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In the Supreme Court of the United States

OCTOBER TERM, 1936

No. 837

CHAS. C. STEWARD MACHINE COMPANY, PETITIONER
v.
HARWELL G. DAVIS, INDIVIDUALLY AND AS COLLECTOR OF INTERNAL REVENUE FOR THE DISTRICT OF ALABAMA, RESPONDENT

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE RESPONDENT

OPINIONS BELOW

The District Court did not write an opinion. The opinion of the Circuit Court of Appeals for the Fifth Circuit (R. 27–33) has not yet been officially reported.

JURISDICTION

The judgment of the Circuit Court of Appeals for the Fifth Circuit was entered on March 20, 1937 (R. 33). The petition for a writ of certiorari was filed on March 26, 1936 (R. 34), and was

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granted on March 29, 1937 (R. 34). The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTIONS PRESENTED

1. Whether the tax imposed by Title IX of the Social Security Act is a valid exercise of the power of Congress under Article I, Section 8, Clause 1 of the Constitution.

2. Whether the tax under Title IX is imposed in violation of the Fifth Amendment.

3. Whether the tax under Title IX is imposed in violation of the Tenth Amendment or the principle that the dual nature of our government must not be impaired.

4. Whether the grants-in-aid to the States authorized under Title III of the Social Security Act are in issue, and, if so, whether they are valid.

STATUTE INVOLVED

The Social Security Act (Act of August 14, 1935, c. 531, 49 Stat. 620, U. S. C., Supp. II, Title 42, c. 7) is divided into eleven independent titles, many of which might well have been enacted as separate statutes. For the convenience of the Court, the entire Act is set forth in the Appendix, pp. 1–63.

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Of the eleven titles only two (Titles VII and XI) are of general application to the entire Act. Title VII provides for the creation of a Social Security Board to perform such functions as may be imposed upon it by other parts of the Act. Title XI consists of general provisions such as certain basic definitions, provision for administrative rules and regulations, a separability clause, a reservation of the right to alter, amend or repeal any provision of the Act, and finally, a section giving the Act its name, the "Social Security Act".

In this proceeding Title IX alone, of the substantive titles, impinges upon petitioner. No other title can possibly be involved unless it be Title III, which authorizes certain appropriations for grants to States. We will later show, however, not only that Title III is not in issue, but that it is in any event a constitutional exercise of power.

Title IX

Title IX imposes an annual excise tax upon employers with respect to having individuals in their employ, measured by wages payable during the calendar year. Section 901. The tax begins with the year 1936, and is payable for the first time on January 31, 1937. It is not applicable to certain types of employment such as agricultural labor,

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domestic service and other designated categories. Section 907 (c). And the term "employer" is defined to exclude those who do not employ at least eight persons. Section 907 (a). The rate is 1 percent of the total wages payable during the year 1936, 2 percent of those payable during the year 1937, and 3 percent thereafter.

The proceeds of the tax are not earmarked in any way, and are required to be paid into the Treasury of the United States as internal revenue collections. Section 905 (a). Mechanically, as to payment, filing of returns, penalties, and the like, Title IX operates in very much the same manner as any other internal revenue measure. See Section 905.

Pursuant to Section 902, a taxpayer is allowed to credit against the tax (not to exceed 90 percent thereof) the amount of contributions paid by him into an unemployment fund under a *state* law. Such deduction, however, may be taken only with respect to contributions made under state laws certified by the Social Security Board. The Board must make such certification whenever the state law meets certain minimum definitional criteria (Section 903), designed to permit the credit only where the state fund is established under a *bona fide* unemployment compensation measure providing for adequate financial reserves.[1]

[1] Beginning with the year 1938 a certain "additional" credit is permitted by Section 909. Since the tax for that

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One further condition for the allowance of the credit is that the applicable state law require that the contributions to the state fund be immediately paid over to the Secretary of the Treasury to the credit of the "Unemployment Trust Fund". Sections 903 (a) (3), 904. The Secretary of the Treasury is merely the custodian of that fund, exercising no control whatever over a state's administration of its unemployment compensation measure, and the authorized agency of any State may at any time requisition *for any purpose* any or all of the money standing to its credit on the books of the Fund. Sections 904 (f), 903 (a) (4). Further, it is important to observe that the Unemployment Trust Fund consists exclusively of deposits of *state* funds, and does not include any of the taxes collected under Title IX, all of which, as stated above, are paid into the general Treasury as internal revenue collections.

