federal co-operation with the several states in providing unemployment insurance; and

"*Whereas,* Under the circumstances, better results will be obtained and with no material delay if said special commission formulates unemployment insurance laws for this Commonwealth after the attitude of the federal government on this matter is known; . . . " (Report, pp. 1 and 2).

The report says (p. 3): — " . . . If Congress acts while these committees are studying the bills recommended, the legislators will be in a position to make the provisions conform to Federal requirements. It is the Commission's belief that the recommended draft **will come within any limitations that may be set by Congress.** (Type not heavy in original)

"If the Legislature decides to pass a state law irrespective of what action Congress may take at the current session, it may do so safely because of the safety clause suggested in the final section of the accompanying draft, making the financial provisions of the act operative when the Federal law begins to function or when eleven of the industrial States enact laws similar to the one in Massachusetts, so that the burden on industry in those States will approximate the burden placed on industry in this Commonwealth. The Federal bill as it now stands makes the law operative as of January 1, 1936. If Congress acts later this summer, and this Commonwealth fails to adopt an unemployment insurance law to become operative at the same time as the Federal law, **the Commonwealth may find itself seriously penalized** in respect to its share of any tax or grant distributed to the participating States." (Type not heavy in original.)

When these words were used the Social Security Act, so-called, as hereinbefore stated, had gone through the House and received a favorable report with amendments from the Senate Committee on Finance.

An attempted act which in terms is not to be effective if the attempted act of Congress to penalize recalcitrant states is not effective, is a legislative declaration that public policy requires that Massachusetts have no such act by itself.

If each one of the forty-eight sovereign States would submit to the dictation so that the net general revenues

of the United States were not increased at all, the end sought by the men in Congress and in the Presidency would be accomplished, completely. In this sense, every dollar from this imposition, which gets into the Treasury, measures, by so much, the short-comings of the device adopted to accomplish the end for which the imposition is made. Any money received spells failure pro tanto.

The enthusiasm of the men in Congress in formulating this abracadabra has led them to seek to force a State for an avenue of escape from the penalty, to enact apparent legislation by which the sovereign State, in this extremity, would violate not only its own constitution but also the Constitution of the United States.

The State act upon which the men in Congress insist, as the only way to avoid the penalty, is **an excessive minimum wage law.** The attempted law says to an employer: — Even if you pay a reasonable wage and a living wage, you must as a minimum wage give also an unemployment insurance policy. It is not enough that you have paid your employee a high enough wage so that he can buy himself unemployment insurance or save up for periods of unemployment. He may waste that. We fix as one item of the minimum wage which you must pay, an insurance Policy against moneyless unemployment. It makes no difference that the Supreme Court has said that a minimum wage law is unconstitutional. That is the kind of a law that we enact.

The imposition attempted by Section 901 is not one to provide general revenue.

THE CONSTITUTION OF THE UNITED STATES

"WE the people of the United States, in order to form a more perfect union, establish justice, insure domestic tranquility, provide for the common defence, promote the general welfare, and secure the blessings of liberty to ourselves and our posterity, do ordain and establish this Constitution for the United States of America.

ARTICLE I.

Sect. 1. All legislative powers herein granted shall be vested in a congress of the United States, which shall consist of a senate and house of representatives."

. . .

"Sect. 8. The congress shall have power — to lay and collect taxes, duties, imposts and excises, to pay the debts and provide for the common defence and general welfare of the United States; but all duties, imposts and excises shall be uniform throughout the United States; — to borrow money on the credit of the United States; — to regulate commerce with foreign nations, and among the several states, and with the Indian tribes; — to establish an uniform rule of naturalization, and uniform laws on the subject of bankruptcies throughout the United States; — to coin money, regulate the value thereof, and of foreign coin, and fix the standard of weights and measures; — to provide for the punishment of counterfeiting the securities and current coin of the United States; — to establish post offices and post roads; — to promote the progress of science and useful arts, by securing for limited times to authors and inventors the exclusive right to their respective writings and discoveries; — to constitute tribunals inferior to the supreme court; — to define and punish piracies and felonies committed on the high seas, and offences against the law of nations; — to declare

war, grant letters of marque and reprisal, and make rules concerning captures on land and water; — to raise and support armies, but no appropriation of money to that use shall be for a longer term than two years; — to provide and maintain a navy; — to make rules for the government and regulation of the land and naval forces; — to provide for calling forth the militia to execute the laws of the Union, suppress insurrections, and repel invasions; — to provide for organizing, arming, and disciplining the militia, and for governing such part of them as may be employed in the service of the United States, reserving to the states respectively, the appointment of the officers, and the authority of training the militia according to the discipline prescribed by congress; — to exercise exclusive legislation in all cases whatsoever, over such district (not exceeding ten miles square) as may, by cession of particular states, and the acceptance of congress, become the seat of the government of the United States, and to exercise like authority over all places purchased by the consent of the legislature of the state in which the same shall be, for the erection of forts, magazines, arsenals, dock yards, and other needful buildings; — and to make all laws which shall be necessary and proper for carrying into execution the foregoing powers, and all other powers vested by this constitution in the government of the United States, or in any department or officer thereof."

"Sect. 9. . . .

No capitation, or other direct tax, shall be laid, unless in proportion to the census or enumeration hereinbefore directed to be taken. . . ."

"ARTICLE VII.

The ratification of the conventions of nine states, shall be sufficient for the establishment of this constitution between the states so ratifying the same."

AMENDMENTS

"Art. V. No person shall . . . nor be deprived of life, liberty or property, without due process of law; nor shall private property be taken for public use, without just compensation."

"Art. IX. The enumeration in the constitution, of certain rights, shall not be construed to deny or disparage others retained by the people."

"Art. X. 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."

"Art. XVI. The congress shall have power to lay and collect taxes on incomes, from whatever source derived, without apportionment among the several states, and without regard to any census or enumeration."

SECTION 901 IS NOT WITHIN THE POWERS OF THE CONGRESS UNDER THE CONSTITUTION OF THE UNITED STATES.

There are three independent reasons for this, each sufficient in itself without any assistance from the other, namely: —

1. The imposition is not an excise in character but is a capricious confiscation.

2. The imposition is not uniform throughout the United States and is capricious.

3. The imposition is not to pay the debts and provide for the common defense and general welfare of the United States.

Sections 901, 804 and 802, if enforcible, would take from a limited class of employers property, — that is, money, — to the extent of 9% of their pay rolls and put that money into the Treasury of the United States

There are only two ways in which by due process of law the Nation may take property from the peoples of the several States to put into the Treasury of the Nation, whether ear-marked there for a particular purpose or available for general purposes. One is, by eminent domain; and the other is, by taxation. For the Nation to take property not in conformity to the requirements for eminent domain or taxation is to take it without due process of law and without just compensation in violation of the Fifth Amendment.

It is to be assumed that no claim will be made that these sections could be supported as an exercise of eminent domain.

They profess expressly to proceed under the taxing power.

The Congress has no powers of taxation except those given by the Constitution. Therein, the only enabling power is that "to lay and collect taxes, duties, imposts and excises, to pay the debts and provide for the common defence and general welfare of the United States; but all duties, imposts and excises shall be uniform throughout the United States".

This power is curtailed by the prohibition against any capitation or other direct tax unless in proportion to the census.

The Sixteenth Amendment relieves from this requirement where the tax is laid on incomes.

The impositions under Section 901 do not conform to the requirements for an excise or any other tax, for the three reasons above stated.

1. The imposition is not an excise in character but is a capricious confiscation

The so-called Social Security Act is not social. It is anti-social. It attempts to put Society's burden on a fraction capriciously picked. It does not give vested security. It is not an Act of The Congress within its powers under the Constitution.

It is an attempt to transfer the State's burden to care for the unemployed within the State by taxes on wealth, to a fraction of the employers within the State who are faultless of the production of unemployment. Reason may be searched in vain for a justification, or even for an excuse, for relieving wealth, whether in capital or in income, from taxation to meet this burden which belongs on the State and in order to be borne socially should fall on the wealth within the State. The attempt is not social. It plays into the hands of the property-owning class.

Herein is the insurmountable distinction between an unemployment benefit and a workmen's compensation allowance for industrial accidents. These are directly the product of the industry chosen to cover its own product. Ceasing to be employed is not the product of the calling in which a man is engaged. He comes to unemployment just as soon if he works as a farm laborer, or as a domestic servant, or sooner if he never can work at all. Before the Workmen's Compensation Acts became the law, employers in industry were by the common law in a large number of cases virtual insurers. They were liable without limit for the negligence of their agents however carefully chosen. The new law merely substituted for the common law — an insurance liability more extended in scope and more limited in amount of benefits.

Even so, an able four-ninths of the Supreme Court deemed it beyond legislative power.

> *Mountain Timber Co.* v. *State of Washington*, 243 U. S. 219, 246.

This is not to be overlooked in marking the limits of the principle which the majority has settled. The principle itself has no relation to the question whether it is the wealth of the whole community or the non-causing employer or the non-causing industry which should bear the burden of providing for those who have gone into unemployment.

Many an employer has no wealth, and has liabilities equal to all his assets. It is capricious to pick the employer to pay what wealth should pay. A property tax, an income tax, an excess profits tax, a profits tax, a surplus tax, a tax on property in manufacture, in trade sale, in retail sale, can find a support which is wholly lacking for an attempted tax on pay roll out-go in the activities of manufacturing, transportation, and commerce.

