unconstitutional, the state laws would be complete in themselves and would remain operative; (g) it will result in federal and state legislation this winter, while 44 state legislatures are meeting and there is strong public support, which is doubtful under the subsidy plan, particularly if many detailed standards to which the state laws must conform are inserted in the federal act. (Ib. p. 227)

Francis D. Tyson, Professor of Economics, University of Pittsburgh, thought it well from a constitutional standpoint to separate the tax feature from the payment of subsidies. He felt that a larger degree of supervision by the federal government would assure a greater measure of uniformity so as to eliminate the obstacle of competition, which would persist if the states were free to fix their own standards of rates. (Ib. p. 739)

Senator King introduced a memorandum by Professor Paul H. Douglas who felt that the fear of constitutionality could be lessened by the passage of two acts. The power to tax is certain. There are almost no limitations upon the spending powers of Congress. If the system under one bill should be declared unconstitutional he suggested that

> " . . . . . it should be able to run the constitutional gamut if they were put asunder." (Ib. p. 895)

In a joint statement submitted by the Washington Branch of the American Association for Social Security the tax-credit bill was criticized (1) as lacking essential standards, whereas the subsidy plan permitted maintenance of basic standards; (2) as permitting a multiplicity of diverse and uncoordinated state programs; (3) as involving a duplication of tax collecting machinery; (4) as controlling the states only by penalizing the employer

through cancellation of tax credits; (5) for requiring state funds to be turned over to the federal treasury, a requirement with which some states could not constitutionally comply.

Dr. Witte thought the difference between the subsidy system and the tax credit system recommended in the bill not very great. It relates merely to the manner in which the money is brought into the federal treasury. If the state collects, it is not a tax but a contribution or a premium rate. (Ib. p. 239)

(2). The Act Provides "Compensation" Rather Than "Insurance"

Mr. Green thought the plan an insurance measure (Ib. p. 169) Mr. Leiserson felt that casual labor could not be handled on the principle of insurance, but this principle was most important in respect to the vast majority of wage earners that ordinarily support themselves by labor and their jobs. (Ib. p. 260)

Senator Black insisted that because some one else paid the premium the result was none the less insurance, with which Mr. Leiserson disagreed on the ground that if half the premium came from the higher income brackets the beneficiaries would be taking money from a place where the risk is not located and there would be no reason for distinguishing the different kinds of unemployed people when they are given money in this fashion. (Ib. p. 278-9)

Mr. Elbert, a member of the Unemployment Insurance Committee to the Industrial Advisory Board, felt that unemployment insurance is not a charitable enterprise; it is meant to be and should be, self-supporting.

Who believes it wise to break up the large insurance companies into 48 small companies with separate administrations and varying scales of premiums and benefits? (Ib. p. 830)

Mr. Frederick H. Ecker, President of the Metropolitan Life Insurance Company, felt that the application of insurance principles to the individual risk of unemployment was absolutely hopeless; that the principle of compensation for unemployment within certain limits of time and money is practical and sound. He recommended that the word "insurance" be dropped and "unemployed compensation" be used instead. (Ib. p. 848)

Mr. Marsh, representing the People's Lobby, felt also that "insurance" is a misnomer, for unemployment could not be put on an actuarial basis. The length an individual employer continues in business cannot be relied on, nor can he be held responsible to maintian people if he is bankrupt himself. (Ib. p. 962)

(f). Report of the Committee on Finance of the Senate

The Committee sees nothing "revolutionary in any of the innovations in this bill." Every measure proposed is in accord with the "tried American institutions and traditions." (Senate Report No. 628 p. 28)

The Committee likens the "tax offset device" to the provision in the Federal estate tax law. (Ib. p. 12)

(g). Statements made in the House

Mr. O'Connor, the acting floor leader, said the bill had no privileged status; that while it contained partial

revenue features, it did not come within clause 45 of Rule XI which makes bills raising revenue in order (Cong. Rec. 79, Pt. 5, p. 5460)

Mr. Jenkins asked why the Rules Committee found it necessary to bring the bill up for consideration under a special rule if the bill were rightly a revenue bill? For a revenue bill properly reported by the Ways and Means Committee is a privileged bill and needs no special rule. (Ib. p. 5684)

Mr. Doughton said that the Social Security Act was one of the most important measures ever placed before Congress for its consideration. While it is designed to enhance the security of the American worker and to provide a larger measure of social justice, it does so within the scope of our economic order. He challenges anyone to say that insurance against these social dangers is contrary to our institutions, or that it will undermine the integrity of the American system. (Ib. p. 5468) If the federal government were to go further and take over the entire problem of old age pensions it would be contrary to our fundamental political institutions and would place upon the federal government a tremendous financial burden "without the protection of local vigilance which will prevail if local taxpayers are required to bear part of the cost." Our constitutional limitations prevent us from setting up a national system of old-age insurance, which is unquestionably the best basis. (Ib. p. 5470)

In discussing Title IX Mr. Doughton related the annual rates of the tax, the credit allowed employers, said that a "few minimum requirements" are imposed which state plans must satisfy in order to qualify for credit, the principal one being that the fund shall be one solely for

the payment of unemployment benefits; that "In general, the states are left free to determine the provisions of their unemployment-insurance laws, the scale of benefits which they pay, and the other features." (Ib. pp. 5475-6)

The discussion of the measure as a tax measure now centers around Title II providing for federal old age benefits, and Title VIII, imposing a tax with respect to employment. There was little discussion in the House under this head as to the unemployment compensation features (Titles III and IX). The trend of debate as to TITLES II and VIII may therefore be applied to TITLES III and IX; for the plan of separating appropriations from taxes is the same in respect to the subjects, both of old-age pensions and unemployment compensation, and the taxes sought to be imposed for these purposes. Mr Treadway, as he had repeatedly done in committee hearings, attacked Titles II and VIII as setting up an old-age retirement system based on reserves imposed on industry under the guise of a tax. (Ib. p. 5530) He charged that "The federal government has no express or inherent power under the Constitution to set up such a scheme as is proposed"; that the administration and the Democratic majority of the Committee had been working for months trying to give Titles II and VIII some color of constitutionality. "They are not very proud of their handiwork, but they think it is in the least objectionable form from the constitutional standpoint." (Ib. p. 5530)

Mr. Jenkins said that the government is being put into the insurance business on a tremendous scale; that in the Ways and Means Committee the proponents had done their best to remove the unconstitutional features of the measure, "but they have failed". (Ib. p. 5682) He

called attention to the fact that the majority report of the Ways and Means Committee says not a word about the constitutionality of Titles II and VIII. (Ib. p. 5682)

Mr. Robsion was advised that many lawyers on the Ways and Means Committee and other lawyers were inclined to think the bill unconstitutional as it was then before the House; that if given an opportunity he would vote to strike this provision from the bill and have it re-referred to the proper committee for further study and preparation, so that the House might have a better bill before it. (Ib. p. 5696)

Mr. Harlan argued at length that the separation between Titles II and VIII preserved both; that there is no precedent under which the courts could declare Title II unconstitutional; that it would be a futile act to provide funds from the general treasury to carry out Title II and later re-enact Title VIII with no physical connection with the Social Security Act. He supported the doctrine that if states could not administer necessary regulations (as they cannot do with unemployment relief), and that if this function was neither expressly excluded from the regulating power of the federal government nor expressly restricted to the states, it was the duty of the federal government to assume control as being the only agency capable of protecting those rights which the Constitution reserved to the people. (Ib. p. 5700)

Mr. Monaghan of Montana asserted that the Supreme Court would read and interpret the bill in its entirety and according to the language found therein. (Ib. p. 5701)

Mr. Cox of Georgia said that the thing that disturbed him was that apparently all thought in Washington had

been directed toward centralization of government, and most of what has and is being done apparently is intended to produce that result. (Ib. p. 5780)

Mr. Reed of New York:

"The provisions have been cut, carved, sawed, assembled, and reassembled in an effort to make it constitutionally presentable to the Supreme Court. A resort has finally been had to an ingenious mechanical arrangement of title II and title VIII as the most likely means of diverting the attention of the Supreme Court from the real issue, viz, that these two titles are the same in purpose, spirit, intent and substance. This clever scheme may succeed, but I do not believe this mechanical subterfuge will deceive the Court. If the purpose sought to be accomplished does escape the scrutiny of the Court because of the mere juggling of titles, then other police powers reserved to the States may in the same manner be taken over and operated by the Federal Government without let or hindrance. (Cong. Rec. Vol 79, Pt. 6, p. 5891)

* * * *

"The best legal talent the administration has been able to engage from the departments and elsewhere has endeavored to so frame title II, change its title, distort it, and put the tax features in title VIII, to mislead and deceive, if possible, the Supreme Court of the United States. I stated yesterday, and I state again today, that the members of the committee in their conscience know that title II and title VIII are unconstitutional. They know they are trying to set up as a Federal activity a police power that is reserved to the States." (Ib. p. 5991)

Mr. Huddleston of Alabama:

> "Mr. Chairman, unusual as the practice is in these times, I wish to make an appeal to reason and to logic. This bill provides for a system of State aid for which there is no warrant in the Constitution and which can be sustained, as the Supreme Court has decided in the Massachusetts case, merely because there is nobody eligible to call it in question. It provides for a system of old-age pensions for which there is no warrant in the Constitution, and upon the soundness of which men of ability and character might well find themselves in radical difference." (Ib. p. 5983)

Mr. Treadway charged that Titles II and VIII are just as closely related as a house and its foundation. Neither is intended to stand by itself The money raised by the tax is not intended for the support of the government. but to pay the benefits provided under Title II to the same employees who are taxed under Title VIII He calls attention to the fact that the report of the majority makes no reference to the connection between Titles II and VIII because they

> "know that the Supreme Court is eventually going to look at that report to see what the intention of Congress was in setting up these titles They purposely omitted any reference to the connection between the two, because they wanted to try to delude the Supreme Court I do not think the Court is going to be deceived, however It is not going to let Congress do in a backhanded way what it cannot do directly." (Ib. p. 5530)

Mr. Jenkins referred to the brief of the Attorney General, which he said appeared nowhere in the record in the proceedings of the Committee; nor did the long speeches

consuming nearly two days by representatives of the Attorney General's office. (Ib. p. 5683) Mr. Jenkins lamented the fact that the Attorney General did not in his brief give both sides of the question, saying that the latter was not justified in taking a partial position.[1]

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1 Mr. Cooper introduced the Attorney General's brief in the record It erroneously appears as a part of his remarks The brief begins on page 5782 of Congressional Record, Vol 79, Part 5, column 2, line 27, beginning "The purpose of this memorandum," and ending on page 5784, column 2, line 42, the last paragraph being "It follows hence that those Titles of the bill," etc

The brief of the Attorney General cites familiar cases, but they are not applicable to this situation In each one the power to tax is not disputed *Veazie Bank v Fenno,* 75 U S (8 Wall), 533 (19 L ed 482), imposed a tax of ten per cent on the amount of notes of any state bank paid out by any banking association, but this tax the Court said was " in the exercise of undisputed constitutional powers " [549 (488)] Likewise in *McCray v United States,* 195 U S 27 (49 L ed 78), it was undisputed that the tax on oleomargarine "was within a power conferred " [54 (95)] With a prophesy which is marked the Court said that if a case were presented where the abuse of the taxing power was so extreme as to be beyond the principles stated in this case, and where it was plain to the judicial mind that the power had been called into play

> "not for revenue but solely for the purpose of destroying rights which could not be rightfully destroyed consistently with the principles of freedom and justice upon which the Constitution rests, that it would be the duty of the courts to say that such an arbitrary act was not merely an abuse of a delegated power, but was the exercise of an authority not conferred " [64 (99)]

In *Billings v United States,* 232 U S 261 (58 L ed 596), it was not seriously denied in argument that the tax levied was intended to be an excise tax upon foreign built yachts [279 (604-5)] In *Brushaber v Union Pacific RR Co,* 240 U S 1 (60 L ed 493), the power of Congress to impose an income tax was not questioned, it was the progressive feature of the tax which was attacked. [25 (504)] *United States v Doremus,* 249 U S 86 (63 L ed 493), turned on the undisputed power of Congress to select the subjects of taxation and, as the power to impose the excise tax was not questioned, the Court stated that it could not look into the motives of Congress to ascertain what may impel the exercise of the taxing power [93 (496)]

> " If the legislation is within the taxing power of Congress—that is sufficient to sustain it ." [94 (496)]

In *Massachusetts v Mellon,* 262 U S 447 (67 L ed 1078), the statute under attack "imposes no obligation, but simply extends an option which the state is

Mr. Knutson said that the tax (for annuities) was not for the purpose of providing revenue for the federal government but simply an enforced contribution for the benefit of a certain class of persons. (Ib. p. 5543)

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free to accept or reject " [480 (1082)] The distinction between the Maternity Act and the Federal Act now before the Court is obvious Appellants here do not sue merely as taxpayers as did Frothingham [485 (1084)] Appellants occupy the position in which the Supreme Court found the processing taxpayer when it afforded him relief

Florida v Mellon, 273 U S 12 (71 L ed 511), likewise raises no question as to the power of Congress to impose a tax on inheritances [17 (514-15)], a field which it may constitutionally occupy irrespective of the result on the finances of the states.