In its basic structure, therefore, Title IX imposes an excise tax upon employers, permitting a deduction not exceeding 90 percent of the tax for amounts paid by the taxpayer to a state unemployment fund.

year becomes due for the first time on January 31, 1939, it is clear that neither such "additional" credit nor the related provisions in Section 910 can be involved in this case. For the possible convenience of the court, that additional credit is discussed in the Appendix at pages 84–96.

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Title III

Title III is entitled "Grants to States For Unemployment Compensation Administration." It is not a taxing measure. Under this title there is "authorized to be appropriated"[2] for the fiscal year ended June 30, 1936, the sum of $4,000,000, and for each fiscal year thereafter the sum of $49,000,000, "for the purpose of assisting the States in the administration of their unemployment compensation laws." Section 301. The appropriation is not authorized to be paid out of any particular revenues or funds in the Treasury, nor is there any provision that connects it with the tax in Title IX. Further, the authorized grants are merely to assist the states in the *administration* of their laws, and no part thereof is authorized for use as unemployment compensation. The latter may be made only from non-federal funds.

[2] Title III, it should be noted, makes no appropriation of any sum; it merely authorizes future appropriations. The authority to appropriate in Section 301 has no legal effect beyond compliance with Rule XXI, Clause 2, Jefferson's Manual and Rules of the House of Representatives. Under that Rule it merely states the maximum that may properly be appropriated; future Congresses may appropriate less, or nothing, if they wish. Actually only $2,250,000 of the $4,000,000 authorized was appropriated for the fiscal year ending June 30, 1936 (Act of February 11, 1936, c 47, 49 Stat. 1109, 1113), and $29,000,000 of the $49,000,000 authorized for the fiscal year ending June 30, 1937 (Act of June 22, 1936, c. 689, 49 Stat. 1597, 1605).

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Section 302 prescribes the method by which payments are to be made to the states. The Social Security Board is required to certify to the Secretary of the Treasury the amount to be disbursed to each State. The Board's determination is required to be based upon the population of the State, the number of persons covered by the state law, an estimate of the cost of proper administration and such other factors as the Board finds relevant.

Section 303 makes certification by the Board subject to certain conditions relating to the proper and efficient administration of state laws, the disposition of the funds granted, and an accounting therefor. These conditions are so worded that they give the Federal Government no assurance other than that the moneys granted by it will not be expended for any purpose other than the one for which they are granted, and will be used in the administration of genuine unemployment compensation laws.

STATEMENT

On March 10, 1937, Chas. C. Steward Machine Company, petitioner herein, filed a petition at law in the United States District Court for the Northern District of Alabama, praying recovery against respondent in the sum of $46.14 (R. 5). On the same day respondent filed a demurrer to the petition (R. 13). The allegations of the petition, as

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admitted by the demurrer, may be summarized as follows:

The Chas. C. Steward Machine Company is a corporation organized under the laws of Alabama, with its principal place of business at Birmingham, Alabama, and is engaged in the manufacture of coal mining machinery (R. 5). Harwell G. Davis, the respondent, is the Collector of Internal Revenue for the District of Alabama (R. 5).

On March 2, 1937, petitioner paid to the respondent the sum of $46.14, the tax imposed upon petitioner as an employer of eight or more persons by Title IX of the Social Security Act for the period from January 1, 1936, to December 31, 1936 (R. 6). On the same day petitioner filed with the Commissioner of Internal Revenue a claim for refund of the tax (R. 8, 9) alleging that it was unconstitutional for a variety of reasons (R. 10–11). The claim was denied by the ~~petitioner~~ commissioner on March 9, 1937 (R. 8, 12).