This attempt would be capricious if it extended the imposition on all employers. There is an additional caprice in picking on a fraction of them; but this can be discussed better when dealing with lack of uniformity, in the succeeding section of this brief.

The attempt is capricious in seeking to subject employers to a minimum wage law notwithstanding the decisions in *Morehead* v. *People of the State of New York*, 298 U. S. —, 56 S. C. R. 918, 57 S. C. R. 4, and *Adkins* v. *Children's Hospital*, 261 U. S. 525. The attempted Act is in essence **an excessive minimum wage law.** It says to an employer: — Even if you pay a reasonable wage and a living wage you must as a minimum wage give also an unemployment policy. It is not enough that you have paid your employee a

high enough wage so that he can buy himself protection from unemployment or save up therefor. We fix as one item of the minimum wage which you must pay, an insurance policy for a period of unemployment.

Even if what has been said heretofore in this section were not so, and this imposition were not capricious, still, it would not be an excise or other tax within the powers of The Congress to impose.

It seems evident that it is no kind of a tax within the powers of The Congress if it is not an excise. The attempt to levy it is as an excise.

The attempted imposition is not an excise within the meaning of that word as it was adopted in 1788 and remains in the Constitution.

"Excise" had a well understood meaning in England and in the Colonies for at least one hundred and forty years before it was used in the Constitution. It meant an inland levy on selected tangible property, or upon the owners of it, because of the activity in which the property was moving. The motion might be manufacture; it might be intermediate sale; it might be ultimate sale commonly amounting to consumption. The antithesis was the direct tax upon property in general, certainly land, when taxed on a rate fixed by its static appraised capital value and possibly when measured by its annual unwrought return in rent, income or products, and, debatably, upon personal property so appraised or judged.

Both the direct tax and the excise were prominently property taxes, — one regardless of its activity or inactivity, and the other taking that activity into consideration.

Dr. Johnson, in the Third Edition of his Dictionary in 1766, defined "excise" as "a hateful tax levied upon commodities, and adjudged not by the common judges of property". In the same time and place, he defined

"commodity" as "interest, advantage, profit, convenience of time or place, wares, merchandise".

"Commodity" suggests as the principal thought, merchandise. If a town meeting were urged to place a tax on commodities, the voters attending would think of whisky, ale, tea, and not of incorporeal rights.

Adam Smith in 1776, in "The Wealth of Nations", says: "The duties of excise are imposed chiefly upon goods of home produce destined for home consumption. They are imposed only upon a few sorts of goods of the most general use. There can never be any doubt either concerning the goods which are subject to those duties, or concerning the particular duty which each species of goods is subject to. They fall almost altogether upon what I call luxuries, excepting always the four duties above mentioned, upon salt, soap, leather, candles, and, perhaps, that upon green glass."

The Massachusetts constitution of 1780 indicated direct taxes to be the normal source of revenue but gave the legislature authority to impose "reasonable duties and excises, upon any produce, goods, wares, merchandise, and commodities, whatsoever". It is submitted that these words "reasonable" and "produce" and those following it were not set out as limitations on the kinds of excises. They were there as clarifications of the intrinsic meaning of the word. "Commodities" was used in association with other words descriptive of tangible things. No intention to add more by the word "Commodities" is to be inferred. "Merchandise" and "wares" were already included in "goods". There is no more tautology in the addition of "commodity" to mean no additional class than in the addition of "merchandise" and "wares" to "goods". These two words could not add a class which was not already covered by "goods".

The Constitutional Convention of New York in 1788 urged its representatives to obtain several amendments to the Constitution one of which was, "That the Congress do not impose any excise on any article (ardent spirits excepted) of the growth, production, or manufacture of the United States, or any of them." (1 Elliot's Debates on the Federal Constitution, p. 329.) These were the words of men who understood excises as falling on tangible things.

In the Massachusetts Convention in 1788, Mr Symmes, in speaking to this phrase, said: — " . . . Congress may lay an impost on the produce and manufactures of the country, which are consumed at home." (2 Elliot's Debates, p. 72.)

Luther Martin in 1788 said: — "By the power to lay excises, — a power very odious in its nature, since it authorizes officers to go into your houses, your kitchens, your cellars, and to examine into your private concerns, — the Congress may impose duties on every article of use or consumption, on the food that we eat, on the liquors that we drink, on the clothes that we wear, the glass which enlightens our houses, or the hearths necessary for our warmth and comfort." (1 Elliot's Debates, p. 368.) If this forceful gentleman had conceived of the idea that Congress could lay an imposition on the natural universal right to employ a consenting wage earner or the natural universal right of the wage earner to obtain wages by the consent of the employer, he would have mentioned it at this point. Evidently he conceived of an excise as an imposition on tangible property.

In the New York Convention in 1788, Chancellor Livingston said: "We may naturally suppose that wines, brandy, spirits, malt liquors, &c., will be among the first subjects of excise." (2 Elliot's Debates, p. 341.) He said this, when speaking to the proposed

amendment to prohibit excises on manufactures of the United States. He was talking of an imposition on tangible property.

In the Virginia Convention in 1788, Mr. Nicholas said: "We are next terrified with the thought of excises. . . . They are a kind of tax on manufactures." (3 Elliot's Debates, p. 243.)

In the "Debates in the Congress of the Confederation" in 1783, Mr. Wilson, in discussing the probability of an excise, said that wine and imported spirits had borne a heavy excise in other countries and might be adopted in ours; that coffee is another object which might be included. (5 Elliot's Debates, p. 40.)

Hamilton speaks of the excise as "Taxes on Articles of Consumption". (The Federalist, No. 21, Dec. 12, 1787, p. 182.)

So says Ellsworth in the Connecticut Convention (2 Elliot 192). It is the property which is taxed, and not the act of consuming it. The short-cut expression "consumption taxes" generally means taxes on goods designed for early consumption and manufactured, sold, and bought for that purpose (The Federalist, p. 267, 275).

Gallatin speaks of it as an excise on "consumable commodities". (Writings of Gallatin, p. 73) Evidently he means by "commodities" tangible articles. Men do not "consume" incorporeal rights.

Hume, in his history of England published approximately thirty years before the adoption of the Constitution, in speaking of the situation at the time of the long Parliament when the excise novelty came in, said: — "So extremely light had government hitherto lain upon the people, that the very name of *excise* was unknown to them; and among the other evils arising from these domestic wars was the introduction of that *impost* into England. The parliament at Westminster

having voted an excise on beer, wine, and other commodities, those at Oxford imitated the example and conferred that revenue on the King." (5 Hume, Ed. of 1861, p. 269.) It was an imposition on these commodities used in the sense of goods. It was an impost laid on tangible property.

Clarendon in the History of The Rebellion in England (Vol. II, p. 453) said substantially the same. He also says "This was the first time that ever the name of payment of excise was heard of or practised in England."

Commodity was used in the same sense that in later days it has been used in transportation. A commodity rate as distinct from a class rate, is a rate on a particular kind of merchandise.

Blackstone, twenty-two years before the adoption of the Constitution, after speaking of other forms of taxation, said: "Directly opposite in its nature to this is the excise duty; which is an inland imposition, paid sometimes upon the consumption of the commodity, or frequently upon the retail sale, which is the last stage before the consumption." (1 Blackstone, p. 308.)

Evidently "commodity" is here used in the sense of tangible property.

Encyclopedia Britannica, in the Third Edition, 1797, gives Blackstone's definition as still the definition.

Even more convincing than the contemporary definitions for 1788, are the many usages exemplary of the real character of an excise as the word then was used in the communities contracting by the Constitution.

Overwhelmingly, and it would seem safe to say universally, the imposition was on tangible property usually articles of merchandise for current use, often described as "commodities".

Early British Excises

What has been called the first British excise act — that of March 28, 1643, imposed an impost on articles of consumption listed in a schedule, such as ale, beer, cyder, perry, strong waters, and other described articles.

In January, 1644, this was extended to other "commodities made or growing in England not formerly charged with excise". It was these classes of merchandise that were called "commodities".

They were indifferently described as "commodities" and as "goods".

On the return of Charles, the laying of excises on selected goods continued. It was on commodities, — meaning, by that term, merchandise — in manufacture, trade or consumption.

Meanwhile, the term "excise" had come to get a meaning in the Colonies, by use there.

Excises in New York before 1788

By October 23, 1713, New York had "An act for laying a duty on Goods sold by Auction, vendue or out-cry." (Vol. I of "The Colonial Laws of New York from the Year 1644 to the Revolution, Transmitted to the Legislature by the Commissioners of Statutory Revision, Pursuant to Chapter 125 of The Laws of 1891", p. 789.)

May 16, 1691, there had been laid "an Excise upon all Brandy, Rum and other Distilled Liquors to be retailed within this Province under fifteen gallons" (Vol. I, same publication, p. 248). This act included an excise on other wines and liquors.

December 23, 1775, there is "An Act to Regulate the Collecting the Duty of Excise on Strong Liquors retailed in this colony". (Vol. IV, same publication, p. 1.)

Other similar acts laying an excise on liquors followed from this time to 1784. (Vol. I, Laws of the State of New York passed at Sessions of the Legislature held in the Years 1775 to 1788, p. 109, 660.)