The Attorney General ignores entirely the principle that in *A Magnano Company v Hamilton*, 292 U S 40 (78 L ed. 1109), involving a tax on butter substitutes imposed by a state legislature, the tax was "a tax of a kind within the reach of its lawful power " [44 (1114)]

The advice of the Attorney General to the committee That if Congress would separate the tax from the appropriation no one could raise the question and it would be "reasonably safe to assume that the social security bill, if enacted into law, will probably be upheld as constitutional" (Con Rec Vol 79, Pt 5, p 5784) is answered by the case of *United States v Butler*, 297 U S 1 (80 L ed 477) In that case the argument was made by the government that the Court could look at the Agricultural Adjustment Act as two separate laws One imposing a tax and the other appropriating the money, and that from this view neither could be attacked As to this the Court said that the sole object of the legislation was to restore the purchasing power of agricultural products to a parity with that prevailing in an earlier day, to take money from the processor and bestow it upon farmers who would reduce their acreage for the accomplishment of the proposed end, and, meanwhile, to aid these farmers during the period required to bring the prices of their crops to the desired level, that in this plan of regulation the tax plays an indispensable part.

> " Passing the novel suggestion that two statutes enacted as parts of a single scheme should be tested as if they were distinct and unrelated, we think the legislation now before us is not susceptible of such separation and treatment
>
> "The tax can only be sustained by ignoring the avowed purpose and operation of the act, and holding it a measure merely laying an excise upon processors to raise revenue for the support of government 58 (484)
>
> "The statute not only avows an aim foreign to the procurement of rev-

(h) Statements made in the Senate

Senator Wagner, the author of the bill, said:

"Viewed in isolation, there can be no doubt that all of the excise taxes embodied in the social-security bill are a valid exercise of congressional power. The only serious question is whether they may be set aside on the ground that their real intent is to stimulate social insurance laws by the several States, or that they form part of a designing Federal scheme to invade the provinces reserved for State action But no constitutional principle is more firmly embedded in case law than that no concomitant motive will invalidate an otherwise valid exercise of the taxing power. . . . . (Cong. Rec Vol. 79, Pt. 9, p. 9287)

"The further objection may be raised that the excise tax and the income tax levied by section 8 are in-

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enue for the support of government, but by its operation shows the exaction laid upon processors to be the necessary means for the intended control of agricultural production" 59 (485)

In its brief in the case of *United States v Constantine,* 296 U S 287 (80 L ed 233), the Government undertook as it does here to distinguish the penalty imposed (Revenue Act of 1926, 44 Stat 9, 95, Sec 701) for the sale of liquors in a state where the same was forbidden, from the *Child Labor Tax Case* and *Hill v Wallace* It cited *United States v. Doremus* and quoted at length from the Court's opinion, including that part wherein the Court states that the fact that other motives may impel the exercise of the taxing power does not authorize the courts to inquire into that subject (Brief of the United States, pp 40-45) But in answer to that argument the Court said

"Reference was made in the argument to decisions of this Court holding that where the power to tax is conceded the motive for the exaction may not be questioned These are without relevance to the present case The point here is that the exaction is in no proper sense a tax but a penalty imposed in addition to any the State may decree for the violation of a state law The cases cited dealt with taxes concededly within the realm of the federal power of taxation They are not authority where, as in the present instance, under the guise of a taxing act the purpose is to usurp the police powers of the State" [296 (239)].

valid because the measure taken as a whole indicates rather strongly that these taxes may be used to defray the costs of the special benefits to workers retiring at the age of 65. While the Supreme Court has not decided this question, the constitutionality of the Agricultural Adjustment Act, which went much further by directing that the proceeds of the taxes provided for therein should be devoted to specific purposes elaborated in the same act, was maintained by Judge Brewster of the United States District Court for Massachusetts. In the case of Franklin Process Co. against Hoosac Mills Corporation, located at page 552 of the eighth volume of the Federal Supplement, we read: (Ib.)

"The act, taken as a whole leaves no doubt of the legislative intent to levy the tax for the purposes of defraying the expenses of administering the act and paying the debts incurred for benefit payments. * * * If * * * it should appear on the face of the act that it was calculated to benefit only private interests, it would be the duty of the court, I take it, to declare the tax unlawful. It is not, however, within the province of the court to substitute its judgment for that of Congress upon the effect of a particular measure manifestly designed to promote the general welfare of the people of the United States. It is no objection that individuals will derive profit from the consummation of the legislative policy. Individuals benefit from every bounty, subsidy, or pension provided for by statute, whether Federal or State." (Ib.)[1]

Senator George raised the question that the act is not intended to raise revenue, but it is intended to furnish a support to the old age annuity and unemployment sections of the bill, in answer to which Senator Wagner said that

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1 The theory relied on by Senator Wagner was rejected when this case reached the Supreme Court *United States v Butler*, 297 U S 1 (80 L ed 477).

the rule that if the measure presented a proper exercise of the taxing power of Congress some other purpose which it may serve would not affect its constitutionality. (Ib. p. 9517)

Mr. Barkley said that his contention was that whenever we establish an old age pension system for everybody we will have to pay for it by general taxation. We cannot levy a tax on Ford Motor Company to pay old age pensions to its own employees and also to the Presbyterian minister and the school teacher. So whenever we decide to pension everybody who is over sixty-five years of age we must levy a general tax on everybody subject to the tax. (Ib. p. 9528)

Senator King adverted to the decision in the Railroad Retirement case and the claim that due to the fact that the act related to the power of Congress to regulate interstate commerce and not to the power of Congress to levy taxes, it was not an authority on this measure He stated that the argument was also advanced in the Child Labor Tax Case and asked if the Senate wished to go around the circle? That in view of the Railroad Retirement decision, and the Child Labor Tax Case, how could it be said that Congress could provide pension plans for employees under the taxing clause? (Ib. p. 9536)

(3) The Act as Coercing the States

We have undertaken to set out in Appendix A a comparison of the model unemployment compensation acts provided by federal agencies for use by the states, with the forty-two state acts now in effect. A careful examination of the latter reveals that the state acts generally follow the model acts with precision, with only occasional and unsubstantial de-

partures. The laws of thirty-five states[1] provide that if TITLE IX, or in some instances if the Federal Act, is declared invalid the laws of such states shall be no longer operative. The laws of five states[2] provide that in such circumstances the funds arising in such states shall be returned to the states respectively for disposition under the laws thereof.

In its brief in the case of *Davis v. Boston and Maine Railroad,* 17 Fed. Supp. 97, the Government argued that the tax levied under TITLE IX, increases rather than decreases, the freedom of state action, pointing out that in ten states "bills proposing similar laws were defeated in the legislatures" (p. 56). These ten states were named:

Colorado, Illinois, Kansas, Maryland, Minnesota, Nebraska, New Jersey, Pennsylvania, Vermont and Virginia.

The contention, therefore, argued the Government, that the states were coerced to enact the legislation, was unsound. We would assume that the Government would now be driven from this argument since all these states except Illinois and Ne-

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[1] Alabama, Arizona, Arkansas, California, Colorado, Connecticut, Idaho, Indiana, Iowa, Kansas, Kentucky, Louisiana, Maine, Massachusetts (with certain limitations), Michigan, Minnesota, Mississippi, Montana, Nevada, New Hampshire, New Mexico, North Dakota, Ohio, Oklahoma, Oregon, Rhode Island, South Carolina, South Dakota, Tennessee, Texas, Utah, Vermont, Virginia, Washington, West Virginia

[2] Maryland, New Jersey, North Carolina, Pennsylvania, Wyoming

braska have changed their perspective and enacted such laws (see Appendix A).

(a). Messages of the President

In his message to Congress of June 8, 1934, the President stated (p. 7) that he believed there should be a maximum of cooperation between states and the federal government, that social insurance should be national in scope, although the several states should meet at least a large portion of the cost of management, leaving to the federal government the responsibility of investing, maintaining and safeguarding the funds constituting the necessary insurance reserves. (Cong. Rec. Vol. 78, Pt. 10, p, 10771)

In his later message of January 17, 1935, the President said that he had concluded that the most practical proposal is the levy of the federal tax with the 90 percent. credit feature; the purpose being to afford a requirement of a reasonably uniform character for all states cooperating with the federal government and to promote and encourage the passage of unemployment compensation laws in the states; the 10 percent. not offset being used for federal and state administration of this "broad system". (Cong. Rec. Vol. 79, Pt. 1, p. 599)

(b). Report of the Committee on Economic Security

It was recognized that in several respects state administration might develop marked inadequacies. It was recommended that the Federal Act expressly provide that all states must include in their statutes a provision for repeal and amendment, so as to avoid any "vested interest" resulting thereunder, so that Congress could at any time increase the requirements which state laws must fulfill. (Re-

port p. 16) On account of the danger of competition from the industries of other states, few such state laws will be enacted. The obstacle to state action can be removed through the imposition of a uniform federal tax, with an offset permitted to any employer who contributes under a compulsory state law. This it is thought "will encourage the speedy enactment of state laws which meet minimum standards of security and fairness". (Ib.) The Committee further recommends that central control of reserve funds should be allowed so as to prevent their operating toward instability. A "tax-credit device" was preferred to a grant-in-aid, because under the latter system the states would not have self-supporting laws of their own (Ib. p. 17) The credit should be permitted

> "only if the State is cooperating with the Federal Government in the administration of unemployment compensation, expending the money raised solely for benefits, and is depositing all contributions as collected in an unemployment trust fund in the United States Treasury, as hereafter recommended." (Ib. p. 18)

Additional credits would be allowed to employers having reserve or guaranteed-employment accounts "only on the condition that the employer has discharged in full his obligation under the State law and continues to pay at least 1 percent. into the pooled state fund." The employer with the individual reserve account must maintain a reserve equal to 15 percent. of his payroll, and with the guaranteed employment account, a reserve of 7½ per cent. of his payroll; and the state law must have been in operation five years. (Ib. p. 18)

The federal government should grant the states sufficient money for proper administration, "under condi-

tions designed to insure competence and probity" Selection of personnel on a merit basis is vital to success. The grant for administration would be paid for by the 10 percent. against which no credit is allowed. (Ib.pp.18-19)

(c). Hearings before the Committee on Ways and Means of the House

Dr. Witte set forth the requirements in the bill imposed on the states as the condition of the credits In these there is no substantial change from the law as enacted, except as to the amount of the tax-rate. Among other requirements is that all contributions imposed by the state are to be spent in the state, which removes all necessity of inserting any standards regarding benefit provisions or anything of that sort. (Ib. p. 137)

Dr. Witte referred to the fact that Governor Lehman of New York regarded as bill number 1 the measure proposed in the legislature of that state, for the enactment of which he will push "as soon as he knows what will be required". (Ib. p. 143) Ninety-eight percent. of the 10 percent. of the tax goes to the states for administration. (Ib. p. 147) In a model state bill "that we are preparing, we are putting in a clause saying that the states may depart therefrom." (Ib. p. 149) If there should be state laws that are utterly unfair, "we have a club here; we won't give them the administration fund, and they won't be able to administer the law at all unless they dig down into their own pockets to pay the administration costs. . . ." (Ib p. 154)

Miss Perkins felt that the federal-state system was the most practical at this time. (Ib. p. 183) Credits are al-

lowed up to 90 percent., only for the purpose of providing a ten per cent. fund for administration. It is proposed that this 10 percent. be given back to the states. (Ib. pp. 183-4) It had been thought wise [it is presumed, by the Committee] "to permit the States to determine under their laws who shall contribute to the fund." (Ib. p. 185)

Mr. McCormack, in questioning Miss Lenroot (Chief of the Children's Bureau, Department of Labor) drew from her the admission that unless the state submits an unemployment compensation plan that meets with the approval of "somebody in Washington," then the plan can be disapproved. (Ib. p. 286)

Mr. Hansen: The amount withheld (the 10 per cent.) will be used for the purpose of subsidizing or giving a grant-in-aid to the state employment offices and building up the standards of administration of the various states. (Ib p 380)

Mr. Green, discussing the grant-in-aid policy, observed that out of the moneys collected the United States "would subsidize the states", provided the latter enacted unemployment insurance measures containing the minimum standards established by Congress. (Ib. p. 388) In answer to a question, why the money should not be given direct to the beneficiary, Mr. Green said that "we have 48 sovereigns here. It cannot be done any other way. The states must enact the unemployment-insurance acts." The federal government must provide for the pool plan. It must not be left to the states, to adopt a hit-and-miss plan, like workman's compensation laws. If Congress sets up standards which should be uniform in their application, each state will respond and incorporate in its law simple standards providing, (1) a waiting period of a

week, (2) a pool-reserve fund, (3) a limit of 26 weeks. These simple standards can be set up by Congress in order to enable the states to receive a subsidy out of the federal treasury. In Great Britain all funds are pooled, but our 48 sovereignties make that "a little difficult." (Ib. p. 389) If Congress fails to establish standards the states "must conform to", it will be found that in states "where our liberal forces are not strong, where social-minded people are not so numerous, where they do not possess a social conscience, they will adopt an unemployment-insurance measure providing for the payment of the most meager sums and those "liberal forces in the state will be unable to prevent it." But if Congress says that the benefits must be fifty per cent. of earnings, not to exceed $15 a week, and if that must be put in the law in order to secure the subsidy from the federal government, the state legislature will so provide. That is the only way to get uniformity. (Ib. p. 396)

Mr. Leiserson felt that better progress would be made if "we let those states which are ready to act now begin and enact their own laws under the general authority" of the Wagner-Lewis bill. It is advisable to let each state begin administering this kind of an act and begin to collect the data on which an actuarial calculation for that state alone can be made. (Ib. p. 401)

Mr. Leiserson protested that instead of imposing a standard on the States of a 3 per cent. tax on the employer, the States ought to be allowed to split it as in Ohio: Two per cent. from the employer and 1 per cent. from the employee. He did not think it wise, because "you and I think that it is not the wise thing to do, to impose standards here in Congress that will force the States to

follow our ideas rather than their own ideas on the subject. They ought to be allowed that measure of self-government as long as all the money that is collected will go to the employees in the end. (Ib. p. 402) . . . . I would not like to see Congress at this time lay down a rule that would compel the States to act just one way and not another way." (Ib. p. 403) The federal tax should be imposed on all states so that the employer in the state that fails to pass a law "cannot chisel on the State that is going forward." (Ib. p. 408)

The purpose of the bill is, very frankly, to lead employers in a state to establish such a law, since they have to pay the tax anyway, so as to avoid this paying of the tax (except the 10 per cent.) and moving of the people to States where the system is in effect. (Ib. p. 418) This would be an inducement to every state to provide such a system of unemployment insurance.