The demurrer to the petition was sustained by the District Court on March 11, 1937 (R. 16). Petition for an appeal was filed and allowed on the same day (R. 17, 20). The case was submitted to the Circuit Court of Appeals for the Fifth Circuit on March 12, 1937 (R. 26). That Court, on March 20, affirmed the judgment and order of the District Court (R. 33).

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THE CIRCUMSTANCES WHICH "FURNISH THE OCCASION FOR THE EXERCISE OF POWER" CONFERRED UPON CONGRESS BY ARTICLE I, SECTION 8, CLAUSE 1, OF THE CONSTITUTION *

Before addressing ourselves to the question of the power of Congress to enact the tax under review, we here summarize [3] the circumstances which "furnish the occasion for the exercise of power." These circumstances "do not call into life a power which has never lived," but "afford a reason for the exertion of a living power already enjoyed" [4]—that is, the power "to lay and collect taxes, duties, imposts and excises, to pay the debts and provide for the common defence and general welfare of the United States." [5]

This taxing statute was enacted because of the drain which unemployment had made, and was likely to make in the future, upon the revenues of the nation.

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*Analytical and research assistance has been furnished by· Robert P. Bingham; Berniece N. Lotwin; Elliott H. Moyer; Peter Seitz; Frank H. Sloss; Morton Stavisky; Prof. Harry Shulman.

[3] In order to abbreviate this part of the brief, we shall so far as possible incorporate by reference tables and citations presented to this Court by the "Economic Brief" for the appellee in No. 49, *W. H. H. Chamberlin, Inc.* v. *Andrews*, Oct. Term, 1936. That brief will hereafter be cited as "N Y. Brief in No. 49."

[4] *Home Bldg. & Loan Assn.* v. *Blaisdell*, 290 U. S 398, 426.

[5] U. S. Const., Art. I, Sec. 8, Cl. 1.

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Experience [6] had shown that unemployment had ceased to be an occasional or local problem, but has become a permanent and widespread characteristic of our industrial economy.[7] Its magnitude in normal, in boom and in depression times is impressive. In the period of great industrial expansion from 1897 to 1926, unemployment in manufacturing, transportation, building and mining averaged more than 10 percent and reached a high level of more than 3 million persons.[8] From 1920 to 1929, when the country was extremely prosperous, the number of unemployed in non-agricultural industries fluctuated between 1,400,000 and more than

[6] This experience is reviewed in the Report of the President's Committee on Economic Security (1935), 74th Cong., 1st Sess.; Hearings Before the Senate Committee on Finance on S 1130, 74th Cong., 1st Sess.; Hearings before the House Committee on Ways and Means on H. R. 4120, 74th Cong, 1st Sess.; Senate Rep. No. 628, 74th Cong, 1st Sess.; and House Rep. No. 615, 74th Cong., 1st Sess.

[7] N. Y. Brief in No. 49, pp. 2, 5, 79–94. Report of Pres. Hoover's Committee on *Recent Social Trends;* J. M. Clark. *Economics of Overhead Costs* (1923), p. 360; Webb, S. and B., *English Poor Law History*, Part II, *The Last Hundred Years*, Vol. 2, p. 631; Beveridge, W. H., *Unemployment, A Problem of Industry* (1930), pp. 68, 100–103; Hansen, *Business Cycle Theory*, p. 2; Douglas, Hitchcock and Atkins, *The Worker in Modern Economic Society* (1925), p. 242; Douglas, P. H., *Real Wages in the United States 1897–1926* (1930).

[8] Douglas, P. H., *Real Wages in the United States 1897–1926*, p. 460; Douglas, P. H. and Director, A., *The Problem of Unemployment* (1931), pp. 32, 28; N. Y. Brief in No. 49, p. 15, their table 20, p. 184, and their chart 7, page 15; our table 7, Appendix, page 67.