December 1, 1756, an excise on tea was imposed. (Vol. IV, Colonial Laws, *supra*, p. 105.)

The expression "excise" in New York in this period appears to be confined to inland duties or imposts upon commodities in the sense of "goods".

Excises in Pennsylvania before 1788

February 18, 1777 there is "An act authorizing the Collectors of the excise due and to become due on Spirituous Liquors to collect the same and directing the Mode of obtaining Tavern and other Licenses for other purposes therein mentioned." (IX Statutes at Large of Pennsylvania, 1776–1799, p. 55.)

Excises in Massachusetts before 1788

Nearly contemporaneously with what has been asserted to be the first excise law in England, the Colony of New Plymouth in 1646 enacted "That these excises shalbe imposed to be payd by all that are lycensed to retayle wines strong water and y^{t} sell Tobaccoe as followeth viz^{t} upon every gallon of Spanish wine eight pence . . . " This is followed by a list of other strong waters, wines, tobaccos, and certain fish. This excise was on the "goods". (Plymouth Colony Laws, 1836, p. 85.)

June 24, 1692, the Massachusetts Colony enacted that there may be paid "an excise upon all wines, brandy, rhum and other distilled liquors, perry, beer, ale, cyder, and metheglin, that shall be sold [by] retail" to be paid by the retailer (Vol. I, Acts and Resolves of the Province of Massachusetts Bay, Chapter 5, p. 32).

Thereafter follow many acts, imposing an excise on "goods" (Vol. I, same, pp. 57, 272, 391, 475, 527, 662, 738; Vol. II, same, pp. 203, 849; Vol. III, same, pp. 495, 568, 750; Vol. IV, same, p. 219).

In this Colony it would appear by investigation of the many laws in the four volumes that the term "excise" was confined to this class of taxes.

The last reference above cited from the Laws of The Colony was in the year 1759.

The usage continued in the State. The Act of November 1, 1781, Chapter 17, was "An Act laying certain Duties of Excise on certain articles therein mentioned" (Vol. I, Laws of Massachusetts, p. 60). Others in like tenor followed in 1782 and 1783 (Same volume, pp. 62, 78, 85; Laws and Resolves of 1782, Chapter 33, p. 92).

It is respectfully submitted that the prior and contemporaneous utterances overwhelmingly tend to the conclusion that an excise was in character an inland duty or impost on a tangible commodity in manufacture or in sale either in the course of trade or for consumption. It was not cut out of the activity. It was cut out of the goods. It did not rest on the activity. It rested on the goods, and was payable for the quantum of goods by the manufacturer, the seller, or the purchaser of them.

This "page of history is worth a volume of logic" (Mr. Justice Holmes, 256 U. S. 349).

If this position is wrong, and the term "excise" included an imposition on something other than selected tangible property or on the owner or handler of it, because of the property, it becomes necessary to define what other subject it covered according to the common meaning of the day. It is respectfully submitted that it is inconceivable that the intelligent people of the common run in the thirteen States could have under-

stood that the word included an imposition on the state of being of exercising the universal natural right to employ, for wages, other men who consented to that employment, in a manner not injurious to the public good.

Supporters of this tax have urged that it is a tax upon a privilege. **There is no privilege.** The state of being on which the imposition is made is not derived from government or from public authority in any manner. Privilege contrasts with common natural opportunity. Contrast the privilege to do business without liability for debts, as in corporate form. Any dictionary of common meanings shows that "privilege" as used in this context means something not of common right.

The derivation confirms this. Privilegium was a law against or in favor of an individual. It was compounded of lex, a law, and privus private.

There is nothing here present, even of an incorporeal nature, to satisfy the term. If this is a privilege, — breathing, sleeping, or holding decorous discussion of the weather may have an excise imposed on it equally well.

It is believed that no statute, of the United States or of any State, a party to the Constitution, lends the slightest color to the contention that there is something here which is subject to excise as that word is used in the Constitution.

If this imposition is not in character an excise, it is submitted that there is no occasion to go further. It is announced in the attempted Act as an excise tax. It does not conform to the requirements for a valid tax of any other kind, and it is not an excise.

There must be some limit to what is an excise.

Presumably the having of lungs with which to breathe, and nerves which permit sleep, will be conceded to be something which Congress cannot excise,

and that if an attempted tax thereon could be supported it must meet the requirements of a capitation tax. On the other hand, a whisky tax is a foremost example of an excise. Between the two there is a boundary line which the men in Congress may not cross, and on crossing which they will not be acting as Congressmen. This case involves no necessity to set that boundary line. It is sufficient, if the Court observes that this particular imposition is beyond the bounds.

The word "excise" had a meaning in 1788, when the contracting thirteen States used it in their compact. For present purposes, that is the meaning which it has today, and the only meaning which it can have. Neither the Court nor The Congress is empowered to change that meaning by interpretation or expansion. Such procedure would mutilate the contract which was made.

Undoubtedly properties of modern times — as, for example, automobiles, — never thought of in 1788 may come within the meaning which the word had in 1788. But, if the state of being, of having individuals in a man's employ, — a thing of a character which existed in 1788, — did not then come within the meaning of the word, it is not there now.

The unlettered experienced carpenter set to saw a pile of boards to a given length, has found that if he saws each from the last one before, in most cases, by a process of negligible errors, he has created a grave one, and that the boards of his later sawings are wrong. Accordingly, he has adopted the policy of sawing them all by the application of his first one, which he marks as a pattern. It is not presumptuous to urge the worth of this example of the unlettered carpenter upon this cultured and enlightened court.

The meaning in the Constitution of the word "excise", is the meaning that it had in 1788 in common

usage of the common run of men in the thirteen contracting States who made the contract in State conventions of representatives chosen by those men of the common run. Judges and lawyers and statesmen formed a very small minority of the common men in the thirteen contracting groups. The understanding of the eminent and revered draftsmen and promoters of the Constitution is of no value to fix the meaning in any respect at variance with the common usage. They were not the ones who made the contract.

The tax here attempted is novel. A brief on it may seek first with reason the Court's own application of the Constitution to the proposal, in the exercise of its own skillful judgment on an original question, regardless of what other Justices have said at other times. Decorum does not require that the Justices be approached on this novel question as a congregation of mere reporters of the language used by other Justices, in disposing of other questions.

Turn next from this appeal to the original judgment of this Court on this novel question. The Court now is asked to recall and to observe that nowhere in the precedents of the prior decisions and language of the Supreme Court of the United States is there any indication that this attempted tax is within the powers of The Congress, and that there is much in those decisions and in that language to show that such a tax is not within those powers.

An attempted act may be clearly without the powers of The Congress and a particular litigant nevertheless may have no right to invoke the judgment of the Supreme Court of the United States.

Massachusetts v. *Mellon*
Frothingham v. *Mellon* } 262 U. S. 447.
Florida v. *Mellon*, 273 U. S. 12.

Consequently, the fact that the validity of appropriation of the money of the United States in questionable ways has not been questioned before that Court, carries no implication that the appropriations were lawful, or approved by the people of the United States.

It may well be, also, that many unlawful appropriations have been thought so favorable to those who might otherwise have questioned them, that they would discourage any attempt to prevent them.

It is only in the last twenty years that inland taxes of the United States have become so burdensome, that it has been worth the extensive effort of many people, to prevent unlawful appropriations.

A person in terms obliged by an attempted invalid act to pay money to go into the Treasury of the United States, has a right to a decision.

United States v. *Butler*, 297 U S. 1.

In considering the validity or not of a novel tax, attempted, the Court is not foreclosed from exercising its own judgment, by the misunderstandings of The Congress or of the Supreme Court of the United States, even if they have persisted unabated for a century.

Pollock v. *Farmers' Loan and Trust Co.*, 157 U. S. 429.

An imposition on a particular class of tangible property, in manufacture, use, gift, bequest, or sale, may be sustained as an excise if it meets the other constitutional requirements, including that the end is to provide revenue for the general welfare of the Government of the United States and that the selection is not capricious or the tax anti-uniform.

Magnano v. *Hamilton*, 292 U. S. 40.
Bromley v. *McCaugn*, 280 U. S. 124.

N. Y. Trust Co. v. *Eisner*, 256 U. S. 345.
Billings v. *United States*, 232 U. S. 261.
McCray v. *United States*, 195 U. S. 27.
Thomas v. *United States*, 192 U. S. 363.
Cornell v. *Coyne*, 192 U. S. 418.
Spreckels Sugar Ref. Co. v. *McClain*, 192 U. S. 397.
Patton v. *Brady*, 184 U. S. 608.
Treat v. *White*, 181 U. S. 264.
Knowlton v. *Moore*, 178 U. S. 41, 84.
Nicol v. *Ames*, 173 U. S. 509.
Springer v. *United States*, 102 U. S. 586.
Railroad Co. v. *Collector*, 100 U. S. 595.
Scholey v. *Rew*, 23 Wall. 331.
Veazie Bank v. *Fenno*, 8 Wall. 533.
Pacific Ins. Co. v. *Soule*, 7 Wall. 433.
License Cases, 5 Wall. 462.
Hylton v. *United States*, 3 Dallas, 171.

Important documents, and paper, particularly commercial paper are tangible and valuable because of that fact.

Patton v. *Brady*, 184 U. S. 608, 617.
Cook v. *Pennsylvania*, 97 U. S. 566.

It has been held in at least one case that a franchise is a sufficiently palpable kind of property to permit an excise of it.