Mr. Lewis, questioning Miss Christman (representing the National Women's Trade Union League of Washington, D C.) who was objecting to the lack of further standards, asked if she thought the states would set a tax at less than three per cent., then proposed in the bill, when otherwise the tax would stay in the federal treasury, to which the witness replied "Well, I would like to be sure of it . . I think they [the more laggard states] need Federal guidance." (Ib p. 794)

Mr. Ellenbogen felt that the tax device proposed would not in some states provide sufficient pressure to bring about the enactment of unemployment compensation systems. (Ib. p. 822)

The Report of the Technical Board on the Major Alternative Plans for the Administration of Unemploy-

ment Insurance compares the three proposed systems, (1) the national system, in which the federal government administers the entire plan, (2) the federal-state system or the subsidy plan, where the government collects all the taxes and subsidizes the states, and (3) the federal-state system or the credit plan, where the federal government retains only ten per cent. of the tax for use for administrative purposes. As to which of these plans should be adopted should be "decided primarily on practical and fundamental policy considerations, rather than on the issue of constitutionality." (Ib. p. 875) Under the third plan, if the states should pass laws and the federal act be held unconstitutional the state laws would continue to operate; while under the subsidy plan, the state administration would fail without a federal appropraton. (Ib. p. 876)

The Report of the Advisory Council to the Committee on Economic Security recommends the grant-in-aid system in a bill separate from the tax bill; the bill providing that no state is to receive aid until its law is in effect, and containing any other feasible provisions "designed to stimulate prompt state action." This plan would run less risk of unconstitutionality than the plan adopted, if the latter were "equally equipped with provisions of minimum standards for the States." (Ib. p. 883) It is recommended that wide latitude be allowed to states with regard to rate of benefits, ratio of weeks of benefit to weeks of employment, and length of waiting period; provided the states satisfy the federal administrative authority that there is reasonable prospect that they will be able to maintain payment of benefits on the basis prescribed in their law; no law to be approved which provides a waiting period of not less than two nor more than four weeks, and

prescribes a rate of benefits of not less than 50 per cent. of weekly wage not in excess of $15 per week. Actual payment of benefits should not begin until two years after the act becomes effective. The length of the probationary period of the unemployed before obtaining benefits should be left to the states. (Ib p. 886) The federal board should have the responsibility of passing upon state laws and their administration and of certifying to the treasurer their compliance with the Federal act. (Ib. p. 887)

The Committee recommends that the Committee on Economic Security frame model state bills "incorporating the various types of legislation permitted under the federal act, and be prepared upon request, to provide actuarial and expert assistance in the drafting of bills for introduction in the several state legislatures." (Ib. p. 888)[1]

Senator Hastings remarked that "the clear purpose of the act [containing the tax-credit device] is to compel the states to adopt some plan of unemployment compensation. If the state does not adopt such plan, the tax paid by the employer goes into the general fund of the federal treasury." (Ib. p. 951)

> "I cannot see how, under our Federal Constitution, we can levy a special tax upon the people of the various states, when its sole purpose is merely to compel the states to enact, for the benefit of the people of such state, the kind of law that the Federal Congress believes to be for their benefit. (Ib. p. 951)
>
> ". . . . I think the question of the necessity and the desirability of such a law should be left to the legislature and the executive of each state. (Ib.)

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1 See Appendix for comparative analysis of draft bills with the laws passed by the states.

> ". . . . We have never heretofore, so far as I know, attempted to compel a state to adopt any particular kind of law believed by the Federal Congress to be desirable or necessary. The adoption of this act thus takes us into an entirely new field. (Ib.)
>
> * * * *
>
> ". . . . I insist that the State ought not to be compelled to adopt a particular kind of a tax in order to prevent the tax that the Federal Government has laid upon it being taken out of the State." (Ib. p. 961)

The one argument in favor of the measure that in the Senator's judgment was sound "economically", was that the federal tax eliminated the question of competition among the states. (Ib p. 961) The argument does not, however, overcome the constitutional objection (Ib. pp. 961-2), which nothing can overcome. (Ib. p 962) The senator's remedy for the problem is through governors' conferences and compacts among states The latter would then request Congress to approve the compact. He knew of no state requesting legislation, except New York according to "last night's paper." (Ib. p. 962) The states would hasten to enact their laws if they were required to pay the 3 per cent. federal tax anyhow, which would be spent elsewhere, and the Senator objected to "our forcing them to hasten to do it." (Ib. p. 963) The employer would invite the state government to levy the state tax, since the employer has to pay the federal tax anyway. (Ib. pp. 963-4) That is the only way the state can save the tax for itself. (Ib. p. 965)

M. B. Folsom, assistant treasurer, Eastman Kodak Company, member of the Advisory Council on Economic Security, favored the plan of experimenting with several

state systems; for if a federal system were adopted we could experiment with only one plan, which would not suit the whole country with conditions so different in the various sections. (Ib. pp. 1001-2)

Mr. Emery, representing the National Association of Manufacturers, felt that the problem could be approached in another way, if the federal government would leave the states free to act and assist them financially without endeavoring "to undertake to compel them to adopt a policy which seemed good to it [the federal government] as a condition of receiving temporary assistance. . . ." (Ib. p. 1032)

(d). Report of the Ways and Means Committee of the House of Representatives

It is noted that Titles III and IX seek to encourage states to set up unemployment compensation systems and "to keep them from being handicapped if they do so" (House Report No. 615, p 7) A uniform nation-wide tax upon industry, removing the objection of competition as between industries in different states, is necessary before states can go ahead and pass this socially desirable legislation.

> "This is one of the purposes of Title IX of this bill. In this title a tax is imposed upon employers throughout the country against which a credit is allowed of up to 90 per cent. of the tax for contributions made by employers to unemployment compensation funds established pursuant to State law." (Ib. p. 8)

The standards (as to state legislation) prescribed in the bill "are designed merely to insure that employers will receive credit against the federal pay-roll tax only for pay-

ments made under genuine unemployment compensation laws." (Ib. pp. 8-9)

(e). Hearings Before the Committee on Finance of the Senate

Senator Wagner discussed the features of the subsidy grant-in-aid plan, the chief objection to which was that the states would not stand upon their own feet but would exert increasing pressure to secure contributions larger than the sums raised by the federal tax, thus mingling the insurance with relief, a most unsatisfactory method. (Hearings before Committee on Finance of the Senate, p. 4). As a substitute, however, "as a more powerful incentive", the bill presented the tax-credit feature, the natural result of which would be the enactment of laws in every state, "since the states will be anxious to draw this federal tax back into their own borders. . . ." (Ib.) The tax will put all states on a parity, "so that if a State refuses to pass a law it hasn't that advantage gained by a low standard. That is the purpose of the act". (Ib. p. 22)

Senator Black brought out from Senator Wagner that if the state desired to raise its benefits through some other method of taxation, as by correcting the "maldistribution of income", it would not be permitted to do so under the bill as framed, and secure federal aid and credit on federal taxes; that the funds intended for state administration come from the 10 per cent. retained by the federal government. (Ib. pp. 23-24)

Miss Perkins explained that the 10 per cent. of the federal tax for which no credit was allowed was for administration. There is no advantage to the state in allowing employers merely to pay the federal tax, for the

state would still have its unemployment burden to meet. The advantage to the state would come from passing such a law, for the funds contributed could be used for regular benefits to the unemployed persons within that state (Ib. p. 112). Miss Perkins did not think that the states should be cut off from any experimentation they wanted to give to various aspects of the problem [of collecting contributions by use of a pooled fund rather than plant reserve funds]; provided the federal government assures itself that the funds received are properly taken care of and are used for the benefit of the unemployed. The Committee has several alternative model bills, which can be drawn with reference to the methods of contribution. (Ib. p. 115)

Senator Black brought out that except for administration the state had no funds to expend except from the funds raised in such state (Ib p. 120), that the state could not substitute excess profits or any other tax for the contribution exacted of employers (and employees); that (except for the claimed precedent of the inheritance tax credit plan) there is no precedent (which Miss Perkins could at the moment think of) for this "system of federal aid, we will call it, or Federal coercion—that is what it amounts to, so far as I am concerned." (Ib p. 122)

Senator Barkley asked for Miss Perkins' theory as to the justification for this "form of coercion or intimidation or whatever it is". He is a little bothered about the theory that Congress can say to a state "If you do not pass a law yourself we are going to take it away from you, and you do not get any of it back." (Ib. p. 126) If the money is returned, she answered, for unemployment relief, the incentive for the state to pass a suitable law is removed; the purpose of the federal law being to equalize

in the states the cost of doing business in every state so far as possible with regard to taking care of unemployed persons. She was opposed to the suggestion of Senator Barkley to earmark the funds until the states should pass proper laws, for if the states were to get the funds back anyhow the inducement or incentive to pass such laws would be removed. (Ib.)

Senator Barkley found a serious objection to the collection of a tax for a definite purpose, like unemployment insurance, and then using a considerable portion of the tax for general government expenses (Ib. pp. 126-7), as to which Miss Perkins answered that the tax was a general tax for which it is assumed the government had ample use and was always seeking new sources of revenue (Ib. p 127). Senator Barkley replied that the tax would not be levied except to provide for unemployment insurance. Miss Perkins answered that the tax is levied to raise funds for general purposes "and to encourage the states to pass unemployment insurance laws of their own" (Ib)

> "Senator Barkley And penalize them if they do not?
>
> "Secretary Perkins It only penalizes the employers, not the State generally.
>
> "Senator Barkley. It does not penalize the Government.
>
> "Senator Couzens (of Michigan) In other words, if this was earmarked to go back to the States at some future time, there would be no incentive for the States to hurry and create an unemployment-insurance law.
>
> "Secretary Perkins. That is my thought, sir. (Ib.)

* * * *

> "Senator Barkley. I think the fund ought not to be dissipated for general purposes; it ought to be kept intact for unemployment insurance.
>
> "Secretary Perkins. It might be kept intact in a fund from which the Government will draw to pay, for instance, for public works, which it is anticipated will have to be thrown in to provide a work benefit after the tax benefits have been exhausted in periods of deep depression. I am told by the Treasury that things like that are merely a bookkeeping procedure. If the Government has an obligation it has to pay the obligation, and whether you have earmarked the fund or not does not matter." (Ib.)

Miss Perkins did not object to permitting the states to benefit whose legislatures did not meet before January 1, 1936, except that the plan should be so safeguarded

> "that it is not an encouragement to a State to postpone its action, or to believe that it will get the money back. In that case it will not pass the law and the funds will not be accumulated as they ought to accumulate for the benefit of the unemployed."[1] (Ib. pp 134-5)

Mr Green expressed the thought that (as to the grant-in-aid system) the United States with the money could better bargain with the states wanting the money, which means that "the States must meet the standards set by Congress in order to get the money." (Ib. p. 159). There is a question as to whether Congress can use its taxing power "to indirectly compel a state to do something". (Ib.) But there is nothing new in the plan to impose a tax in one bill, and provide an appropriation in

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1 See also Senator Barkley's discussion with Mr Reyburn on Ib pp 709-10

another on such terms as Congress may impose. Such a plan avoids experimentation which may be "both dangerous and unconstitutional". (Ib. p. 163)

In the Report of the Advisory Council to the Committee (dated December 18, 1934) the majority recommended the two bill plan for the reason, among others, that it ran less risk of unconstitutionality as compared with the credit device bill "when the latter is equally equipped with provisions of minimum standards for the States". (Ib p. 227). The minority felt that if the credit-device bill were declared invalid, the state laws would be complete in themselves and would remain operative. (Ib.). States should have freedom to substitute their own benefit provisions for the standard benefit recommended, provided they satisfy the federal authority that there is a reasonable prospect that they will be able to maintain payment of benefits on the basis prescribed in their laws. But in no event is a state tax to be approved unless it has a waiting period of not less than two nor more than four weeks, and prescribes a weekly benefit of not less than 50 per cent. of average weekly earnings, and a maximum benefit of at least $15 per week. (Ib. p 230). The Committee recommended that the state law provide, in substance, what was finally adopted (Ib. pp. 226-31).

Dr. Witte said the word "subsidy" was a misnomer. It relates not to a grant by the federal government from the general revenues, but it relates "to the return of the taxes collected from a state from the 3 percent tax in this bill to the state from which collected." (Ib. p. 239). Under the tax credit plan the money the state collects is not a tax; it is a contribution or premium rate. (Ib.) Credits are withheld until the state complies, as to which Senator Connally said:

> "Of course, it is designed to coerce the States into coming in".