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4 million, and was more than 1,800,000 in 1929.[9] In the period from 1929 to 1936, when the country was passing through a cyclical depression, the unemployed often averaged more than 10 million, and occasionally, according to the most conservative of varying estimates, approximated 16 million.[10] Although these last figures, which show that at times the wage-earners of one-third[11] of our families were directly affected, are abnormal, it is clear from the statistics as a whole that large unemployment in our civilization is a permanent phenomenon,[12] covering all States (often in about the same proportion[13]), reaching at various times into

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[9] Report of Pres. Hoover's Committee on *Recent Social Trends*, Vol. II, p 478, 498; N. Y Brief in No. 49, p. 15, their table 21, p. 184.

[10] See Table 20, Appendix, p 77; International Labour Office, Studies and Reports, Series B (Economic Conditions) No. 20, *Social and Economic Reconstruction in the United States* (1934) Chap. III, pp. 54–55; *International Labour Review*, January 1936, p. 80

[11] *Social and Economic Reconstruction in the United States*, *supra*, pp. 54, 55. Compare the statement in the Report of the Committee on Economic Security (Hearings before the House Committee on Ways and Means, 74th Cong., 1st Sess., on H. R 4120, p. 67) that in 1934 over 19 million persons, or over 15% of the population, were receiving from the national government assistance under the general relief and special programs.

[12] Harry L. Hopkins, Works Progress Administration Administrator, has said that "it is reasonable to expect a probable minimum of 4,000,000 to 5,000,000 unemployed even in future 'prosperity' periods." *The New Republic*, Feb. 10, 1937.

[13] Appendix p. 67, Table 8

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all industries,[14] diminishing the actual productive capacity of the nation,[15] and creating continuous public relief problems.[16]

There is disagreement among experts as to the causes of this large volume of unemployment. The complexity of our modern interdependent economic life, the necessity of a "labor reserve", technological advance, seasonal fluctuations, style changes, shifting markets, and bad judgment are blamed in varying degrees by different experts.[17] But no informed person suggests that in the majority of cases the individual worker loses his job through his personal incapacity or dereliction. The loss comes to him as a disaster over which he has and can have no control.

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[14] The widespread incidence of unemployment is thoroughly discussed in the N. Y. Brief in No. 49, pp. 20–25 See particularly their Table 7, p. 21.

[15] Appendix p. 69, Table 10. The figures in that table show that the people of the nation were, by reason of unemployment, denied goods and services equal to nearly two-fifths of the quantity that they were actually furnished by the gainfully employed.

[16] See N. Y. Brief in No. 49, pp. 28–43

[17] For varying explanations of the causes of unemployment, see Report of Pres Hoover's Committee on *Recent Social Trends;* J. M. Clark, *Economics of Overhead Costs* (1929), pp. 366–367; N. Y Brief in No 49, pp. 1–3; W. C Mitchell, *Business Cycles; the problem and its setting* (1927), p. 61; Hansen, *Business Cycle Theory*, p. 2; Douglas, Hitchcock, and Atkins, *The Worker in Modern Economic Society* (1925), p. 242; Beveridge, *Unemployment, a Problem of Industry* (1930), pp. 100–103.

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The disaster is not merely a personal misfortune, for when the breadwinner stops earning money his family, and ultimately society, suffer.[18] Very soon the average family of the unemployed must change its habits. First it reduces its standard of living:[19] at once it eliminates luxuries and the purchase of even such necessities as clothing;[20] it withdraws from the group contacts so essential not only to the family's own morale,[21] but also to the functioning of a highly civilized society; then it makes drastic economies in food,[22] even requiring infants and expectant mothers to go without milk or adequate nutrition,[23] and prejudicing the health of

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[18] Epstein, A., *Insecurity, A Challenge to America* (3d ed., 1936) p. 198.

[19] Goodrich, Carter, *Earnings and standard of living of 1,000 railway employees during the depression* (U. S. Department of Labor, 1934).

[20] U. S. Department of Labor, Women's Bureau, Bulletin No. 108, *The Effect of the Depression on Wage Earners' Families*, p 20.

[21] N. Y. Brief in No. 49, p. 58.

[22] Hall, Helen, *Case Studies of Unemployment* (1931); U S Department of Labor, Women's Bureau, Bulletin No 108, *The effect of the depression on wage earners' families*, p. 9; N Y. Brief in No. 49, pp 49–50, 53.