Flint v. *Stone Tracy Co.*, 220 U. S. 107, 155, 162.

A tax does not cease to be an excise and become an income tax, merely because it is placed on income, if that is under the circumstances a reasonable criterion for the rate or amount of tax which should be imposed on that property. Income received is property.

Flint v. *Stone Tracy Co.*, 220 U. S. 107.

The Supreme Court of the United States never has held that the natural harmless state of being or natural harmless conduct privileged or unprivileged is subject to excise. Where the special privilege was a franchise derived from government and long recognized as itself a piece of property, although intangible, and produced property, *Flint* v. *Stone Tracy Co.*, permitted its excise.

This does not suggest that the state of being an employer with the consent of the employee in a common harmless calling is a privilege, or as such or otherwise, is property or anything but a natural universally attainable state not derived from government.

These decisions of the Supreme Court of the United States are supported by the prevailing and confirmed interpretation of the word "excise" by the Supreme Judicial Court of Massachusetts throughout the existence of the State, and recently with emphasis, that it is an imposition on property in industrial or trade movement whether the word be used in the Constitution of the United States or in the constitution of the Commonwealth of Massachusetts.

> *Opinion of the Justices in 1933*, 282 Mass. 619, *and many cases therein cited.*

The natural operation of employing with the consent of the employee, is not a privilege or any other type of property, tangible or intangible, which may be subjected to excise.

> *Opinion of the Justices*, March 27, 1929, 266 Mass. 592, 595, *semble.*

" . . . we are not aware of any case in which an excise tax is shown to have been imposed upon the use of one's hands in simple manual labor, or upon the making of a simple contract, without the use of any auxiliary method, device, or machinery that might be

availed of to establish one's rights under the government in courts and elsewhere. . . "

Opinion of the Justices, Knowlton, Morton and Braley, in 1908, 196 Mass. 624.

"In this Commonwealth, in dealing with the term 'commodity,' it has been held that an ordinary 'agreement or mode of transacting business' is not within its meaning, and cannot be made the subject of an excise tax. . . " (Same page)

" . . . the word 'is not broad enough to include every occupation which one may follow in the exercise of a natural right, without aid from the government, and without affecting the rights or interests of others in such a way as properly to call for governmental regulation'." (Same page)

Property may not be taken by government from one for another even for public advantage or welfare without just compensation.

Louisville Bank v. *Radford,* 295 U. S. 555, 601, 602.
United States v. *Butler,* 297 U. S. 1.
Railroad Retirement Board v. *Alton R. R. Co ,* 295 U. S. 330.

It makes no difference that it is done under the guise of a tax or is the product of a tax.

Loan Association v. *Topeka,* 20 Wall. 655.
Calder v. *Bull,* 3 Dallas, 386.
Miles Planting Co. v. *Carlisle,* 5 Ct. of Ap. D. C., 138, 146.

Even if a tax is levied expressly for the purpose of obtaining general revenue, if it appears "in the light of its history and of its present setting" that it is for a

purpose which the Constitution does not permit the law-making body to accomplish, the tax is bad.

> *Grosjean* v. *American Press Co. Inc.*, 297 U. S. 233, 250.

Heretofore, *Spreckels Sugar Refining Company* v. *McClain*, 192 U. S. 397, has been put forth for the defendants Helvering and Welch as their main authority to support the contention that the attempted levy at bar is an excise within the Constitution. This decision contains nothing at variance with the definition of the word "excise" for which the plaintiff contends. The tax in the cited case (p. 398) was expressly "upon the gross annual receipts, in excess of a named sum, of every person, firm, corporation or company carrying on or doing the business of refining sugar". The sole question was whether this was a direct tax requiring apportionment. It was not. It was on receipts of property. There is nothing in the case even remotely to suggest that an excise may be laid on the state of being of having employees.

Therefore, however high the motives, this attempt by the men in Congress to take from a fraction of employers the money to be given to the Treasury of the United States to go to other men on their going out of employment, is not the levying of an excise but is a capricious confiscation.

2. The imposition is not uniform throughout the United States and is capricious

This imposition is capricious and not uniform throughout the United States whether it be laid to produce general revenues of the Government of the United States or to provide the funds with which to care for the unemployed.

If general revenue is the purpose of the attempted imposition, there is no basis in reason for picking out certain faultless employers to bear the whole burden so as to relieve wealth generally from taxation to furnish the revenue. The time-honored example of a tax on red-headed men only, is no more beyond the bounds of reason than is this attempted imposition.

If the purpose is unemployment benefits, there is no more reason for removing the burden from wealth to the shoulders of possibly propertyless employers who are not the cause of the unemployment.

Even if employers were selected to bear the burden, still, the attempted imposition would be capricious and anti-uniform, because there is no attempt to cover all in the same class.

If this attempted imposition is an excise, the subject matter excised is the state of being of having employees. In order to be uniform throughout the United States, it must cover everyone having that state of being throughout the United States. It is not contended that uniformity of a reasonable excise would be defeated by reasonable exemptions, reasonably selected, or that reasonableness is defeated by the fact that the Court can think of a wiser way of doing it.

In the present imposition, all three elements of reasonableness are lacking.

If unemployed men ought to have a benefit, they ought to have it because of that fact and not because of the type of employment in which they have been

engaged. If employers ought to pay an excise for the state of being of having employees, they ought to pay it when they have that state of being.

The benefit and the burden, are capriciously limited in this attempted imposition.

It is the known fact that the imposition upon non-agricultural labor is equivalent to confining the imposition to certain States to the approximately complete exclusion of other States. It is capricious to deny the benefits to unemployed farm laborers and to relieve their employers from an imposition placed on other employers. Industry and trade do not produce unemployment any sooner than does agriculture.

If the state of being, which is attacked, is not related to the particular benefits to the attacked class, but is for general revenues, that selection among the States is wholly capricious and anti-uniform. Stated in another way: — It is wholly capricious and anti-uniform to cast the general expense of maintaining the government of the United States, upon this state of being of a part only of those who have that state of being, in the particular States. The non-inclusion of the vast territory of agricultural labor and labor performed in groups of seven and under, is both capricious and anti-uniform and bears no relation to the end of acquiring general revenues for the Treasury.

The failure to include employments of seven and under cannot escape the true charge of capriciousness by the plea of administrative reasons. In the very next preceding title, Title VIII sections 801 and 804, these very groups are included down to employers of one employee. These groups, as much as others, require help in times of unemployment and their employers are no worthier of escape from the burden.

The imposition is capricious and anti-uniform in another respect. It is imposed 100% on the described state of being, of those in a State which fails or declines to exercise its sovereign powers to put the burden of its poor relief upon the shoulders of particular employers already in danger of crumbling under the weight of other impositions but whom, nevertheless it is the will of the men in Congress and in the Presidency, that the sovereign State should select as the body, to the exclusion of others, to bear the public burden, in dollars and cents, resulting to the whole community within that State from the tragedy of unemployment within that community; when, at the same time, an imposition of only 10% is made on the same condition of being, in States which subserviently exercise their sovereign powers as dictated by the men in Congress and in the Presidency, irrespective of the disposition or beliefs of legislators within those sovereign States.

Thus far, the matter considered is the text of the attempted statute read in the light of general information. The Court is asked to consider now the particulars surrounding the attempted passage of the Act.

June 28, 1934, the President, by Executive Order No 6757, created the Committee on Economic Security and provided further for a technical board and staff for the same.

In November, 1934, the President appointed an Advisory Council on Economic Security.

January 15, 1935, the Committee on Economic Security reported to the President.

January 17, 1935, the President transmitted this report with his approval to The Congress in a special message urging prompt action.

This report covers fifty pages dealing with the gravity of the problems of economic want and insecurity. It recommends a general outline for legislation by The Congress and by the States, broad enough to include what later entered into the so-called Social Security Act. Nowhere does it contain any suggestion that the proposed Federal tax shall be to provide unemployment benefits or revenue for the general purposes of the Treasury of the United States. The tax proposed is as a measure to penalize any State that fails or declines to enact legislation to require compulsory contributions for unemployment benefits. The penalty is to be sufficiently large to offset the burden on complying States, but the non-complying States are not to get benefits in return for the tax which they pay.

March 15, 1935, the Committee on Labor of the House submitted a report (No. 418) to accompany the Lundeen Bill (H. R. 2827) to provide among other things for unemployment insurance by the United States by taxes by the United States on higher incomes. The Report says: — " . . . Technicians and scientists agree that the productive capacity of the United States is equal to a far greater measure of security and to far higher standards of living than have yet been established; and science and invention promise to expand this productivity to a higher level if the productive system can be freed from the recurrent burden of industrial depression. [Para.] (5) This, however, cannot be achieved merely by rearranging workers' earnings by taxing pay rolls for reserves for future unemployment. The first step is compensation for insecurity by taxing higher incomes, not pay rolls."

January 17, 1935, Senator Wagner presented to the Senate [S. 1130] and Representatives Doughton and Lewis presented to the House [H. R. 4120] bills incorporating the President's recommendations. These

were immediately referred to the Senate Committee on Finance and the House Committee on Ways and Means, respectively.

Committee hearings were held on these bills.

April 4, 1935, Representative Doughton introduced a bill [H. R. 7260] which on that day was referred to the Ways and Means Committee.