Dr. Witte replied that

> "You can use that phrase if you want to".

So Senator Connally changed the word to "induce". (Ib. pp. 239-40) On account of the objection of competition, the states have declined to act. Now the federal government imposes conditions which make it of advantage to the states to come in. (Ib. p. 241)

> "Senator Connally. Whether you use the word 'induce' or 'coerce' the result is the same The State says, 'Well, we are going to pay the 3 per cent. tax anyway, or the Government is going to take it away from us, so we will pass it ourselves.' That is the philosophy of the bill?
>
> "Mr. Witte. The philosophy of the bill is to make it possible for the States to act." (Ib.)

Mr. Leiserson, discussing Mr. Green's preference for the grant-in-aid plan, said that some of the standards proposed under such plan would not be acceptable to all the states—Massachusetts, for instance, and he thought Massachusetts would rather lose its 3 per cent. tax than to accept the standards, although he agreed that the act of turning such tax over to the federal government is

> "a power or a force which you hold over the head of the people of the State of Massachusetts and would be a very substantial money loss to them if they did not pass the law." (Ib. p. 277)

Mr. Leiserson stated that Mr. Alexander Holtzoff, a representative of the Attorney General's office who was

on the Technical Board of the Committee on Economic Security, prepared a brief on the subject. [1] (Ib. p. 280)

Mr. Epstein favored the grant-in-aid plan, for the states would adopt the standards proposed by Congress; they had all to gain and nothing to lose. (Ib. pp. 468-9, 497-8)

Mr. Story, Vice President and General Counsel of Allis-Chalmers Manufacturing Company, Milwaukee, asked the Committee to show liberality toward Wisconsin and permit it to carry out the experiment it had begun, and not require a certain percentage as a contribution into a pool fund. (Ib. p. 521)

Mr. Folsom insisted that some freedom be left to the states, as for instance, Wisconsin which had begun its experiment without a pool fund (Ib. pp. 563-4)

A preliminary draft of a state law was presented by Dr. Witte which contains the following advisory suggestions:

> "Each State which passes such a law promptly will be able to set up a State unemployment-compensation fund, thus using for State purposes that money which would otherwise be paid into the Federal Treasury by the State's employers (Ib. p. 591)
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> * * * *
>
> "It is suggested, however, that each State executive or legislator who plans to make any change in either of the model bills (prepared by the Committee on Economic Security) might do well to write the Committee for advice on the vital question: 'Would

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[1] Supra, p 96, footnote 1.

the proposed change prevent the State law from qualifying for (a) Federal tax credits to employers, and (b) Federal aid for State administration?'

"By thus writing the Committee on Economic Security, each State can be advised whether the proposed changes (a) will meet Federal requirements and (b) are consistent, or conflict with other provisions of the 'model bill' itself.

"The Committee's address is 1734 New York Avenue, Washington, D. C." (Ib. p. 592) [1]

Elmer F Andrews, State Industrial Commissioner of New York, requested the Committee to reduce to one year the time within which benefits are forbidden to be paid, so as to preserve a like provision in the New York law (Ib p. 717). This the Committee declined to do and New York changed its bill so as to comply (Laws 1935, Chapter 468, Sec. 503 2). The New York law was in the making. At the direction of Governor Lehman Mr Andrews appeared before the Senate Committee with amendments to bring the Federal Act more nearly in line with the New York bill. These amendments were: (1) to eliminate the provision of the act fixing the rate of contribution on the adjusted index of industrial production averages (Section 601, p. 34 of the bill as introduced) (Ib. p. 714) and to provide a rate of tax at a fixed percentage, (Ib. pp. 714-5); (2) to limit the amount of money distributed to any state for administration so that the amount based on additional need of financial assistance should not exceed ten per cent. of the total allotment to be made to that state, (Ib. p. 715); (3) to eliminate bonuses and to include tips or gratuities as part of

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[1] See Appendix for comparative analysis of model bills with the laws passed by the states.

wages (Ib. p. 717); (4) to eliminate any system except a statewide pooling system (Ib. p 717); (5) to permit benefits to be paid within one year after the enactment of the state law (Ib. p. 717); (6) to enforce a minimum standard of benefit (Ib. p. 718); (7) to apply the contribution to one who had employed four or more persons at any time in any three months period, or such shorter accounting period as the state agency may establish (Ib. p. 718); (8) to exempt farm labor (Ib. p. 719); (9) to limit to twenty-five hundred dollars the salaries on which contributions should be made (Ib. p. 719); (10) to amend the federal bankruptcy act so as to provide a priority status for contributions due from insolvent employers (Ib pp 720-21). The Committee accepted amendments (1) and (8).

Mr. Filene of William Filene's Sons Company, Boston, stressed the necessity of state experimentation, saying that under the bill it was made impossible for the state to set up its own system unless it desires a system after the pattern of that proposed in the bill (Ib. p. 821).

According to the Report of the Unemployment Insurance Committee to Industrial Advisory Board the purpose of the bill is to encourage state action. All states will naturally pass an unemployment insurance law merely to keep the money at home, if nothing else (Ib. p. 857).

Mr. Hooker, President Hooker Electro-Chemical Co., New York City, representing the Manufacturing Chemists Association, said the bill as framed practically forces the states to adopt the pooled plan. If they comply they cannot experiment with other types of unemployment compensation (Ib. p. 882).

Prof. Paul H. Douglas, Department of Economics, University of Chicago, thought a greater degree of control could

be exercised by the federal government through the distribution for administrative purposes of the 10 per cent. of the tax which it retains, to be withheld if the states do not conform to proper standards of personnel (Ib. p. 893). A state could not substitute other methods of taxation (Ib. pp. 893-4).

Mr. Webster, representing The Connecticut Manufacturers Association, Bridgeport, Conn., felt that the people of his state had theretofore shown the ability to handle their affairs, and viewed with disquiet the attempt of the federal government to direct them along a path of action which their legislators,

> "closer to their constituencies and more familiar with our limitations, have not seen fit to launch upon as yet." (Ib. p. 898)

The industrial employers are concerned about the latent powers of federal coercion that lie in the bill. (Ib.)

Mr. Kellogg, Editor The Survey and Survey Graphic, and Vice Chairman Advisory Council, Committee on Economic Security, New York, felt that to turn back the tax to the states without setting the standards below which no state should go is to make a hollow shell of the protection for which the money is collected (Ib. p. 904).

If the 3 per cent. tax were not sufficient Mr. Kellogg would compel the states to raise the funds in some other manner (Ib. pp. 906-7).

Mr. Sargent, representing The National Association of Manufacturers: The bill apparently allows the state to have pooled or reserve funds, but in fact coerces it into creating pooled funds by providing that employers shall not receive credit for favorable employment records unless the state has

such pooled funds. He urged that each state be fully and actually allowed to determine for itself whether it desires to establish a pooled fund, an industry reserve plan, or a company reserve plan as the basis of the law (Ib. pp. 958-9).

Dr. Eveline M. Burns, Columbia University, said that it is hoped the states would hasten to set up schemes in order to get back their share of the tax paid by their employers and to obtain their share of the $49,000,000 grant for administration (Ib. pp. 1007-8).

Miss Abbott, Editor Social Service Review and Professor of Public Welfare, University of Chicago: The present form of the bill will supply the need, which is pressure at the present time on the states to enact unemployment-compensation laws, and standards can be added as they need to be added (Ib. p. 1081).

George B. Chandler, representing the Ohio Chamber of Commerce, protested against the coercion of the states as represented by the assessment on payrolls and in other ways (Ib. p. 1102).

Henry E. Jackson, President Social Engineering Institute, preferred the grant-in-aid bill, and felt that the apparent courtesy of the tax credit device was a meaningless formality to the states, because it proceeds to take almost every bit of freedom from the states (Ib. pp. 1111, 1126). He preferred a federal tax, the percentage of which is of small importance, because it is designed not to produce revenue but solely for compulsory purposes; the tax to be automatically cancelled as to the employer when its employees shall have adopted a social security plan, with appropriate yields and benefits (Ib. p. 1127).

(f). Report of the Committee on Finance of the Senate

After H. R. 7260 had been passed by the House on April 19, the Committee reported it out eliminating the requirement thate state contributions be confined to the pooled type, which will "permit states to enact whatever type of unemployment compensation law they desire." (Senate Report No. 628, p. 3). The Committee inserted two new sections (909 and 910) allowing additional credits to employers as a reward for favorable employment experience, designed "to permit states to give an incentive to employers to stabilize employment." (Ib.) The bill seeks to "stimulate" the states to set up their systems. The objective is carried out through grants-in-aid to the states (Title III) for administration, and the imposition of a uniform payroll tax on employers with the tax credit device (Title IX). (Ib. p. 12) The conditions under which state laws are approved by the federal board are "intended merely to make certain that the states actually have unemployment compensation laws, rather than mere relief measures". (Ib. p. 12). No state can gain any advantage by failing to establish a system. The interest throughout the country is such that it is to be expected that nearly all states will enact such laws "within a very short time". The states may or may not add employee contributions to those required from the employers. They may likewise determine their own rates, waiting periods, and maximum duration of benefits. (Ib. p. 13). The Committee deemed it desirable to permit the states freedom of choice as to pooled or other funds, with the recognition of credit for employers who have "regularized their employment . . . " (Ib. p. 14). The Committee analyzes Section 903 (a) setting out requirements if a state law be approved. (Ib. pp. 46-7)

(g). Statements Made in the House

Mr. Doughton, in explaining TITLE IX, stated that a few minimum requirements are imposed which the state laws must satisfy in order to qualify for the tax credit, indicating that the principal requirement was that the fund should be used solely for the payment of unemployment benefits. In general the states are left free to determine the provisions of the unemployment insurance laws (Cong. Rec. Vol. 79, Pt. 5, pp. 5475-6); that the federal bill "does not provide for unemployment insurance but merely makes it possible for the states to do so. . . . " (Ib. p. 5476)

Mr. Treadway, of the minority, said that the coercion effected by TITLES III and IX took two forms; under TITLE III the states could not secure their administrative expenses unless their laws met standards laid down in the bill; and under TITLE IX the coercion "in the guise of a tax was more direct." . . . If the state did not pass the law employers located therein nevertheless must pay the full federal tax and get no unemployment benefits; that the only way they could escape the major portion of the federal tax was "by prevailing upon their state legislature to enact such a law. . . ." In effect, TITLE IX forces employers to pay a tax either to the federal government or to the state. (Ib. p. 5529)

"Moreover", said Mr. Treadway,

> "there is a constitutional question involved, since the tax under title IX is not a true tax, but a legislative 'club' to force State action along certain lines." (Ib.)

Mr. Plumley of Vermont referred to the admission contained in the Report of the Committee on Economic Security that its recommendations are "frankly experimental"; that

the plan, according to the Committee, is one that will secure the much needed experience necessary for the development of a more nearly perfect system; yet the Committee urges haste and experimentation. (Ib. p. 5705)

Mr. Cooper of Tennessee took the position that there was no coercion; rather that TITLE IX will have the effect of enabling the states to proceed with their own laws which they have heretofore been unable to do because of the element of competition with the industries of other states (Ib. p. 5781); the bill enables the state to enact these laws which, as a practical proposition, they have heretofore been unable to do (Ib. p. 5782).

Mr. Vinson of Kentucky outlined the requirements imposed on the states before they could qualify under the bill, and these as contained in Section 303 (a) of the bill are substantially as finally enacted. Mr. Vinson stated that these measures are designed to encourage the states to act; that the uniform federal tax will remove the principal objection (Ib pp. 5900-1).

Mr. Ellenbogen of Pennsylvania stated that as a result of the enactment of the state law the tax will be paid for the benefit of the employees in the state enacting the law; that in other states the tax will likewise be paid,

> "but the employees of such a State will derive no benefit from the tax payments, since they will go into the general funds of the Federal Government." (Ib. p. 5975)

Mr. Burdick of North Dakota characterized the act as

> "the most brazen attempt to submerge the sovereignty of State governments to the will of the General Government ever attempted in American history. Every State is compelled to pass laws such as will be approved

by the board in control of payments under this act. Had any such attempt been made in 1861 to do the same thing this Government would not be known to the world today as the United States of America. Today we see the sovereign power of States disappearing entirely and the Federal Government reaching out in all directions to control the destiny of the American people. Why have any State legislature at all, if they must pass such laws as Congress and the executive branch of the Government shall direct? When will this tendency to overshadow State governments cease?" (Ib. p. 5555)

Mr. Reed of New York, describing the effect of the tax-credit device, said that in such a case "it is not a tax but a penalty, and, therefore, discriminatory as well". (Ib. p. 5892) He stated further that the purpose of the tax was to force the states to enact such laws.

"Mr. Huddleston (of Alabama). Does the gentleman think that such a measure as this which coerces and bribes the State into a system of Federal aid is conducive to the dual form of government? You are destroying our governmental system.

"Mr Doughton (of North Carolina.) Oh, I make the point of order, Mr. Chairman, that the gentleman from Alabama is out of order.

"Mr Sabath (of Illinois) This is encouragement to the State.

"Mr. Huddleston. What we are doing is to wipe out State lines. We are centralizing all of the powers here in Washington. We are trying to destroy our dual system of government. That is what is the matter with this measure. (Cong. Rec. Vol. 79, Pt. 6, p 5982).