[23] Lenroot, K., *Children of the Depression*, Social Service Review (June 1935) pp. 219, 212–242; Williams, J M., *Human Aspects of Unemployment and Relief* (1933) p. 49; Eliot, Martha M., *Some Effects of the Depression on the Nutrition of Children*, printed in Hospital Social Service December 1933.

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every member of the family;[24] soon, as a result of voluntary action or eviction, it moves to a dwelling in a poorer neighborhood, often "doubling up" with another family in a tenement.[25] At the same time, the family is concerned about not increasing its numbers: unemployment discourages new marriages and new births to couples already married.[26] The severe effect of these cumulative restraints is before long reflected in an increase of physical[27] and mental[28] illness which overcrowds hospitals. Moreover, deprived of a normal way of life and a normal satisfaction of their needs, the younger members of the family of the unemployed are likely to become vagrants or criminals.[29]

In addition to promoting these evils, which are not purely personal, but affect the general well-being of society and the manpower of the country,

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[24] N Y. Brief in No. 49, pp. 52–53; Perrott, G. St. J., and Collins, S. D, *Relation of Sickness to Income and Income Change*, Public Health Reports, May 3, 1935, pp. 595–622, Palmer, Carroll E, *Height and Weight of Children of the Depression Poor*, printed in Public Health Reports, Aug. 16, 1935, p. 1106.

[25] N. Y. Brief in No. 49, pp. 50–51; Brandt, L., *An impressionistic View of the Winter of 1930–1931 in New York City* (1932) pp. 9–10.

[26] The decline of the marriage and legitimate birth rate is discussed with appropriate citations in N. Y. Brief in No. 49, pp. 54–55.

[27] *Id*, p. 52.

[28] *Id.*, pp. 53, 54.

[29] *Id.*, pp. 55–57; U. S. Department of Justice, Federal Bureau of Investigation, *Uniform Crime Reports* (1936) p. 50; National (Wickersham) Commission on Law Observance and Enforcement, Report (No. 13) on the *Causes of Crime* (1931) Vol. 1, p. 312.

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widespread unemployment indirectly saps the whole economic structure. The large total loss of income which accompanies widespread unemployment markedly curtails consumer demand; [30] that curtailment in turn reduces production, since production in a profit-making system is keyed to anticipated sales; and this reduction of production automatically causes increased unemployment. Thus unemployment promotes unemployment and the forces impairing the general welfare constantly augment themselves.

Although the intelligent workman undoubtedly foresees the dilemma in which he and his family may be caught, he is almost as powerless to protect himself against unemployment as he is to prevent its occurrence. He and his family seldom receive enough money to provide against the risks of unemployment [31] as well as of sickness,[32] accident and

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[30] See authorities cited in footnote 15, page 12, *supra;* N Y Brief in No. 49, pp. 44–46, particularly their chart 22, p 45.

[31] The average worker in the course of his 45 working years will pass through 8 or 10 depressions (Clark, J. M., *Strategic Factors in Business Cycles*, 1934, p. 11) during which employment will fall off from 10 to 30 percent. Douglas, P. H, and Director, A., *The Problem of Unemployment*, 1931, p. 32, and *Social and Economic Reconstruction in the United States*, International Labour Office, Studies and Reports, Series B, No. 20, 1934, pp. 54–55.

[32] Falk, I. S., *Security Against Sickness* (1930) pp. 15–17, estimates that families with incomes ranging from $1,200 to $2,500 have an average charge for medical care of $86, while those with incomes of less than $1,200 expend an average of $49. Of course, the average hardly tells the story, since a

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death.[33] A brief reference to statistics will conclusively prove this. In the highly prosperous year 1928 the *average* income of the 46,704,275 *individuals* in the United States who received any income whatsoever was $1,816,[34] a figure undoubtedly higher than it has ever been before or since.[35] And in that year 80 percent of those *individuals,* or

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single disabling illness may at any time involve even the poorest family in an expense higher than the average