The next day, the Committee reported [House Report 615, 74th Congress, 1st Session, April 5, 1935] the bill which the Congressmen later purported to pass.

April 11, 1935, the House resolved into Committee of the Whole House on the State of the Nation, for consideration of the bill.

April 17, 1935, the members of the House purported to pass the bill.

In May, 1935, the Senate Committee on Finance considered the bill and reported favorably with amendments [Senate Report No. 628, 74th Congress, 1st Session, 1935].

June 19, 1935, the Senate purported to pass the bill with the amendments which had been reported by its Committee.

The matter went to Conference, and was reported back by the Conference Committee.

August 8, 1935, the members of the House purported to pass the Act.

August 9, 1935, the Senators did the same.

August 14, 1935, the President approved, as Public Act No. 271 of August 14, 1935, 74th Congress, 1st Session, 1935.

The Report No. 615 submitted April 5, 1935 by the Committee on Ways and Means, which recommended the enactment of the particular law in the terms of the so-called Social Security Act, contains a number of significant statements as to its purpose and expected effect.

The Report contains no suggestion that the Act is designed to raise general revenue. It is directed throughout to a consideration of the needs of relieving against distress due to the various conditions covered by the various Titles.

> "Thus far in the depression, we have merely attempted to relieve existing distress, but the time has come for a more comprehensive and constructive attack on insecurity. The foundations of such a program are laid in the present bill."
>
> "Work for the employables on relief is contemplated in the work-relief bill; a second vital part of the program for security is presented in this bill. The bill is designed to aid the States in taking care of the dependent members of their population, and to make a beginning in the development of measures which will reduce dependency in the future. It deals with four major subjects: Old-age security, unemployment compensation, security for children, and public health. These subjects are all closely related, all being concerned with major causes of dependency. Together they constitute an important step in a well-rounded, unified, long-range program for social security." . . . .
>
> "Unemployment is an even more prevalent cause of dependency than old age; in fact, it is the most serious of all hazards confronting industrial workers. . .
>
> " . . . It should be clearly understood that State unemployment compensation plans made possible by this bill cannot take care of the present problem of unemployment. They will be designed rather to afford security against the large bulk of unemployment in the future." . . ,

" . . . To provide something better than relief on a needs basis for the unemployed of the future, the establishment by the States of unemployment compensation systems is urgently to be desired. Titles III and IX seek to encourage States to set up such systems and to keep them from being handicapped if they do so." . . .

" . . . Unemployment compensation is greatly preferable to relief because it is given without any means test. It is in many respects comparable to workmen's compensation, except that it is designed to meet a different and greater hazard." . . .

" . . . In this country it has been endorsed by numerous Federal and State commissions and committees, but prior to this year only one State enacted such a law, and this came into operation less than a year ago.

"The failure of the States to enact unemployment insurance laws is due largely to the fact that to do so would handicap their industries in competition with the industries of other States. The States have been unwilling to place this extra financial burden upon their industries. A uniform, Nation-wide tax upon industry, thus removing this principal obstacle in the way of unemployment insurance, is necessary before the States can go ahead. Such a tax should make it possible for the States to enact this socially desirable legislation." . . .

(This is equivalent to saying that the Nation may tax the States which do not want this system of relief and not that these States ought to be taxed to provide general revenues for the United States. It is evident also that the respective legislatures of the States including that of Massachusetts do not deem it in the interest of the State to have such an act, if other

states are not to be forced to enact similar legislation burdening their industries correspondingly.)

> "Yet the Federal Government, under this bill, has important functions to perform in order to make it possible for the States to have unemployment insurance laws and to facilitate their operation. It equalizes competitive conditions through the imposition of the employment excise tax provided for in title IX . . . "

(At another time it had been thought that States should be forced by a so-called Federal Tax to prohibit child labor in order to equalize competitive conditions in States which prohibited child labor.)

> " . . . In title III financial aid is given the States by the Federal Government to defray their costs in administering unemployment insurance. Finally, the Federal Government is to handle all unemployment reserve funds, in a trust account in the United States Treasury for the benefit of the States to which they belong " . . .
>
> " . . . the provision that all reserve funds are to be held by the United States Treasury, to be invested and liquidated by the Secretary of the Treasury in a manner calculated to promote business stability . . . "

The schedules attached to this Report read in conjunction with the Senate Report, give these estimates:—

Total number of gainful workers .	48,830,000
Total number of owners, operators, self-employed (including the professions)	12,087,000
Total number of workers excluded because of occupation (farm labor, domestics, teachers, and governmental and institutional workers)	9,389,000
Estimated number of workers attached to establishments with less than eight employees	4,200,000

Estimated number of workers attached to establishments of eight or more employees (including unemployed) April 1930	23,154,000
	48,830,000

The figures for the establishments with under eight employees is arrived at in this manner: — The Report from which quotations are being made places the figure for establishments with nine or less at 5,400,000. The Senate Report places the estimated number of workers attached to establishments with three or less, at 2,600,000. The figures just given in this brief are reached on the assumption that if in the different establishments employing from one to nine there are 5,400,000, it is accurate enough for present purposes to assume nine gradations. This would mean, employed in groups of nine, 600,000; employed in groups of eight, 600,000; a total of 1,200,000, which, deducted from the Committee's estimate of 5,400,000, leaves the 4,200,000.

The gainful workers are divided, then, into —

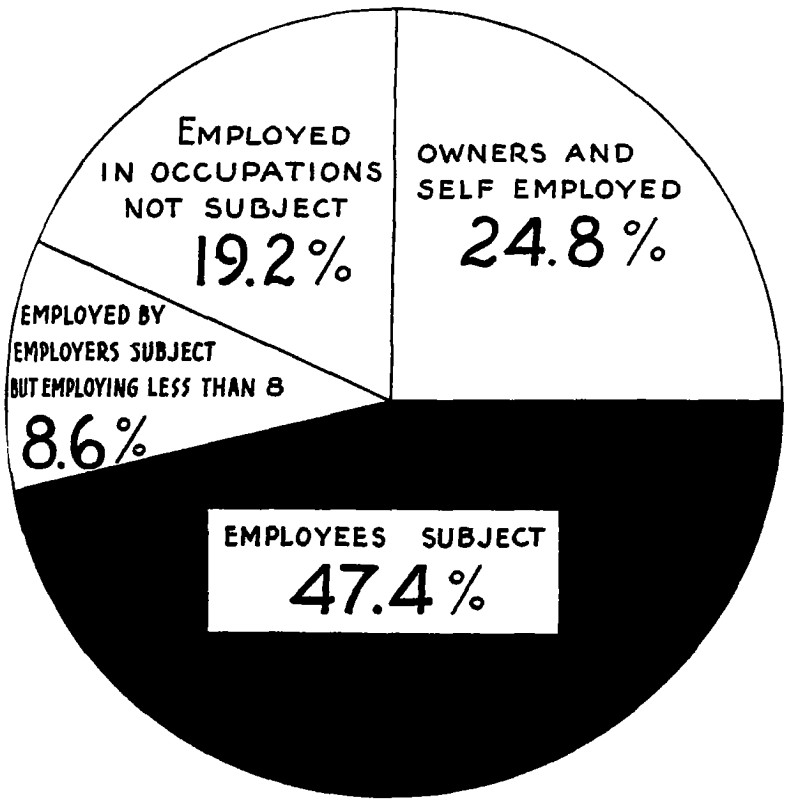
Owners, operators and self-employed.....	24.8%
Employees in occupations not subjected	19.2%
Employees in taxed employments not subjected because of exemption.....	8.6%
Employees in employments subjected — including unemployed..	47.4%
	100. %

It will be noted from this that of the gainful workers of the country, less than half are in employment subjected to this imposition.

Even this figure is too large, because, as the Committee Report says: — "

> " . . . The actual number of employees covered by the tax would be considerably smaller . . . due to unemployment."

The relative percentages are shown on the accompanying graph.



The Biennial Census of Manufactures of the United States, Dept. of Commerce, Bureau of the Census, for 1933, Interim Release of May 1, 1935, shows that the number of industrial establishments in the United States employing wage earners was 137,251, employing an average of wage earners for the year of 6,055,736. These establishments are classified in classes of wage earners 1 to 5, 6 to 20, and above 20. If it be assumed that the establishments employing 6 to 7 wage earners are 2/15 of the establishments employing 6 to 20 wage earners, the establishments employing 1 to 7 wage earners are 62,508; and the establishments employing 8 and above are 74,743. This means that of the industrial establishments the burden is placed upon 54 per cent and that 46 per cent bear none of it.

	Number	*Per Cent*
Establishments employing 1 to 7..	62,508	46
Establishments employing 8 and more...	74,743	54
	137,251	100

Uniformity is destroyed and caprice is established when it is shown that the imposition is on the state of being of having employees and yet half the gainful workers in the forty-eight States are excluded from the supposed benefits of unemployment insurance and their employers are not subjected to the imposition This is not a reasonable exemption. It is a capricious selection from among those in like position. The excepted workers need the social security of unemployment insurance just as much as those who get it. Statistics indicate that farm and domestic laborers and servants have been thrown out of employment onto the relief rolls and into the C. C. C. in vast numbers.

The Census of Unemployment in Massachusetts as of January 2, 1934 Labor Bulletin No. 171, Public Document No. 15 of 1935, shows that the percentage of unemployment in rural areas (28.9) is larger than that for the State as a whole (24.9).