* * * *

"One member replied that not to require contributions from the States would tend to destroy our system of

> government. What, I ask him, could have more influence toward the destruction of our duality of government than an offer to the legislatures of the States a bribe of a grant of Federal Funds to do a thing that they perhaps otherwise would not do? (Applause). What greater force to destroy our form of government can be offered than for the Federal Government to coerce, through a measure such as this, the States into establishing a pension system which they otherwise might not want to do?" (Ib. p. 5983)

Mr. Knutson said that the purpose of the bill was not to "induce" the states to set up systems of unemployment relief, but to "coerce" them. "There is a distinction between the two words". (Ib. p. 5541)

(h). Statements Made in the Senate

Senator Harrison referred to the factor of competition as having heretofore deterred states from establishing such a system, and for this reason it has been considered

> " a most desirable step for the Federal Government to eliminate this barrier to State legislation " (Cong. Rec. Vol. 79, Pt. 9, p. 9271)

The Senator explained that the federal tax placed all employers on the same footing and allowed and encouraged the inauguration of state systems. (Ib.)

Mr. Wagner of New York spoke of the "two powerful Federal incentives to State action" which the bill set out; these being the appropriation for administration of the state system and the credit on the federal tax which the employer under such system secured. (Ib. p. 9284). The Senator justified the tax-credit on the authority of *Florida v. Mellon,* 273 U. S. 12 (71 L. ed. 511). He entered into a discussion

of the opinion of the Supreme Court in the Railroad Retirement case recently handed down (May 6, 1935), and argued that in the present bill the power exercised was derived not from the commerce power but from the power to tax and to spend. He explained the opinion of the court as to the invalidity of the arrangement to pool the funds of the railroads by saying that in that case the benefits were to be paid for past services, but that the present bill applies to the future only. (Ib. pp. 9287-8). He took up the question of *Mountain Timber Co. v. Washington,* 243 U. S. 219 (61 L. ed. 685) and undertook to justify the present bill on the basis of the workmen's compensation decisions. (Ib. p. 9288)

The Senator ended with the peroration that the bill embraces objectives that have driven their appeals to the conscience and intelligence of the entire nation; that among other things the duty rests on Congress to

> "tear down the house of misery in which dwell the unemployed. . . " (Ib.)

(4) The Act as an Invasion of the Reserved Powers of the States

This subject is to a large extent covered under the subjects entitled "History and Evils of the Times", supra, pages 17 et seq., "The Act as a Tax Measure", pages 71 et seq., and "The Act as Coercing the States", pages 100 et seq. The discussions which deal expressly with the invasion of reserved powers indicate the thought on the part of those who raised the subject that such an invasion was not without its constitutional problems.

(*a*). *Message of the President*

In the message of the President dated January 17, 1935, he touched indirectly on this question when he said that

> "in order to encourage the stabilization of private employment Federal legislation should not foreclose the States from establishing means for inducing industries to afford an even greater stabilization of employment." (Cong. Rec. Vol. 79, Pt. 1, p. 599)

Thus it was the presidential view that the states would be left room for moving forward with their own plans though the federal government proposed to pre-empt much of the space which had theretofore been occupied by the local solution of the unemployment problem.

(b). Hearings before the Committee on Ways and Means of the House

Senator Hastings, appearing before the Committee, refers to the new policy contained in the Act of placing on the federal government a large portion of the expense of taking care of those in need of public assistance, which had theretofore been borne by the states, except in unusual circumstances, especially in earthquakes and floods, where the federal government has frequently rendered temporary aid (Hearings before the Committee on Ways and Means of the House, p. 947) In answer to a question from a member of the Committee the Senator thought that it was "universally agreed" that the duty of taking care of the needy and unemployed rested primarily on the states, based

> "on the theory that the States withheld all their powers that they did not give up to the Federal Government, and kept for themselves not only the duty but the re-

sponsibility of taking care of their own people. That has been the history of this country. We never heard of a Federal almshouse. The Federal Government has never gone into any of that, except upon the theory that it was to take care of persons for our national defense. We take care of our old soldiers. That is all that we have ever done up to this time. It has always been considered and never has been disputed that these questions are primarily duties of the communities where the people live.

"Mr Hill That is because the States heretofore have been measurably able to take care of those situations.

"Senator Hastings That is true." (Ib. p 959)

Mr. Folsom in a statement filed by him said that he had heard summed up the argument against the proposed federal system, and the compelling argument against it is that

"it is almost impossible for any group to devise one plan which would be workable or desirable for the whole country with conditions so different in the various sections. . . . ." (Ib. pp. 1001-2)

Mr. Emery:

"As you examine this legislation piece by piece—and, of course, the repeated statements of its proponents makes it practically unnecessary—you perceive again and again that the whole legislation, upon its face, is pointed to one result, and that is to secure State legislation upon a subject on which the States have not legislated and which under the tenth amendment is not only under their control but which they are free to accept or reject." (Ib. pp. 1026-7)

(c). Hearings before the Committee on Finance of the Senate

Dr. Witte referred to a brief by Joseph P. Chamberlain of Columbia University on the constitutionality of the old-age pension assistance bill which is found in the Hearings before the Senate Committee on Pensions of the 71st Congress, 3rd Session, considering Senate Bill 3257, at pp. 99-101. Dr. Witte introduced the opinion (Hearings before the Committee on Finance of the Senate, pp. 92-4) in which Mr. Chamberlain referred to the class of congressional acts extending aid to the states, such as highway, maternity and infancy welfare, industrial and commercial rehabilitation; invoked that part of the opinion in *Massachusetts v Mellon* as to a lack of power on the part of the court to adjudicate "abstract questions of political power" [262 U. S. 447, 484, 485 (67 L. ed. 1078, 1084)], the court pointing out that no state rights were invaded merely by extending the option. From this authority the author draws the conclusion that the statutes referred to and the old-age assistance bill drawn on their pattern "seem therefore to be free from possibility of attack in an action by a state or by an individual taxpayer" (Ib. p. 93). Mr. Chamberlain points out also that if the conditions in the Act involved cession of reserved powers, the Act would not be unconstitutional, because it did not become effective until accepted by the state, and that the delegation by the state to the United States of some reserved power is no violation of the federal Constitution; that the Tenth Amendment is inapplicable as a test of delegated powers of the United States and cannot be taken to limit the exercise of the delegated powers, in particular the powers of taxation and appropriation.

Interference with the power of the states is no constitutional criterion of the powers of Congress, argued Mr. Chamberlain. If the power is not given, Congress may not exercise it. If given, the laws and constitutions of the states fall before its exercise. The state's acceptance would, at most, violate only the state's constitution and would raise no question within the jurisdiction of the federal courts. No federal aid legislation had so far involved delegation of state powers precedent to receiving benefits, and the same would be true of the proposed old-age law (of 1931). [This law however is quite different from the proposed Social Security Act, which requires the delegation of powers prior to the acceptance of benefits.—Section 303(a)].

It would thus seem that an easy method for Congress to assume powers not delegated to it is to secure them from a state; for by the argument advanced the Tenth Amendment protects the state against Congress but not against itself and the act of the state in exending the power to Congress is no violation of the federal Constitution! Mr. Chamberlain's theory would throw considerable doubt on the principle that has not heretofore been challenged: That Congress can exercise only powers delegated to it by the Constitution. He would now have it exercise powers delegated to it by a single state. Thus the Constitution is amended by one state instead of thirty-six. Thus Congress is free to interfere with the powers of a state if the state accepts the offer which effects the interference, for only the state constitution would be violated (Ib. p. 93).

The author discusses the general welfare clause, discards Madison's theory and adheres to the views of Hamilton and Story: That the expenditure be general and not local (Ib. pp. 93-4). He says in summary that an act would be "free

from attack", and would be no invasion of state rights to local self-government; that the appropriation "would probably not be reviewed by the courts." Thus he reaches the same conclusion which is put forward by the attorney general (supra, p. 96): That if the tax act and the appropriation act are separated no one is left with a justiciable cause and neither act can be tested in the courts.

As far as the state is concerned, there is no doubt that it has the power and the duty to take care of its indigent people, said Senator Gore, "but it is a new theory as far as the Federal Government is concerned." (Ib. p. 133)

Labor legislation is in effect in foreign countries with unitary governments and which do not have "forty-eight sovereignties." Because the latter in this country have such different conditions it is difficult to provide a single plan; "but we should establish as great a uniformity as possible," said Mr. Green (Ib. p. 186).

In an extended discussion between Mr. Epstein and the members of the Committee he brought out that the "approach" would have to be toward "a national way without interfering with our present form of government." (Ib. p. 468) The Congress would say to the state legislature that if the latter adopts a proper law under proper standards (at least a number of weeks and a minimum amount of benefits, and a decent administration) Congress will turn over to the state all the money it has collected through the 3 per cent. tax [changed to the present rates of 1, 2 and 3 per cent., Section 901] and all the state has to do is disburse it under proper standards (Ib. pp. 468-9).

Mr. Peckham, representing the Sentinels of the Republic, referred to the work of this organization in assisting in the movement relating to the repeal of the Maternity Act,

cited its objections to the entire Social Security Act with its highly complex and experimental schemes "covering the same fields of purely local legislation" (Ib. p. 679). As accomplishments by the states he cited the abolition of child labor, adoption of workmen's compensation laws, improvement in public health and educational service, "all under state legislation and administration and at the expense of the respective communities". All these fields of state action "involve private right and domestic problems, and were wisely withheld by the founders from Federal control".

> " . . . . The proposed Federal legislation is designed to be permanent, and if enacted will work a permanent and unwholesome dislocation of our scheme of government." (Ib. p. 679)

Dr. McCormack, Commissioner, State Board of Health of Kentucky, supported the plan proposed. He had found fine cooperation from these [public health] bureaus of the government. Very rarely is there a temporary conflict with them. He annually submitted his plans and found "wise and considerate advisers in those with whom we came in contact". They would make suggestions and issued no orders except in one or two instances, where they should have done so (Ib. pp. 689-90).

Senator Capper observed that there was no reason why the states should be alarmed at anything in the bill, as to which Mr. Tyson said: "Not in the least. They have the very broadest powers" (Ib. p. 738). Here we have the remarkable picture of Congress extending the very broadest powers to the states!

Mr. Emery referred to the hearings before a Senate Committee in 1932, consisting of Senators Wagner, Glenn and Hebert. This was under Senate Resolution 483, the

Report being Senate Report 964, June 20, 1932. Senator Wagner's views are contained in Senate Report 629. The Majority Report (by Messrs. Glenn and Hebert) contains the following:

> "The subject of unemployment insurance is not within the sphere of congressional action.
>
> * * * *
>
> "2. Unemployment insurance or wage reserves to be successful, should be inaugurated under compulsory State legislation and be supervised by State authority." (Ib. p. 923)

(d). Statements Made in the House of Representatives

Mr. Reed said that the tax imposed by TITLE IX was another payroll tax; that the system was a state function as distinguished from a federal function (Cong. Rec. Vol. 79, Pt 6, p. 5892); that the members of the Committee on Ways and Means knew that they were trying to set up as a federal activity a police power reserved to the states (Ib. p. 5891).

Mr. Doughton, in charge of the bill, while not admitting that the bill invaded the reserved powers of the states, explained in words that can mean nothing else:

> "Social insurance quite justifiably places on industry itself a part of the burden of unemployment. Under suitable legislation, industry can and will be encouraged to go far toward stabilization and regularization of employment. . . . (Ib. Pt. 5, p. 5468)
>
> * * * * *
>
> " . . . . It places part of the financial burden upon industry, and in that way provides an incentive for stabilization of employment. . . . " (Ib. p. 5476)

In prior years some industries have provided their own pension systems. This has never before been regarded as anything but local and subject to state regulation. No one suggested that such a system was valid merely because Congress had not entered the field. Yet according to Mr. Treadway, "the majority . . . . will not show any consideration for the corporations that have their own systems of pensions. . . . ." (Ib. p. 5533)

> "Mr. Robsion of Kentucky. What will become of the tremendous sum that the workers in years past have put into these various annuity funds?
>
> "Mr. Treadway. There are two features, as I understand it. The first proposition is, they could liquidate, if it was an agreement between the employer and the employee. The other proposition is that if large corporations have insured their employees through an insurance company, those policies could be canceled.
>
> "Mr. Robsion of Kentucky. But there are contracts. How do you get rid of those contracts?
>
> "Mr. Treadway. I hope I made it plain that I am not defending that proposition whatever. I am only trying to explain it a little bit." (Ib.)

(e). Statements Made in the Senate

Senator George, discussing both the old-age and unemployment features of the bill, invited attention to the rights enforceable at law which are granted private citizens,

> "irrespective of the character of their employment, irrespective of the character of the industry in which employed, in every State in the Union; and that, in my judgment, clearly shows that an effort is here made to establish a system which does not lie within the powers granted to the Congress, but which have been definitely reserved to the States under the reserved rights and

powers of the State. (Cong. Rec. Vol. 79, Pt. 9, p. 9514)

* * * * *

" . . . . If the scheme is one that can be referred to any legitimate power of the Congress, all well and good; but if it cannot be, and if it is one that must depend rightfully and rightly upon the exercise of the reserved powers of the States, then Congress should not through the compulsion of a tax undertake to compel the adoption of the scheme." (Ib. p. 9516)

Mr. King, discussing TITLE VIII, contended that Congress lacked the power to set up a system of compulsory old-age annuities. He cited *United States v. Knight,* 166 U. S. 1 (39 L. ed. 325), as holding that "the power of a state to protect the life, health, and property of its citizens is a power not surrendered to the Federal Government and is essentially exclusive to the State." (Ib. p. 9526)

Here we have Congress undertaking to protect the economic condition of the citizen and at the expense of another.