[33] In a study of typographers' families in San Francisco, Miss Peixotto notes: "Exclusive of the money put into their houses, the most characteristic form of investment was an insurance policy carrying a premium of less than $100 a year, with usually no other savings. Forty-eight men, 59 percent of the whole group of 82 families, carried life or accident insurance, or both. The average premium paid fell between $60 and $70 * * *." (Peixotto, Jessica B, *How Workers Spend a Living Wage A Study of Incomes and Expenditures of Eighty-two Typographers' Families in San Francisco.* Heller Committee for Research in Social Economics of the University of California. Cost of Living Studies, pp. 161–245 in volume including series of studies; p. 183, (1929). Taylor summarized the situation as follows: "Approximately between one-half and two-thirds of the dependent population in the United States in normal times are paying insurance premiums * * * The average dependent family carries in excess of one thousand dollars of insurance spread over its members. * * * The average weekly premium expenditure for all families was $1 15" (Taylor, Maurice, *Social Cost of Industrial Insurance*, p. 343). Compare Appendix page 69, Table 11, Item 8.

[34] See Appendix page 65, Table 3.

[35] See Appendix pages 68, 75, Table 9, 18. In 1929 the average wage of employees in the manufacturing industry was only about $1,300. Martin, Robt. F., *National Income and Its Elements*, pp. 23, 28, 29. See the even lower figures for Ohio in that year, Appendix page 76, Table 19.

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over 37 million persons, received less than $2,000 each.[36] If instead of looking at individuals, we turn to *family* income, we find that in this same year, 1928, 55 percent of all non-farm families received less than $2,000 and 76 percent less than $3,000.[37] Other years show even lower figures.[38] Moreover, low individual incomes imply low family incomes inasmuch as sample studies indicate that the earnings of husbands constitute 89 percent of the average family income,[39] and that in 77 percent of all families the husband or some other one person is the sole provider of family revenue.[40]

[36] It is, of course, much less significant to know the average income than to know the number of persons in each economic group. The number of persons in each group in 1910 is shown at Appendix page 64, Table 1; in 1918 at Appendix page 64, Table 2; and in 1928 at Appendix page 65, Tables 3 and 4.

[37] See Appendix, page 66, Table 5.

[38] See Appendix, page 66, Table 6. Compare N. Y. Brief in No 49, p. 47, and authorities there cited. See also *America's Capacity To Produce*, *supra*, pp 187–205; *National Income in the United States, 1929–1935*, U. S. Dept. of Commerce (1936), pp. 44, 48

[39] U. S Bureau of Labor Statistics, Bull. No. 357, *Cost of Living in the United States* (1924) p. 4.

[40] U. S Bureau of Labor Statistics, *Incomes Received and Rents Paid by Chicago Families*, Feb. 23, 1937, Table 6. For an analysis demonstrating how little the poorer families receive from income supplementing the wages of the principal breadwinner, see Houghteling, L., *The Income and Standard of Living of Unskilled Laborers in Chicago* (1931) pp. 50, 73.

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Starting from such a small income, the average worker does not get even the amount necessary in 1929 to support an urban family at a minimum level of health and decency.[41] Skimp as he may, the average worker (as shown by independent sample studies in the North[42] and in the South[43]) often runs into a deficit[44] and even if continuously employed seldom succeeds in saving as much as $50 a year. These savings are frequently consumed in periods of sickness (see footnote 32 on page 15, *supra*) and absence from work and are almost cer-

[41] See the minimum budget in 1929 for a self-supporting Chicago family reprinted in the Appendix, p. 69, Table 11 And note the correlation of this budget to years other than 1929 in the Appendix, p. 70, Table 12. Compare the budget of New York families considered in National Industrial Conference Board, *The Cost of Living in New York City, 1926*, p. 114.

[42] See Appendix, pp. 70, 71, Tables 13, 15. Compare U S Dept. of Labor, Bureau of Labor Statistics, preliminary mimeographed report on the Urban Study of Consumer Purchases, entitled *Incomes Received and Rents Paid by Chicago Families* (Feb. 23, 1937), p. 1.