In addition to this, it appears from Works Progress Administration Research Bulletin, Series 1, No. 16, that in May, 1935, that from those ages 16 to 24 with former occupations there were 372,200 agricultural workers on relief.

It is probable that employees in groups of seven and under have suffered fully as much as those in groups of eight and over.

The employees of the forty-seven percent bear not only the burden of caring by so much for the unemployed among the forty-seven percent, but also the burden of their share of taxes to meet the public expense for poor relief and assistance of the remaining fifty-three percent and of the unprovided balance of the forty-seven percent. Crudely repeated, the employers of the forty-seven percent pay one hundred percent of the unemployment benefits for the forty-seven percent and also forty-seven percent of one hundred percent of the poor relief and assistance. These are average approximations, subject to wide variations in individual cases. They are sufficiently accurate to show the capriciousness of the imposition on the forty-seven percent.

The United States Census Report for 1930, giving the figures for the year 1929, show the following figures: —

	Industry	*Trade Wholesale and Retail*
Establishments . .	210,959	1,712,860
Wages.	$11,620,973,000	$8,199,800,000

This vast wage earning in Trade is largely in establishments employing under 8 persons — that is, from 1 to 7.

The same census shows that of the 1,712,860 establishments, 169,702 are in wholesale trade employing an average of nine and four-tenths persons and that 1,543,158 are in retail trade employing an average of two and nine-tenths persons. From this it is apparent that considerably more than ninety percent of the establishments employ less than eight persons.

To anticipate the Senate Committee's report about to be given, stating that the tax of 1% on payroll amounts to only about one-third of one percent on sales, this has reference to the 3% tax. It does not take into account the 6% tax designed for old-age compensation. The Committee's figures would be equally applicable and make the two taxes amounting to 9% equivalent to a general sales tax of 3%.

As the tax is on trade as well as on industry, it is, except in the case of imported merchandise sold, taxed twice.

The same census report shows the value or sale of

Industrial products.	$70,434,863,000
Wholesale Trade.	69,291,548,000
Retail Trade	49,114,653,000

Those products of domestic industry in this way pay two taxes, inevitably; and those which pass through both wholesale and retail trade, three taxes; and those which pass from the wholesale trade into the hands of manufacturers as the raw materials of those manufacturers, pay the tax again.

When the 9% goes into effect, then, we have it in both comminuted and compound form, beyond the possibilities of accurate mathematical statement.

These compoundings are measurably avoidable in a general retail sales tax not falling upon goods in the

earlier operations of wholesale trade and manufacture. To some extent they are avoidable in a general manufacturer's tax. They cannot be avoided in a payroll tax.

On the question whether this huge tax — estimated in the same Committee Report for the year 1951 at $2,724,000,000, and in excess of two billion dollars for every year after 1943, can all be passed on to the consumer, let him who claims the vision of an inspired prophet give the answer. It is the known fact to anyone familiar either with industry or with commerce, that in many cases the levy cannot be passed on without the destruction of the trade. If it cannot be passed on, the employer inevitably meets financial destruction when subjected to such a huge tax.

In Massachusetts, the apparently unprinted Special Report after a special study made by the Bureau of Labor Statistics early in 1935 for the Commission on Unemployment Insurance and furnished to it, gives classifications of manufacturing establishments employing wage-earners by the number of wage-earners employed. This gives:

Employers of 1 to 7 . .	3,807
Employers of 8 and over	4,251
	8,058

It is apparent from this that in one State, in manufacturing, alone, 47.2% of the employers are not subjected to the imposition; and that 52.8% must carry the burden in the competition.

The above Report of the Senate Committee, No. 628, follows the general course of the above described Report of the Committee of the House. Certain differences are to be noted. The Report says: —

> "A considerable part of the population, however, is outside of title II. Included in this

excluded group are all agricultural workers, domestic servants, employees of charitable, educational, and religious organizations, all self-employed persons, farmers, professional people, and proprietors and entrepreneurs. These groups include almost half of all persons 'gainfully occupied' as this term is used in the United States Census. Many of these people will not be so greatly in need of old-age assistance as the industrial workers to whom title II is applicable, but large numbers are likely to be dependent . . . "

" . . . Of all urban families on relief more than 90 percent have become dependent upon the public for support because the breadwinner or all breadwinners in the family are without work." . . .

" . . . Unemployment compensation differs from relief in that payments are made as a matter of right, not on a needs basis, but only while the worker is involuntarily unemployed." . . .

"Such unemployment compensation is not a complete safeguard against the hazard of unemployment. In periods of prolonged depression many workmen will exhaust their compensation benefits before they find other employment. This will hold true of some workmen even in periods of prosperity. Supplemental to unemployment compensation there will still be need for work relief for those whose compensation rights have been exhausted, as well as for workers who are outside of the compensation system." . . .

"This bill does not set up a Federal unemployment compensation system. What it seeks to do is merely to make it possible for the States to establish unemployment compensation systems and to stimulate them to do so. This objective is carried out through grants-in-aid to the States (in title III)

for the administration of unemployment compensation laws and through the imposition of a uniform pay-roll tax on employers (in title IX) against which a credit is allowed for contributions made by them to unemployment compensation funds set up pursuant to State law." . . .

" . . . These conditions do not prescribe what sort of unemployment compensation laws the States shall enact; they are intended merely to make certain that the States actually have unemployment compensation laws, rather than mere relief measures. . . . "

" . . . With a uniform tax and this offset device, employers in all States will be put in an equal competitive position. No State can gain any advantage through failing to establish an unemployment compensation system. This provision will equalize competitive conditions and thus enable States to enact unemployment compensation laws without handicapping their industries." . . .

" . . . However, large groups of workers (agricultural workers, employees in small establishments, etc.) embracing approximately one-half of all gainful workers will not be brought under unemployment compensation. This means that, on the average, a 1-percent contribution rate for unemployment compensation purposes will increase costs to the consumers by only about one-third of 1 percent. Such small increased costs may well be offset by reductions in costs brought about through regularizing employment and maintaining the purchasing power of unemployed workers."

It is evident that the object was not to impose a tax for revenue and then to grant an exemption to avoid

double taxation. It was to impose a tax, not for revenue, upon recalcitrant States which would get no benefit whatever from the tax and the employees in which would be eligible for no benefits from the tax. The men in Congress seem to have thought that they would be justified in imposing this coercion upon those States that would not bend to their will, because these men were so deeply convinced of the beneficent character of the system which they proposed that they thought that it ought to be imposed on sovereign States whether the States will it, or not.

The criticism of the action of these men in Congress does not impugn the loftiness of their aspirations. Their very earnestness in pursuit of what they believed a good cause, has brought an obliquity of vision as to the rights of the several States under the Constitution to decide these matters of policy of government for themselves.

The beneficence or not of unemployment insurance is not involved in this case.

A State should not be penalized by the Nation because it chooses to govern itself within its own domain, and outside the category of government set by the Constitution for the Nation.

However lofty the motives, an attempt by the men in Congress to impose such a penalty on a State for governing itself in its own way, is a capricious imposition and not a tax uniform throughout the United States.

As soon as it became apparent, April 17, 1935, that the men in Congress were going to pass this Act, already recommended by the President, no State was any longer able to exercise an independent judgment on the policy of compelling employers to contribute unwillingly to unemployment compensation. The enactment of the State laws, however worded, is not an

indication of a judgment of the legislature that such a policy is for the public good. It is an indication only of an opinion that it is for the public good to avoid the penalty imposed by the Social Security Act on recalcitrant States.

The Social Security Act so-called, is a superlative example of anti-uniformity and caprice.

If from the language and the context, the purpose for which the imposition is laid can be ascertained, the Court is not required to remain blind thereto.

Grosjean v. *American Press Co.*, 297 U. S. 233.
Trusler v. *Crooks*, 269 U. S. 475.
United States v. *Butler*, 297 U. S. 1.

Ordinarily, an imposition described by The Congress as a tax, is payable into the Treasury of the United States. This does not establish that it is a revenue measure.

The title of an Act and its whole content may be inspected to see that The Congress intended the imposition to be for a particular purpose and not merely to produce general revenue for the United States.

Hill v. *Wallace*, 259 U. S. 44.
Child Labor Tax Case, 259 U. S. 20.
Carter v. *Carter Coal Co.*, 298 U. S. 238 (semble).
United States v. *Constantine*, 296 U. S. 287, 294, (semble).

The mere fact that property excised is not equally distributed throughout the United States does not make the tax anti-uniform.

Knowlton v. *Moore*, 178 U. S. 41.
Head Money Cases, 112 U. S. 580, 594.

Nor does the fact that other kinds of property are not taxed, at the same rate or at all if the selection is reasonable and not capricious.

Brushaber v. *Union Pacific R. R. Co.*, 240 U. S. 1.
Van Oster v. *Kansas*, 272 U. S. 465.

An excise otherwise reasonably imposed to provide revenue for the general welfare of the Government of the United States may still be uniform even if reasonable exemptions are reasonably made.

Jeffrey Mfg. Co. v. *Blagg*, 235 U. S. 571.
N. Y. Central R. R. Co. v. *White*, 243 U. S. 188. (semble).
Florida v. *Mellon*, 273 U. S. 12.

A capricious selection of class of property, class of persons, or rate gradation is indicated by repeated language of the Supreme Court of the United States to make an attempted excise into an anti-uniform confiscation, without tax character.