Senator Wagner pictured the benefits to industry—the incentive to the retirement of superannuated workers will improve efficiency standards, will make new places for the strong and eager and will increase the productivity of the young by removing from their shoulders the uneven burden of caring for the old; that the purchasing power resulting from the flood of benefit payments "will have an incalculable effect upon the maintenance of industrial stability" (Ib. p. 9286).

(5) The Act as a Denial of Due Process

(a). Hearings before the Committee on Ways and Means of the House

Mr. Hill suggested to Dr. Witte that the failure to tax all employers might raise a question of constitutionality, referred to the Railroad Retirement Case, and asked if it were valid to have one kind of tax for railroad employees and another kind for others; as to which Dr. Witte replied that the Retirement Act had been held invalid as not authorized under the Commerce Clause, while if it had been passed under the taxing power it would have been valid (Hearings before the Committee on Ways and Means, p. 106). Dr. Witte described the additional credits an employer may secure based on his good record

> "because he has stabilized his employment, because he has cut down his unemployment, and has built up an adequate reserve fund." (Ib. p. 138)

Merit ratings are available to employers also, allowing the credits in addition to the taxes actually paid (Ib. p. 139). But these are deferred until experiences are built over a period of five years (Ib. p. 144). While this in a sense destroys the element of uniformity it is being done for the definite purpose of encouraging employers to stabilize their employment—to reduce unemployment if they can. It gives the employer an incentive to which to look forward in reducing his unemployment to the maximum degree possible (Ib. pp. 145-6). "As in all other types of insurance we should try to measure the risk." In time the federal government may impose different rates on different industries; but our experience is not yet sufficient to guide us. The employer who gets the added

benefit is probably making a larger contribution in keeping his employees at work. This credit is available through pursuing the policy, for instance, of distributing work in slack times. This tax does depart from the rule of uniformity but the employer is meeting another cost when he stabilizes his business (Ib. p. 146).

Mr. Cooper could see an opportunity in the course of time "for considerable special favors being granted in this very system here." (Ib. p. 147)

Dr. Witte said that the provision for additional credit was clearly severable, and its elimination would not affect the constitutionality of the Act (Ib. p. 151). The credit is authorized by authority of *Florida v. Mellon*—"Whether you can allow an additional credit of the amount not paid is a difficult question, I grant you," said Dr. Witte (Ib. p. 151).

Mr. Jolly appeared for the hospitals and secured an exemption for them. He said that non-profit hospitals had payrolls just like other hospitals (Ib. p. 431).

Mr. Epstein urged that the cost of collecting from farmers, servants, small storekeepers and others would be twice as much as the amount collected (Ib. p. 559). The Act could not be administered if it included these groups (Ib. p. 571).

Mr. Morgenthau said that if domestic servants, agricultural workers and transients were included, the task of administration would prove insuperable (Ib. pp. 901-2); that of these there are seven million. The bill now embraces twenty million (Ib. p. 910).

(b). Hearings before the Committee on Finance of the Senate

Senator Wagner stressed the encouragement offered industry to enable the latter to reach the goal of stabilization (Hearings before the Committee on Finance of the Senate, p. 4).

It was Miss Perkins' opinion that under the proposed bill the states could tax one industry three percent. and another industry across the street four percent. (Ib. p. 125).

The figure of four employees [as originally provided when the bill was before the Committee and now changed to eight—Section 907 (a)] is an arbitrary number said Dr. Witte (Ib. p. 218). It is quite common in workmen's compensation acts. Administrative problems become very great when an attempt is made to eliminate all numerical limitations (Ib. p. 218).

> " . . . The number of employers to be dealt with is enormously increased when you include all of the small employers, without increasing the number of employees anywhere near the same proportion. The Census does not distinguish between how many employers there are with four or more, but it gives figures as to the number of employers who have more than five. Eighty-five percent of all retail establishments employ five or less employees, but they have only 25 percent. of the total number of employees in the retail establishments." (Ib. pp. 218-19)

The question is one of balancing complete coverage against the administrative difficulties that develop (Ib. p. 219). There are enough serious administrative problems to cope with in the first years of the Act without trying to include all employers (Ib.) The classification of workmen's

compensation laws has been sustained by the courts of the states (Ib. p. 223).

Senator Couzens inquired of Dr. Witte:

> " . . . . If you are going to exempt one class of employers under this act how can you defend your position that this is an equal taxation?" (Ib.)

as to which Dr. Witte answered that the question is whether the classification is reasonable; that an exclusion of a group from which less money would be collected than the cost of collection would be reasonable (Ib. p. 224).

The tax is computed on the entire payroll in order to avoid examining the payroll in detail for exceptions—to secure ease of administration (Ib. p. 244).

Mr. Jolly, representing the hospitals of the country, said that all hospital employees should secure benefits but should not be taxed. These are exempted under conditions [Sec. 907 (a) (7)] (Ib. p. 258).

Mr. Leiserson said that it was desirable to use the principle of insurance for as many of the unemployed as possible; it is not possible to use such principle as to all the unemployed (Ib. p. 259). Casual labor cannot be handled on the principle of insurance, but this principle will take in a majority of wage earners who suffer from unemployment (Ib. p. 260). He saw no particular reason why the railroads should be exempted (Ib. p. 270).[1] He saw no reason why employees of federal agencies engaged in private businesses, such as barge lines and electric light plants, should not be covered by the

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1 Section 906 provides that no person shall be relieved from making payments under a state law on the ground that he is engaged in interstate commerce

measure, if the business were of a permanent nature and not an emergency (Ib. pp. 270-1).

Senator Harrison could see some unfairness in not imposing a tax on such activities competing with private business (Ib. p. 271).

If one industry has a large amount of unemployment it ought to pay more because it is a part of its cost. The moment one considers income or paying capacity one is getting away from the principle of insurance (Ib. pp. 274-5).

Mr. Huggins appeared for various denominational bodies to ask that organizations be exempted which maintain pension systems with pension provisions at least equal to the provisions made under the Act. Senator King asked the witness if the latter did not think it highly improper for the government to discriminate against or in favor of any section or any group, such as giving a larger pension to preachers than to others; in answer to which Mr. Huggins said that he did not propose the exclusion of the group but of individual members of the group where the provision under which they fall is of wider coverage than the government plan (Ib. pp. 430-1). Such individuals would not make a contribution to the fund.

Mr. Epstein:

> " . . . Under this bill it seems that executives of $100,000 a year would still have to pay the tax. Yet no bill ever contemplates that they should get any benefit. You cannot in all fairness when you charge a pay-roll tax charge any tax on any of the pay roll except the pay roll of the insured workers. I suppose the intention was to limit it to $2,500 a year. But it is not in the bill." (Ib. p. 499)

No country taxes employees who do not get commensurate benefits (Ib. p. 501). The only important principle to consider is this: Is it right or fair for any unemployment insurance plan to establish a merit rating system some day which will relieve employers who stabilize, to get them a reduced rate?

> " . . . . Personally I do not believe any employer is entitled to any merit rating in case of unemployment insurance, because no employer is responsible either for his employment or unemployment. He is either lucky or he is not lucky. It is the social and economic forces which cause one industry to be shut down and another industry to blossom. The employer himself is not so important as to what he does; it is the social and economic forces which lie beyond him. So if a man is lucky enough to be in an industry which everybody wants, such as a public utility, let us say, it seems to me fantastic for Congress or for a State to say to them, 'Well, you are such a good boy, you are so nice, we will make it easy for you.' In other words, it is like a good insurance company saying, 'Here, you people are living happily ever after and you do not die. Let us pay you back all of your premiums. You have been nice and you have not died on us. But we will keep all the dead ones.' The insurance company would go broke of course in 2 weeks; it could not do it. The only way it can get along is by keeping the good and the bad risks (Ib pp. 501-2)
>
> * * * *
>
> " . . Why should you let all your good risks escape —and you are going to deal with all of the dead ones? It is unfair, and it is against all principles of insurance " (Ib. p. 504)

Mr. Story took a different view. He asked, why should an employer who gives steady employment subsidize a competitor who does not give steady employment? (Ib. p. 518).

Unemployment is as much a hazard of industry as accident and the employer should, to a limited extent at least, bear the cost in the same way that he is bearing accident costs (Ib. p. 518).

Mr. Folsom expressed the same view. The burden of unemployment should not be placed equally on industries with good and bad records (Ib. p. 568).

Mr. Hutzler:

> " . . . We want to give real encouragement to employers to stabilize their employment seasonally in other ways, and those employers who would take wage-saving measures that might throw employees into this fund should be penalized by keeping the full rate while those employers who use their own establishment and manage to stabilize the employment either seasonally or by not taking drastic labor-saving measures, should have the benefit of that stabilization earlier than at the end of 5 years . . . . Those differentials can be made slowly, so that by the various State laws they do not operate too quickly and not too short an experience, but they should be made early so that as in other forms of insurance, you get the benefit of good performance, but of course as a corollary to that, provision should be put in the law giving minimum standards of benefits to the workers, so that a partially cooperating State cannot give differentials to its industries and give them a competitive disadvantage " (Ib. p. 713)

It was Senator Connally's view that every employee drawing a salary from an industry should pay. If a man drawing a salary of twenty-five thousand dollars is exempted and the man drawing fifteen dollars per week is taxed, it results in "an unjust shifting of the burden." The whole theory is that industry is going to bear its burden (Ib. pp. 719-20).

Mr. Ogburn, counsel for the American Federation of Labor, compared a street railway company with the beet canning industry. In the first the larger part of the operating cost is labor cost. The canning industry operates only a few months a year and unemployment is very large. By pooling the two the railway industry is required to contribute funds to support the canning industry (Ib. p. 772).

The legislation would never work said Mr. Elbert, unless those who continue in employment regularly contribute something to take care of the casuals. The theory is that the efficient industries which have continuous employment will contribute to some whose employment is not so favorable.

> "Senator Connally. Unless you make both the efficient industries and the efficient workers contribute to take care of the casuals, and the inefficients, who are going to be the first to lose their jobs, you are not going to accomplish anything.
>
> "Mr. Elbert. You have hit it right on the head, Senator.
>
> "Senator Connally. I am enjoying your discussion. Therefore, if you permit these big efficient corporations, like the Standard Oil and the International Harvester to segregate themselves off into watertight compartments and run their own system, you are going to destroy the whole basis of this legislation.
>
> "Mr. Elbert. I think so; yes, sir. Unemployment insurance will never work that way." (Ib. p. 834)

The administrative problem is too great to include farm hands and domestic servants (Ib. p. 841).

Mr. Kolb: The system would penalize industries maintaining relatively stable employment (Ib. p. 865).

Mr. Hooker felt that government employees should pay their share; that elimination of firms employing less than four [now eight] employees is discriminatory; that the bill selects from our total gainful population a special group and gives it unemployment benefits as a legal right while the remainder of the gainfully employed would be compelled in times of unemployment to submit to a test of need in order to obtain relief (Ib. p. 888).

Mr. Harriman, President of the United States Chamber of Commerce, felt that casuals and domestic and agricultural workers should be exempted for administrative reasons (Ib. p. 915).

Dr. Marvin, representing the American Council on Education, said that educational and charitable institutions should not be taxed, for there is practically little unemployment in this field.[1] (Ib. p. 1079)

(c) Report of the Committee on Finance of the Senate

The Committee felt it desirable to permit the states freedom of choice, in respect of the adoption of the additional credit plan, available to employers "who have regularized their employment" (Senate Report No. 628, p 14). The number of employees covered by the tax imposed on employers (having four or more) is 25,804,000 (Ib. p. 26).

The conditions of the additional credit plan are explained (Ib. p. 50). It is noted that the employer who can qualify adds to the credit secured by the tax he actually pays the difference between such state tax actually paid and the

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1 Exemptions are available if the institution is not operated for profit [Sec 907 (a) (7)]

maximum tax he would have had to pay if he had been contributing at the maximum state rate; the total credit not to exceed ninety percent. of the federal tax (Ib.).

(d). Statements Made in the House of Representatives

Mr. Reed said that the tax imposed by TITLE IX was not a tax but a penalty "and therefore, discriminatory as well" (Cong. Rec. Vol. 79, Pt. 6, p. 5892)

(e). Statements Made in the Senate

Senator Wagner said that "At the very hub of social security is the right to have a job". (Cong. Rec. Vol. 79, Pt 9, p. 9283)

If this is a right on the part of the employee, the obligation to supply the job must rest on the employer. Under the provisions of our present government, which is to be protected? They could not both be equal before the law. Yet the result of the tax is to compel the employer to supply the employee with income even after the latter may have left the service years before.

The Senator pointed out the incentive to business men to diminish the volume of unemployment; that if a state law permits an employer to reduce the amount of his contribution because of his good employment record he may offset against his federal tax not only the amount of his actual payment under the state law but also the amount of the reduction which he has won; for otherwise he would not benefit in the slightest by securing such a reduction, or "additional credit". (Ib. p. 9284)

Senator George contended that Congress had selected the classes of employers which are "intimately and inescapably tied in with the employers who are taxed under Title VIII and Title IX of this bill;" that the scheme is therefore palpable and clear to his view that Congress is imposing the tax for identically the same purpose condemned by the Supreme Court in the Railroad Retirement decision—that Congress could not by compulsion make the industry set up an old-age pension system (Ib. p. 9515).