[43] See Appendix, p. 71, Table 14. Compare Lenroot, K, *Children of the Depression*, Soc. Serv. Rev, June 1935, pp 219–222.

[44] In addition to the tables referred to in the two preceding footnotes, see U. S. Department of Labor, *Monthly Labor Review*, Vol. 29, pp. 41–61, for a study of *Cost of Living of Federal Employees in Five Cities;* U. S. Dept. of Labor, Bulletin No. 357, *Cost of Living in the United States*, 1918–1919, pp. 4, 5, 447.

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tain to disappear in periods of part-time employment or seasonal unemployment.[45]

Anything which is left, if it is not lost in bank failures, is completely drained by the worker's needs in periods of cyclical depression. This is proved by the evidence of the last depression: from 1930 to 1934 over 13 million depositors closed their savings accounts, and withdrawals totaled more than 7 billion dollars; [46] in 1932 and 1933, 11,654,000 industrial insurance policies having a face value of $24,109,644,000 were surrendered while 32,-

[45] A very large part of savings are consumed in periods of part-time employment and voluntary or involuntary absence from work. It has been estimated that the average worker spends 8 percent of his working life in such periods. Douglas, P H., *Real Wages in the United States, 1890–1926* (1930) p. 588. If this is correct, then long before the depression, these periods exhaust his savings. In any event, once the depression comes, savings are soon exhausted. By January 1935 over 20 million persons, having exhausted all available assets, were on public relief rolls. Federal Emergency Relief Administration, Release No. 8665, December 1935 (Table I thereof). Probably prior to that date, a large proportion of them were in debt as a result of small sums they had borrowed either without security or on chattels or assignments of future wages. Robinson, L. N. and Nugent, R., *Regulation of the Small Loan Business* (N. Y. 1935) p. 55; Clark, Evans, *Financing The Consumer* (1930) p. 213.

[46] American Bankers Assn., Savings Bank Division, *Savings Deposits and Depositors in Banks and Trust Companies of the United States for the years 1930 and 1935*, p 2. See corroborative statement N. Y. Brief, No. 49, p. 48, particularly footnote 37.

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410,000 such policies having a face value of $7,554,972,000 were allowed to lapse.[47] By June 1933 workers were losing the equities they had in their homes at the rate of 1,000 houses per day.[48]

If, from the foregoing, it is clear that the average individual worker cannot, by taking heed in advance, protect himself against his future days of unemployment, it is equally clear that once the day has arrived, adequate funds cannot usually be had by resort merely to the resources of the worker's relatives, his employer, private charity, and local governments.

It is well known that relatives of the unemployed worker, usually being in the same economic group as the worker, cannot long carry the burden.[49] Those few private employers who have generously and voluntarily established plans to deal with unemployment rarely make anything like adequate provision, and frequently have found that even the limited schemes which they adopted were beyond their capacity to carry through unaided.[50] Al-

[47] The Insurance Yearbook of the Spectator Co., New York, N. Y., *Statistical Abstract of the United States* (1935) p. 279.

[48] Federal Home Loan Bank Board, *The Home Owners' Loan Corporation, Its Purposes and Accomplishments, June 13, 1933 to June 13, 1936*, pp. 1, 2, 5.

[49] Givens, M. B., *Statistical Measures of Social Aspects of Unemployment*, in *Journal of American Statistical Association*, September, 1931, p. 311; N. Y. Brief in No. 49, p. 49

[50] See N. Y. Brief in No. 49, pp. 99–107, and authorities there cited.