Grosjean v. *American Press Co., Inc.*, 297 U. S. 233, 251.
Colgate v. *Harvey*, 296 U. S. 404, 422, 424.
Concordia Fire Ins. Co. v. *Illinois*, 292 U. S. 535.
Stebbins v. *Riley*, 268 U. S. 137.
Louisville Gas & Elec. Co. v. *Coleman*, 277 U. S. 32.
Schlesinger v. *Wisconsin*, 270 U. S. 230.
Bromley v. *McCaugn*, 280 U. S. 124, 139.
Mayflower Farms, Inc. v. *Ten Eyck*, 297 U. S. 266, 272, *semble of a regulation.*
In re Opinion of The Justices, 85 N. H. 562; 154 Atl. 217 (semble).

3. The imposition is not to pay the debts and provide for the common defense and general welfare of the United States

It is obvious that this imposition is not to pay the debts of the United States or to provide for the common defence of the United States. It is submitted that it is not to provide for the general welfare of the United States.

An imposition to provide unemployment benefits regardless of need, to persons who have worked in local employments in local trade and manufacturing within a State, not related to interstate or foreign commerce, or in any calling related to the matters subject to be governed by The Congress, is not to provide for the general welfare of the Government of the United States.

No question is presented in this case as to the beneficence or wisdom of unemployment benefits to the needy or to the wealthy.

Ignoring payment of debts of the Government of the United States and providing for the common defence of the Government of the United States, no tax by The Congress is authorized unless it is to provide for the general welfare of the Government of the United States. The men in Congress who chose the Title for Chapter 531, said that it was "An Act to provide for the general welfare by establishing a system . . . " This selection of title suggests their avenue of approach; but this choice does not make the payment of such unemployment benefits a part of the general welfare of the Government of the United States.

The limits upon the taxing power are not set by "welfare", only. They are set by the limits upon the kind of welfare for which the tax may be levied. It must be the limited kind of welfare which is "general" and it must be the limited kind of welfare which is "of

the United States." In this limitation, "of the United States" evidently is used in the sense of Government of the United States. The phrase would not be changed in meaning if put in the form "for the General Government and not for the State Governments".

In the Constitution, Article I, Section 8, it is obvious that "of the United States" qualifies not only "general welfare but also "common defence" and "debts". The qualification is used in the same sense in the three applications. "Debts" of the United States do not mean debts of the territory or of the people within the territory. They are the debts of the Government of the United States, either incurred or assumed. Equally, it is the general welfare of the Government of the United States that is described as the purpose to provide revenue for which The Congress may tax.

If it had been intended that The Congress should have power to legislate for the general welfare of the territory of the thirteen States, the Constitution would have said so. There does not appear in any clause of the Constitution, nor in the sum total of it, a grant of power to legislate for the general welfare of those residing in the territory of the several states separately or added together. There could not be a grant of such power in a constitution designed to preserve the existing complete sovereignty of the several States in all matters which related to the welfare of the people of those respective States, where the State could legislate concerning that welfare without interfering with the external relations of the group of States or the mutual relations between the States.

It is not to be supposed that a constitution would grant to The Congress of the United States a power to tax to provide revenue for the general welfare of the territory of the United States when that Congress had been given no power to legislate for the general welfare of that territory.

The acquiring, the holding, or the disposing of territory outside the confines of the particular States was an external matter and by the Constitution was made a part of the "general welfare of the United States". Such territory could be obtained by treaty or by war—sovereign powers expressly granted to the United States. The particular powers granted, all relate to foreign relations or to mutual relations, and none to the governing of the composite of the thirteen territories.

If it were not for the phrase, "general welfare of the United States" the Constitution would contain no grant of any power to tax except to pay the debts and provide for the common defence. It is only in this third classification of objects — "general welfare of the United States" — that there is found any power to tax for the purpose of running the government of the United States including therein all those things other than payment of debts and providing for common defence which the United States may do.

In determining the meaning of this phrase, "general welfare of the United States", it is respectfully urged upon the Court that what is to be looked for is the meaning of that phrase in 1788 to the ordinary people of the thirteen States which joined in making the contract tendered to them, respectively, for adoption. It makes no difference what any of the draftsmen or proponents thought that it meant, if that differs from the common understanding of it which the three million ordinary men and women of the times should have had when they were deciding whether or not to adopt it.

The Articles of Confederation which were the forerunner of the Constitution, made among the same thirteen sovereign States that made the Constitution, contained the phrase, "welfare". These Articles start off with the agreement that "Each State retains its sovereignty, freedom, and independence, and every

power, jurisdiction, and right which is not by this confederation expressly delegated to the United States in Congress assembled". By Article III they entered into a "firm league of friendship with each other for their common defense, the security of their liberties and their mutual and general welfare, binding themselves to assist each other against all force offered to or attacks made upon them or any of them on account of religion, sovereignty, trade, or any other pretense whatever." Anyone knows without argument that this gave no power to the Confederation to govern the territory of the thirteen sovereigns for the welfare of the citizens of those States. The welfare which the Confederation was to care for, was the welfare in external relations — general, as distinct from local or internal, and mutual, in the relations between the sovereigns.

When the words "General Welfare", came into the Constitution from the same States which had used them in the Articles of Confederation, they meant the same thing. The external relations — such as war, defensive or aggressive; acquisition of external territory by treaty; foreign commerce, naturalization — were made clear. The mutual relations — such as interstate commerce; postal communication, bankruptcy which would affect debts and credits of men in different States, patent rights, money, were made clear. These foreign relations and mutual relations, with such implications as arise from them, comprehend all that was put into the hands of the Government of the United States. The governing in those matters was what constituted the general welfare of that government. It was for that government that the power to tax was given. All the specifically described powers, and all the generally indicated powers, of the Government of the United States fall into one or another of these two classes, — foreign relations and mutual relations.

The terms "general" and "of the United States" are not terms of extension. They are terms of restriction upon the kind of welfare to provide revenue for which the Congress may levy a tax. They stand opposite to the restrictions of "State" or "local" in defining the welfare for which a State may levy a tax.

The novel feature of the Constitution of the United States was the erecting of two absolute sovereignties over one territory. Thirteen sovereigns erected a new sovereign but retained all the sovereign powers except those transferred to the Nation expressly or by reasonable implication. The thirteen States were the contracting parties who did this by ratifying, in separate Conventions, in the respective States, the Constitution which had been proposed by the draftsmen of the document.

Welfare evidently is served by bringing arid lands into needed cultivation. Nevertheless, the Supreme Court has said: — "While arid lands are to be found, mainly if not only in the Western and newer States, yet the powers of the National Government within the limits of those States are the same (no greater and no less) than those within the limits of the original thirteen, and it would be strange if, in the absence of a definite grant of power, the National Government could enter the territory of the States along the Atlantic and legislate in respect to improving by irrigation or otherwise the lands within their borders. Nor do we understand that hitherto Congress has acted in disregard to this limitation". (*Kansas* v. *Colorado*, 206 U. S. 46, 92).

As far as it may be done by legislation, the control of the relation between employer and employee, the rate of wages, the withholding of wages to build reserves, the insurance against accidents, the making of reserves for the employee when he no longer or not for a time can earn wages, within a State, in labor local to that

State, between residents or operators within the State, and not in the course of interstate commerce, is in the legislature of the State and not elsewhere. The Congress has no more control over it than has the Canadian Dominion Parliament or that of Great Britain. That local relation is not a feature of the welfare of the Government of the United States. If it turns out to be that this feature of the welfare of each State calls for similar or the same control in each other State by the legislature of this other State, these forty-eight States' welfares do not hatch out into the general welfare of the Government of the United States.

Picture, if you will, the consternation of the men of the thirteen sovereign States, engaged in considering whether or not to enter into the compact of the Constitution, if they had been told that they were handing over to the new Nation the control of the way in which the unemployed within a State, needy or wealthy, should be supported, and power to draw from the State of Georgia or South Carolina a part of the money with which to support the indigent, or wealthy, in the State of New York or Massachusetts. The surprise would have been great, to know that The Congress could regulate the employment relation internal in a particular State and provide that an employer must, whether he wished or not, give to an employee, whether he demanded it or not, a minimum wage which must include not only a reasonable wage and a living wage but also an unemployment support. It is self-evident that what the employer must pay in taxes for this benefit he cannot pay in larger wages currently to enable the thrifty employees to provide for their own periods of idleness.

Should the contracting parties, in adopting the Constitution, have understood that they were giving away this power?

The contracting parties, the men of the several States, never conceived that they were giving away this power to a new, distant sovereign. They had no reason to conceive it. They made no such grant. Instead they reserved any such power, if it existed, to the people of their separate sovereign State.

Of course, if The Congress may impose on a non-wealthy few the support of the many temporarily unemployed; whether wealthy or indigent, The Congress may do the same as to the support of all unemployed. If the power exists, The Congress is the one to say where the line shall be drawn. It makes no difference that no one would suppose that The Congress would put the support of the many, needy or wealthy, upon the few wealthy or poor. It is what the men in Congress have attempted in the proposed Act now at bar. The granting of such a vast power, the adopters of the Constitution never conceived of. No such grant was made.