In answer to Senator George's argument that Congress is imposing a tax on one class of its citizens for the benefit of another, Senator Wagner undertook to justify the tax "because the employer gets a special benefit from the pension law . . . . because it is now a recognized fact that more security to the worker improves his efficiency . . . ." (Ib. p. 9526)

(6) The Act as Raising Funds to be paid into Private Hands

(a). Hearings before the Committee on Ways and Means of the House

Mr. Dingell inquired as to the advantage resulting from the operation of the Act under a governmental agency as compared with existing private agencies, in answer to which Mr. Hansen replied that with respect to unemployment insurance there were no private agencies in the field; that very close governmental supervision would be required over private agencies, the combined cost of which with the administrative cost of private agencies would be greater than if it

were handled directly through a governmental agency.[1] (Hearings before the Committee on Ways and Means, p. 382). Mr. Lewis interrupted to say:

> "There is a grave constitutional question as to whether even the Government of the United States could impose a tax which should be payable into private hands." (Ib. p. 383)

(b). Hearings before the Committee on Finance of the Senate

Senator Gore observed that the plan takes the purchasing power [resulting from the expenditure of the old-age pension] from the manufacturer and the merchant, which they have earned, and transfers it to the aged pensioner, which he has not earned, in order that the latter may use it to buy from the manufacturer and the merchant, whose purchasing power was taken away to start with. Miss Perkins replied that she did not think it the function of the government to take purchasing power away from one individual to give it to another; that the incidental advantage which the whole community would get, as well as the aged pensioner, was that there would arise a new location of purchasing power which would be useful to all of the community who have contributed to the fund into which the taxes going to support the plan are paid (Hearings before the Committee on Finance of the Senate, pp. 130-1).

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1 The payment by a state agency of the contributions imposed by state law into the hands of the unemployed individual under the compulsion of the Federal Act, merely follows a route through the Unemployment Trust Fund leading direct to the private individual. If the contributions were paid to a private agency for disbursement, the latter would only be substituted for the Unemployment Trust Fund provided by Section 904

Senator Gore contended that the transfer of purchasing power may help the individual who gets the purchasing power, but it hurts the one who parts with it. He cited the effect of the processing tax resulting in taking millions of dollars out of one set of pockets and putting it into another set of pockets; that the distincion is fundamental (Ib. p. 131). He referred to Senator Long's plan to take the wealth from those who have it and give it to those who lack it, and inquired, "Now, how does that differ, in principle, from this plan?" (Ib. p. 132). Miss Perkins replied at length that the difference in degree frequently relates to principle itself; that of course if the government took all the wealth, or even a substantial part of it, away from the sources where it is created, the possibility of creating any more wealth at that place is dried up. Merely to divert a portion to a source which needs it "does not seem to be in any way a distribution of the wealth of the ordinary income-producing agency". (Ib.)

> "Senator Gore Your answer, as I understand it, is that under your plan you would not take too much of a person's income, and Senator Long would take too much of a person's income. Now what is the standard? Who is to decide how much is too much and how much is not too much?
>
> "Secretary Perkins The Congress of the United States (Ib.)
>
> * * * * *
>
> "Senator Gore I know the theory of private property used to be—I do not say it is now—that the man who earned the dollar honestly has a better right to it than anybody else.
>
> "Secretary Perkins. I would not dispute that.
>
> "Senator Gore. What I am trying to get at now is whether this legislation is not out of line with that

> once established principle. . . . . Now who is to decide? Is it the people who want this wealth given to those who haven't got it? Has a citizen no guarantee, under our constitutional system, that that thing cannot be done? Do you think he has? Isn't this plan, and the Long plan, in effect to take private property for private use?
>
> "Senator Couzens Isn't that a question for the Supreme Court to decide?
>
> "Secretary Perkins It is not for me to decide Thank you, Senator." (Ib. p. 133)

(c). Statements Made in the House of Representatives

Mr. Knutson replied that Congress could impose taxes only to provide revenue for the government; that the tax (under TITLE VIII) on its face is not for the purpose of providing revenue for federal purposes, but it is simply an enforced contribution for the benefit of a certain class of persons (Cong. Rec. Vol. 79, Pt. 5, p. 5543).

Mr. Scott of California observed that the only way Congress seemed to be able to accomplish the purpose of the bill was to try to take from those who have and give to those who have not (Ib. p. 5477).

(d). Statements Made in the Senate

Senator Harrison said that almost every state commission investigating the subject urged some form of unemployment insurance uniformly recognizing that part or all the cost should be borne by employers in industry and that reserves should be built up in good times to help in providing for the welfare of those unfortunates cut off from regular work by seasonal unemployment or that resulting from the

many other causes found even in normal times (Cong. Rec. Vol. 79, Pt. 9, p. 9270); that it had been found actuarially possible, and the bill provides a method, for those in industry to contribute from year to year a tax covered into the Treasury of the United States sufficient to bear the costs of an old-age annuity for those in industry (Ib. p. 9268).

Senator George spoke in support of an amendment (Ib. p. 9510) offered by Senator Clark which undertook to preserve pension plans set up by private idustry, providing for approval by the Board of applications from employers who prefer to operate private annuity plans in lieu of the plan set up by the bill.

Senator George said there was grave doubt of the constitutionality of the bill as it stands; that he did not believe that any lawyer of experience would assert that the bill is free from constitutional question.

> " . . . . I do not wish to expand the constitutional argument, because the Senate is not in receptive mood, but the bill undertakes to impose a tax upon specific employers. The beneficiaries of the tax are a special class, it is disclosed in the hearings, and it is disclosed in the suggestion of the Secretary of the Treasury at one time for an alteration in the tax rate itself, showing that the only purpose of the bill is to set up a system of old-age annuity and unemployment insurance by the use of the taxing power, and by the creation of the annuity system and the old-age employment insurance system. (Ib. p. 9514)
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> * * * * *
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> " . . . . I contend further that when the scheme which has been devised is so tied in with the taxing provision as to disclose but one purpose, and that is the purpose of using the general taxing power for the purpose

of providing this system only for the beneficiaries who fall within the classification of the employees of the taxed employers, we shall have a legislative act, if the bill shall be passed, which any reasonable lawyer of experience will be bound to say is subject to serious question." (Ib. pp. 9515-16)

(7) The Act as an Unreasonable and Arbitrary Enactment in Imposing an Unequal Tax

(a). Hearings before the Committee on Ways and Means of the House

Mr. Cooper was interested to ascertain how the principle of additional credits contributed toward uniformity as to which Dr. Witte admitted that it was to a slight extent a deviation from that principle. Under the plant-reserve system it will not be very great because the number of plants that will build up a fifteen per cent. reserve is likely to be very small. It is a crude system that levies the same rate of contribution on the bank as on the contractor. The risk is of a different sort. Mr. Cooper replied that if a large industry had different branches in different states and one state allowed preferential treatment which was denied in the other, the principle of uniformity which is sought to be accomplished by the imposition of a federal tax is shaken (Hearings before the Committee on Ways and Means, p. 146).

Mr. Hutzler referred to the differential in workmen's compensation laws. If the experience of an industry was good, it got a lower rate. Mr. Treadway asked, then if employees of stores having less hazardous employment than the employees of a mill, if there are less accidents in the former, or if the health of its employees is such that they can continue working longer without a vacation. is that a differential? In

answer to which Mr. Hutzler said "we are thinking just in the unemployment end rather than in the health end" (Ib. p. 775). This subject is further covered under the subject of Denial of Due Process of Law (supra, p. 138).

(b). Hearings before the Committee on Finance of the Senate

For this subject see The Act as a Denial of Due Process of Law, supra, p. 138.

(c). Statements Made in the Senate

Senator George called attention to the fact that the tax on employers to support the system is levied at a uniform rate without regard to the hazards of industry.

> " . . . . The mining company which sends its men down to the bowels of the earth, where fatalities often occur, has to bear the same burden of tax as the industry in which retirement, accidents, and death rarely and seldom occur. That is another feature involving the constitutionality of the measure, but I do not intend to do more than say that no responsible lawyer who has been in a courthouse three times would dare say that the provisions of this bill which have been discussed are not subject to serious question." (Cong. Rec. Vol 79, Pt 9, p. 9518)

Senator King observed that (under TITLE VIII) when standing alone, there is a discrimination in its classification apparently in violation of the Fifth amendment. He inquired:

> " . . . . Why should stenographers, clerks, janitors, and so forth, doing the same class of work, be exempted from a tax when they are working for religious, chari-

table, scientific, or educational institutions and subject to the tax when working for other institutions or business?" (Ib. p. 9536)

Senator Tydings observed that if it is the general policy of the nation to take people off the work list when they reach sixty-five there is no reason why the federal government or the Presbyterian Church or anybody else should have an exemption, unless every other concern which is already providing its own retirement agency should have an equal right, particularly when it is maintaining a better system or pays more than is proposed to be paid by the federal government (Ib. p. 9528).

Senator Barkley said that Congress could not tax the Baldwin Locomotive Works in order to pension somebody who does not work for that company; so that whenever it is decided to pension everybody who is over sixty-five years of age a general tax must be levied on everybody who is subject to the tax (Ib. p. 9528).

Referring to the decision in the Railroad Retirement Case, and to the argument that that case threatened the bill with extinction under the due process clause, since it held that the pooled funds arrangement violated the Fifth Amendment, Senator Wagner declared that the Supreme Court was "tremendously influenced" by the specific provisions of the pooling system under fire, particularly in its application to past periods of service (Ib. pp. 9287-8).

(8) Retention by Congress of the Power to Alter or Repeal the Act

(a). Hearings before the Committee on Ways and Means of the House

It is not left to inference that Congress demands the right to amend or repeal the Social Security Act without incurring any liability for state funds or otherwise. The state law is required to provide for legislative amendment or repeal before it can be certified by the Board [Sec. 903 (a) (6)]. Mr. Witte:

> " . . . We wish to make it doubly certain that if the Congress desires to insert further conditions at a later date, it may do so, if that should become necessary." (Hearings before the Committee on Ways and Means, p. 138)

III

The Principle of Reasonable Relationship

What reasonable relationship to the taxing power of Congress can this measure be said to sustain? It is not intended that one dollar of the payroll taxes shall be used for general purposes of government. In *Magnano v. Hamilton,* 292 U. S. 40 (78 L. ed. 1109), the Supreme Court said that the requirement that a tax be for a public purpose "has regard to the use which is to be made of the revenue derived from the tax, ... " [43 (1113)]. The entire tax resulting from the Child Labor Tax Act, which is part of the revenue act of 1919 (40 Stat. 1057, 1138), finds its way to the treasury to be disbursed for the purposes of government; yet from the opinion of the Supreme Court we may well infer

the view that the provisions of the Act were not naturally and reasonably adapted to the collection of the tax, but "solely to the achievement of some other purpose plainly within state power." [259 U. S. 20, 43 (66 L. ed. 817, 822)]. Likewise in the Future Trading Act (42 Stat. 187) the tax went into the treasury. In *Hill v. Wallace,* 259 U. S. 44 (66 L. ed. 822), the court said that the manifest purpose of the Act was to compel boards of trade to comply with regulations

> "many of which can have no relevancy to the collection of the tax at all . . . . The Act is in essence and on its face a complete regulation of boards of trade, with a penalty of 20 cents a bushel on all 'futures' to coerce boards of trade and their members into compliance. When this purpose is declared in the title to the bill, and is so clear from the effect of the provisions of the bill itself, it leaves no ground upon which the provisions we have been considering can be sustained as a valid exercise of the taxing power. . . . " [66-7 (829)]

In *Linder v. United States,* 268 U. S. 5 (69 L. ed. 819), the court was considering the Harrison Narcotic Act (38 Stat. 785) as amended by Section 1006 of the general revenue act of 1919 (40 Stat. 1057, 1130). There was no suggestion in the Act as to the use of the funds arising from the tax. The original Act provided by Section 7 that all internal revenue tax laws should be extended and made applicable to the special taxes imposed by the Act, so far as applicable to and not inconsistent with the provisions of the Act. Under the claimed authority of the amendment contained in the revenue act of 1919, the government indicted Dr. Linder on the charge of giving a known addict four tablets containing morphine with the expectation that she would administer them to herself in divided doses, for the sole purpose of relieving conditions incident to addiction and keeping herself comfortable. The Court declared such a claimed construction of the act was

beyond the power of Congress to authorize; that the law was essentially a revenue measure "and its provisions must be reasonably applied with the primary view of enforcing the special tax. . . . " [22 (825)]

Other cases which have reached the Supreme Court in which that Court considered reasonable relationship of the act to the constitutional power under which the act is claimed to arise are *Truman H. Newberry et al. v. United States of America,* 256 U. S. 232, 258 (65 L. ed. 913, 921-2), in which the Court declared invalid the act of Congress regulating primary elections for United States senators (37 Stat. 25) as not being reasonably related to the exercise by Congress of its powers derived under Article 1, Section 4 of the Constitution; *Damselle Howard, etc. v. Illinois Central Railroad Company, etc.,* 207 U. S. 463, 502-3 (52 L. ed. 297, 310-11), involving the first employers' liability act which the Court held extended to matters within the local control of the states; *Joseph Keller, etc v. United States,* 213 U. S. 138, 144 (53 L. ed. 737, 739), involving the prosecution against a citizen who within a period of three years after the arrival of an alien harbored the latter in the pursuit of her degraded life; and the *Child Labor Case,* 247 U. S. 251, 275-6 (62 L. ed. 1101,1107), forbidding the shipment in interstate commerce of goods made in a mill employing child labor. In all these cases the Court declared the end sought by Congress not reasonably related to the constitutional power on which the respective acts under consideration were claimed to rest.

If the acts of Congress involved in all the foregoing cases are beyond the power of Congress, it is difficult to believe that the Court will now so extend the power of Congress under the taxing clause as to permit it to compel the states through the direct penalties contained in the Federal

Act, to engage in a system of unemployment, which Congress acknowledges through the proposed tax device it is unable to put into effect directly.

IV

Inseparability of the Federal Act

The Federal Act contains Section 1103 to the effect that if a provision is held invalid the remainder of the Act shall not be affected thereby. This declaration provides a rule which may aid in determining the legislative intent, "but is not an inexorable command." *Railroad Retirement Board v Alton,* 295 U. S. 330, 362 (79 L ed 1468, 1482). But this Court cannot rewrite the statute and give it an effect altogether different from that sought by the measure viewed as a whole [Ib. 362 (1483)]. To the same effect see *Carter v. Carter Coal Company,* 298 U. S. 238, 312 (80 L. ed. 1160, 1189) [1]

The question to be determined by this Court is, therefore, would Congress have been satisfied to enact what remains of the statute after eliminating the invalid parts?

From the history of the Act it is obvious that Congress was not seeking taxes for the Treasury; it was providing a plan for unemployment Without the plan the tax would not have been imposed. With the plan the entire Act falls.

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[1] Constant use of the separability clause may defeat its purpose See Dissection of Statutes by Noel T Dowling, American Bar Association Journal, Vol 18, page 298

V.

Grants Contained in Prior Acts of Congress Furnish no Precedent for TITLE III of the Federal Act.

Referring again to the brief of the Government in the case of *Davis v. Boston & Maine Railroad,* we note that dependence is placed on the history of prior grants by the United States in varied fields of federal and state action (p. 53), and support is thus claimed for the validity of the Federal Act. In the brief of the Attorney General (Cong. Rec Vol. 79, Pt. 5, p. 5784), reference is made to several classes of grants. In the Committee hearings mention is made of the Morrill Act (12 Stat. 503) which is pressed as a precedent for the grants contained in the Federal Act. There is slight similarity between the two. The Morrill Act grants to each state thirty thousand acres of land (or scrip in lieu thereof) for each senator and representative in Congress on the following conditions:

(a) The sales' price of the lands shall be devoted entirely to the purposes of the grant, the state paying all administration and other costs of sales.

(b) All monies derived from sale of the lands shall be invested in bonds of the United States, or other states, or other safe stocks, yielding not less than five percentum on the sales' value.

(c) The monies so invested shall constitute a perpetual fund for the endowment, support and maintenance of at least one college where the leading object shall be to teach branches of learning related to agriculture and the mechanical arts, including military tactics; in order to promote the liberal and practical education of the industrial classes in the several pursuits and professions in life.

(d) The annual interest shall be regularly applied without diminution, to the foregoing purposes, except that ten percentum of the capital may be expended for the purchase of lands for sites or experimental farms.

(e) No portion of the principal or interest shall be applied to the purchase, erection or repair of buildings.

(f) Any state accepting this grant shall provide within five years at least one college, or the grant shall cease and the state shall reimburse the United States the amount theretofore received by the state from the sale of such lands

(g) Each state shall make an annual report regarding the progress of each college, one copy of which shall be sent to the secretary of the interior and one copy to each such other college.

(h) No state in rebellion or insurrection shall be entitled to the grant.

(i) No state shall be entitled to the grant unless it accept the same within two years after the approval of the act.

(j) The governments of the several states accepting the grant of scrip shall report annually to Congress all sales made of such scrip, the amount received for the same, and what appropriation has been made of the proceeds.

No conditions imposed under any grants heretofore made have approximated the proportion of TITLE III and TITLE IX. It is true that many grants have stipulated conditions, both prior and subsequent to acceptance; but it is likewise true that under *Frothingham v. Mellon,* 262 U. S. 447 (67 L. ed. 1078) any such grant could have been attacked with great difficulty, if at all.

The conditions and requirements contained in the many grants heretofore made may be grouped in the following subjects. These concern:

(1) Lighthouses, Beacons, etc.
(2) Land Grants for Canals, Navigation, Improvement of Water Courses
(3) Land Grants for Schools and Universities
(4) Land Grants for Railroads
(5) Land Grants for Public Road
(6) Land Grants; Miscellaneous
(7) Grant of Use of Vessel
(8) Funds, Grants of
    (a) Diseases among Cattle
    (b) Experiment Stations and Extension Work by Agricultural Colleges
    (c) Vocational Education
    (d) Vocational Rehabilitation
    (e) Public Roads
    (f) Disabled Soldiers
    (g) Forest Fire Protection
    (h) To Reimburse for Losses from Floods
    (i) Maternity and Infancy Welfare
    (j) Flood Control
    (k) Federal Emergency Relief
    (l) Study of Agriculture

We undertake to set out without duplication the conditions attached to prior grants:

(1) *Lighthouses, Beacons, etc.*

The states to cede within one year lands on which are located lighthouses to be maintained by the United States (1 Stat. 53).

(2) *Land Grants for Canals, Navigation, Improvement of Water Courses*

(a) Proceeds of land grant to be used for the construction of canals (5 Stat. 57).

(b) Tolls to be collected not to be in excess of amount necessary for repairs and maintenance and to be expended exclusively on canals. (Ib.)

(c) Annual report to be made of rate and amount of tolls. (Ib.)

(d) Dimensions of canal fixed (10 Stat. 35).

(e) Canal to be a public highway. (Ib.)

(f) Canal to be begun within three years and completed within ten years, or state shall be liable for the lands sold. (Ib.)

(g) Canal to be free of toll to the United States. (Ib.)

(h) Accounts of all expenditures of construction and operation to be kept. (Ib.)

(i) Land sold to be limited to one section per township (15 Stat. 169).

(j) No selection to be made from mineral lands. (Ib.)

(k) Lock and dam to be free from toll, to be constructed under the direction of the United States Department of Engineers, and to be completed within two years; otherwise the land reverts. (Ib.)

(3) *Land Grants for Schools and Universities*

(a) To be sold only with the consent of the inhabitants of the district for which the land was reserved (4 Stat. 237).

(b) Each district to be entitled only to that amount accruing from the sale of land belonging to the district. (Ib.)

(c) Legislature to accept grant within one year (2 Stat. 424).

(d) State to release right to certain tract which had theretofore been granted [to Ohio]. (Ib.)

(e) To be sold at public auction for use and support of university (21 Stat. 326).

(f) Funds derived to be invested in United States bonds and deposited in the Treasury of the United States. (Ib.)

(g) Sale of land for any one year limited to one-tenth of the land granted. (Ib.)

(h) No money to be spent for buildings or salaries until fund reaches $50,000 when interest may be spent; excess of $100,000 may be spent. (Ib.)

(i) State to collect no rent for land granted for college purposes (44 Stat. 1296).

(4) *Land Grants for Railroads*

(a) Land selected to be within twenty miles of road (12 Stat. 772).

(b) Land to be used exclusively for the construction of railroad. (Ib.)

(c) Railroad to be free from toll to United States. (Ib.)

(d) Land to be sold when and as construction proceeds. (Ib.)

(e) If road not completed within ten years land reverts to the United States. (Ib.)

(f) Road to be of certain width and grade (12 Stat. 797).

(5) *Land Grants for Public Road*

(a) Road to be completed within four years (3 Stat. 727).

(b) Land not to be sold for less than $1.25 per acre. (Ib.)

(c) Road to be free for use by the United States (4 Stat. 242).

(6) *Land Grants; Miscellaneous*

(a) Forest lands ceded to Wisconsin for forestry purposes only; if not so used lands revert (37 Stat. 324).

(b) Lands for fish hatchery to be used by the state under plans to be approved by Secretary of War (39 Stat. 35).

(c) For game refuge—to be used solely as authorized; otherwise lands revert (42 Stat. 828).

(d) For park purposes—to be used solely as authorized; otherwise lands revert (44 Stat. 591).

(e) Lands of the United States may be included in state irrigation district, map of district to be submitted and sufficiency of water supply demonstrated; costs of irrigation to be borne by private lands (39 Stat. 506).

(7) *Grant of Use of Vessel*

Use of vessel permitted to a state for use of a school which is maintained for instruction in navigation, etc.; the

vessel to be returned when the school is discontinued (18 Stat. 121).

(8) *Funds, Grants of*

(*a*) *Diseases Among Cattle*

When the plans of the commissioner of agriculture for suppression of diseases among cattle shall be accepted by any state, the commissioner may spend money therein for this purpose (23 Stat. 31).

(*b*) *Experiment Stations and Extension Work by Agricultural Colleges*

1. Only one-fifth of annual appropriation to be spent on buildings (24 Stat. 440).

2. Reports to be made to state government and commissioner of agriculture. (Ib.)

3. State to appropriate a sum equal to that expended by the United States (38 Stat. 372).

4. Reports to be made to the Secretary of Agriculture. (Ib.)

5. Plans for the work to be carried on under the act to be submitted and approved by the Secretary of Agriculture. (Ib.)

(*c*) *Vocational Education*

Plans to be approved by Federal Board (39 Stat. 929).

(*d*) *Vocational Rehabilitation*

No monies to be used for purchase, erection or repair of any building or equipment (41 Stat. 735).

(*e*) *Public Roads*

To be kept in repair by the state (39 Stat. 355).

(*f*) *Disabled Soldiers*

$100 per annum per person appropriated to states which have established homes (25 Stat. 450).

(*g*) *Forest Fire Protection*

1. State to pass a forest fire protection law (36 Stat. 961).

2. State to appropriate equal amount of money for a like purpose. (Ib.)

3. Title to revert to the state when the United States is reimbursed for purchase of lands (1935 Pamphlet, ____ Stat. 963).

4. State to provide for state forester. (Ib.)

5. State to pay future costs of administering and managing lands. (Ib.)

6. State to pay United States one-half of gross proceeds covered by agreement, to be credited on purchase price to state. (Ib.)

(*h*) *To Reimburse for Losses from Floods.*

1. To provide bridges swept away by floods (46 Stat. 84).

2. To be used only on highways in the federal-aid highway system. (Ib.)

3. State to show that either before or after the approval of the act it has expended a like sum for the same purpose. (Ib.)

(*i*) *Maternity and Infancy Welfare*

1. Money is not to be used for payment of maternity or infancy pensions (42 Stat. 224).

2. State to create agency to cooperate with the federal agency. (Ib.)

(*j*) *Flood Control*

1. States to maintain flood works after completion (45 Stat. 534).

2. To accept lands turned over to the States. (Ib.)

3. To provide without cost to the United States rights of way for levee foundations. (Ib.)

4. To contribute one-third of cost of work. (Ib.)

(*k*) *Federal Emergency Relief*

1. State to certify necessity for funds (47 Stat. 709).

2. Monies used on public highways to be repaid by state within ten years. (Ib.)

(*l*) *Study of Agriculture*

To provide for research into basic laws of agriculture; the state to provide an amount equal to that of the United States (1935 Pamphlet, ... Stat. 436).

Let us compare all the foregoing conditions with the requirements of Sections 302 (a) and 303 (a) and (b), and with Sections 903, 904 and 907, an analysis of which is set out at length on pages 9-13 herein. The result is obvious. Past history provides no precedent for the conditions imposed by the Federal Act.

CONCLUSION

1 TITLES III and IX are not a valid exercise of the taxing powers of Congress.

2. The taxing powers sought to be exercised are not separable from the provisions relating to credits and unemployment and to the requirements imposed on the states.

3. The appropriation of $49,000,000 is not intended to correspond with the total tax imposed by TITLE IX It is intended to result from and equal the amount of the tax after the credit is given, the cost of administration of state laws being estimated at ten per cent. of the total (state and federal) tax collected.

4. While Congress may have lately spent billions of dollars for relief, which is the primary burden and duty of the states, the constitutionality of which is difficult if not impossible to raise in the courts, the fact that Congress has spent this sum cannot now be used to arm Congress with the power to impose invalid burdens on the states in order to compel the latter to refill the federal treasury and to encourage the states to assume their proper burdens in the future.

The Constitution marks the boundaries between the United States and the states. Congress lacks the power to discipline the latter.

5. It is undeniable that the states were compelled to comply with the demands of Congress. The entire history of the Federal Act shows this plan and intention. That forty-two states have submitted is convincing of its effectiveness.

6. No grant by Congress is justified if its non-acceptance results in a penalty. If the states do not comply their citizens are compelled to supply millions of dollars to be used for the administration of agencies in the states that submit

7. The system denies due process of law to employers of eight or more by requiring the states to impose on this group a tax for the purpose of paying benefits to individuals who are unemployed.

Respectfully submitted,

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Birmingham, Alabama,
April 3, 1937.

I hereby certify that I have this day forwarded to Hon. Stanley Reed, Solicitor General, copy of the foregoing brief and of Appendix A thereto

WM. LOGAN MARTIN,
Of Counsel for Petitioners.