The support of men and women who are unemployed in the respective states or who cannot get employment is no more for the general welfare of the Government of the United States than is the keeping the citizenry of the United States from becoming drug addicts and thereby likely to be unable to earn a living or to fight for the United States or to vote intelligently to choose the President and the Senators and the Representatives in The Congress thereof.

Nevertheless, it seems that the Supreme Court is unanimous that provisions of an anti-narcotic act, not to collect an excise on a dangerous article of commerce,

but primarily to suppress that intrastate trade would not be for the general welfare of the United States in the sense in which those words are used in the Constitution and that they would invade the territory of government of the States.

Linder v. *United States*, 268 U. S. 5, 17.
United States v. *Doremus*, 249 U. S. 86, 95.
United States v. *Jin Fuey Moy*, 241 U. S. 394, 401.

Local commercial activities and employment relations completed wholly within a State, howsoever common they may be in every State, are not a part of the general welfare of the Government of the United States.

Schechter Poultry Corp. v. *United States*, 295 U. S. 495.
United States v. *Butler*, 297 U. S. 1.
Railroad Retirement Board v. *Alton Railroad Co.*, 295 U. S. 330 (*a fortiori*).
Child Labor Tax Case, 259 U. S. 20.
Hill v. *Wallace*, 259 U. S. 44.
Hammer v. *Dagenhart*, 247 U. S. 251.

In the range of interstate commerce, where Congress has authority, "Congress may not use this protective authority as a pretext for the exertion of power to regulate activities and relations within the states which affect interstate commerce only indirectly" (Hughes, C. J., in *Carter* v. *Carter Coal Co.*, 298 U. S. 238, 317).

In the case cited, it would seem to be that, if there were no possible relation to interstate commerce, the Court was unanimous.

Carter v. *Carter Coal Co.*, 298 U. S. 238.

If no relation to interstate commerce or other substance within the regulatory power of The Congress is involved, it seems that the Court is unanimous that an

Act for a compulsory pension system is not within the powers of The Congress.

Railroad Retirement Board v. *Alton Railroad Co.*, 295 U. S. 330, 362, 368, 375, 381.

The court is unanimous that Congress has no power to regulate the financial relation between employers and employees such as unemployment benefits or other wages in a local business unrelated to interstate commerce.

Schechter Poultry Corp. v. *United States*, 295 U. S. 495.

The present attempt is to regulate wages by providing that the employer must, as a part of the wage, furnish a continuation of a portion of the wage during unemployment after the applicant ceases to be in another's employ. The State where this local employment occurs may deem that it would be wiser to regulate the relation in a different way, to provide no or a smaller benefit with no or a smaller compulsory contribution. The same thing cannot be done by The Congress and by the State Legislature. If it is a subject for legislative regulation at all, the Tenth Amendment says that it is to be regulated by the State Legislature and not by The Congress.

The Supreme Court holds by implication that regulations of the relations between employers and employees by impositions on employers to provide a reserve fund for unemployment benefits to persons formerly employed in employments in the State's category whether by these employers or by others, are not within the power of The Congress, because these impositions are within the powers of the State legislature.

W. H. Chamberlin, Inc. v. *Andrews*, (November 23, 1936), 299 U. S. —, 57 S. C. R. —; 271 N. Y. 1, 2 N. E. Rep. (2nd Ser.) 22.

They cannot be in the legislative control of both sovereignties.

Collector v. *Day*, 11 Wall. 113, 124.

The particular limit to "general welfare", as to which Hamilton and President Madison differed and President Monroe vacillated, is not involved. None of them suggested that any such regulations of employment obligations and relations within a State come within this phrase. None of them, it seems, would have supported a power in The Congress to compel employers and employees in purely local employment to contribute to a fund for unemployment benefits.

President Jackson, May 27, 1830, vetoed the Maysville Road Bill on the ground that such an appropriation could not be said to be for "general welfare" and that Congress ought not to expend where it has not jurisdiction (2 Richardson, 483, 492, 639). President Buchanan, February 24, 1859, vetoed the Act for the endowment of a college in every State with the message: — "I presume the general proposition is undeniable that Congress does not possess the power to appropriate money in the Treasury, raised by taxes out of the people of the United States, for the purpose of educating the people of the respective States." (5 Richardson, 547) It seems that his meaning would cover as well — "for the purpose of supporting the unemployed of the respective States". President Cleveland in 1887 vetoed an attempted Act of The Congress to aid Counties in Texas injured by drought. In his message he said: — "I can find no warrant for such an appropriation in the Constitution" (8 Richardson 557). Like an echo of a receding past, now growing inaudible, comes the rest of the message: —

"the lesson should be constantly enforced that though the people support the Government the Government should not support the people." These convictions have particular force held as they were by revered leaders of the party in control of The Congress whose members are responsible for the attempt now before the Court. The limits set by the Constitution are not newly invented now, to defend against newly conceived attempts to invade.

There is no concurrent sovereignty of the Nation and of the separate States. The Nation is the absolute sovereign in its category of government. Each separate State is absolute sovereign in its category of government. The boundary line between the categories takes the place of the boundary line between territories of neighboring sovereigns.

Collector v. *Day*, 11 Wall. 113, 124.

Nothing is "general welfare of the United States" except that which is within the boundary lines of its category. "United States" as used in the Constitution is not a territory. It is a sovereign government. The State government is a sovereign government.

THE COURTS OF THE UNITED STATES ARE AUTHORIZED TO DECIDE ONLY IN ACCORDANCE WITH LAW AND LACK AUTHORITY TO TREAT AS AN ACT OF CONGRESS THAT WHICH IS NOT WITHIN THE POWERS OF THE CONGRESS

Because of a considerable misunderstanding in the mind of the public as to the powers of the Court concerning an attempted Act of The Congress which is not within its powers, the Court is respectfully urged to re-state the law on this subject.

The constituted power of this Court is to decide in accordance with the law as the Court finds it to be. The Court has no authority to treat as an Act of Congress passed within its powers under the Constitution, something which is not such. It is as vicious to hold to be an Act of Congress within its powers under the Constitution that which is not such, as it is to hold invalid an Act of Congress that is within those powers.

In truth, there is no such thing as an unconstitutional Act of The Congress. The Congress has no power to pass an Act which it has no power to pass. The men in Congress who attempt it, are not acting as congressmen within their commissions when they go through the forms for such an enactment. They may distort the records of Congress by making to appear as an Act of Congress that which is not. In action in Congress they represent their constituents, only, when within the terms of the selection by the constituents. That is, to do only those things which the Constitution permits. Such an attempted Act is not an expression by The Congress or by the constituent people, that it is for the public welfare that such an Act be passed. It is at the most an expression of less than six hundred men out of one hundred and twenty-five million.

The boundary set by the Constitution is rigid, and not elastic. However difficult to define its location in a given case, the boundary which the Constitution sets is not doubtful. The Constitution is certain on the subject.

The courts have no authority to bring within that boundary an area of the courts' own doubts. The court may not create or enlarge a no-man's-land of doubt by indulging in presumptions out of courtesy to the men in Congress who may have acted without power under the Constitution. The Court is not disrespectful to The Congress when it observes that The Congress, because powerless, did not pass an Act which a majority of the men in Congress have asserted that it did. The Court is protecting The Congress against attempting usurpers.

This is more emphatically true where the court has to determine whether these men in Congress have attempted to invade the State. The court is the last and most powerful peaceful means to prevent that invasion.

Accordingly, it has been settled over a long period that the courts have no authority to treat as an Act of Congress within the powers of Congress that which is not.

It is reversible error for a court to hold to be an Act of Congress within its powers that which is not.

> *Knickerbocker Ice Co.* v. *Stewart*, 253 U. S. 149, 166.

The correct judgment of a court that an alleged Act of Congress is not one within its powers, requires that the judgment be affirmed.

> *State of Washington* v. *W. C. Dawson & Co.*, 264 U. S. 219, 228.
>
> *Coyle* v. *Smith*, 221 U. S. 559, 580.

The court of last resort of Massachusetts as early as 1817 adjudged an Act of Congress not to be warranted by the Constitution of the United States.

Wetherbee v. *Johnson*, 14 Mass. 412.

This, and a similar decision in New York (*Patrie* v. *Murray*, 43 Barbour, 321) have been repeatedly cited with approval by the Supreme Court of the United States.

Capital Traction Co. v. *Hof*, 174 U. S. 1, 11.
The Justices v. *Murray*, 9 Wallace, 274, 282.

Such a judgment by the courts of Kentucky, has been affirmed.

Hepburn v. *Griswold*, 8 Wallace, 603, 626.

These principles apply to the District Courts and to the Courts of Appeal of the United States. They are not permitted to decide contrary to law even if the books of Congress say that there is an Act of Congress directing the courts to do so when in fact there is no such Act because The Congress had no power to pass it.

CONCLUSION

For these several reasons, the plaintiff is entitled to have entered a final decree adjudging that Section 901 of Title IX of Chapter 531 of August 14, 1935 (49 Stat. 620), commonly called the Social Security Act, is not an Act of The Congress within its powers under the Constitution of the United States, and that the defendant be enjoined until the further order of this Court from making the payments defined in that section.

Respectfully submitted,

EDWARD F. McCLENNEN,
JACOB J. KAPLAN,
for Plaintiff.

Co-operators
in the preparation
of this brief are:
E. Curtiss Mower, Jr.,
Edward Williamson,
Roger E. Ela,
Leonard Kaplan,
Robert Vance Brown.