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though private charities at all times do much to relieve the unemployed, they cannot, even when their responses are the most magnanimous, even approximate their needs.[51] A dramatic example is furnished by the private Emergency Unemployment Relief Committee in New York City which, through heroic efforts, raised in 1931–1932 almost 20 million dollars, an amount which by 1934 would have carried the city's relief load for scarcely more than a month.[52] At the same time that resort is had to private charities, resort is had to state and local governments. These governments, if they have no contributory or special tax system, exhaust their reserves and their credit in meeting ordinary part

[51] Private charities in cities having over 30,000 population expended, for relief for homeless men and families outside of institutions, $5,819,239 in the first quarter of 1929, and $22,468,161 in the first quarter of 1931. U. S. Department of Commerce, *Relief Expenditures by Governmental and Private Organizations 1929 and 1931* (1932) pp. 6, 8. Although this meant an increase of 286.1 per cent in private philanthropy, the total was never more than two-thirds of what local governments expended, and a mere pittance compared with what the national government ultimately spent for the corresponding periods of time. See Appendix pages 72–73, Table 16. In July 1935 private funds accounted for only 1.1 percent of the total relief expenditures, and in July 1936 the percentage had risen to only 2.7. Social Security Board, *Changes During July 1936 in Different Types of Public and Private Relief in Urban Areas* (October 19, 1936) Table 1 thereof.

[52] N. Y. Brief in No. 49, p. 28, n. 23.

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time and intermittent unemployment. Thus they enter a cyclical depression unprepared. In such a disaster, lacking a special fund for unemployment, crippled by tax delinquency,[53] facing a resistant bond market,[54] and unable to meet their ordinary expenses,[55] they soon are forced to call upon the national government.

The recent experience of the national government in response to such a call for funds is common knowledge. See *West Coast Hotel Co.* v. *Parrish,* No. 293, October Term, 1936, March 29, 1937. After vainly trying to solve the problem through voluntary private action, such as the share-the-work movement, the national government was forced to use the same taxing and spending power here involved to effectuate a policy which began with loans through the Reconstruction Finance Corporation to private corporations and local governments,[56] and proceeded to include grants to local governments for relief,[57] expenditures for

[53] U. S. Department of Commerce, Bureau of the Census, *Current Tax Delinquency* (1934).

[54] Bird, Frederick L., *Municipal Credit in the United States*, included in *Taxation and Public Policy* (Studenski, ed.; 1936) ch. VII; King, Clyde L., *Public Finance*, 1935, p. 549.

[55] Norton, John K., *American Educational Finance*, included in *Taxation and Public Policy* (Studenski, ed ; 1936) ch. VI.

[56] Act of Jan. 22, 1932, c. 8, 47 Stat. 5; Act of July 21, 1932, c. 520, 47 Stat. 709.

[57] Act of May 12, 1933, c. 30, 48 Stat. 55.

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public works,[58] including allied efforts such as the Civilian Conservation Corps; [59] and eventually expenditures for direct relief or work relief.[60] Without measuring precisely the extent to which the national government shared with the States this financial burden of providing for the unemployed, it will be enough to recall that although between January 1, 1933, and July 1, 1936, the States incurred obligations of $689,291,802 for emergency relief, and local subdivisions of government incurred an additional $775,675,366, the national government was forced to incur, for emergency relief alone, more than twice as much, or $2,929,-307,125.[61] According to the President's budget message for the fiscal year 1938, the national government's total expenditures for public works and unemployment relief for the three fiscal years 1934, 1935 and 1936 was $8,681,000,000. Thus, mirrored large in the depression, we see the role which the national government must take in our complex industrial civilization to care for the unemployed whose constant presence is a concomitant of that civilization.

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[58] Act of July 21, 1932, c. 520, 47 Stat. 709; Title II of Act of June 16, 1933, c. 90, 48 Stat. 195, 200, and subsequent statutes.

[59] Act of March 31, 1933, c. 17, 48 Stat 22, and subsequent statutes.

[60] Act of Feb. 15, 1934, c. 13, 48 Stat. 351; Title II of Act of June 19, 1934, c. 648, 48 Stat. 1021, 1055; Act of April 8, 1935, c. 48, 49 Stat. 115; Title II of Act of June 22, 1936, c. 689, 49 Stat. 1597, 1608.

[61] See Appendix, pages 72–75, Tables 16 and 17.

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Recognizing the permanency of the unemployment problem, and the inevitability of continual large drains on the federal treasury if no new program were fostered, public authorities considered how best to meet the problem. No informed person supposed that even by foresight and prudence complete financial provision could be made for all unemployment, including that in cyclical depressions.[62] Experts, however, did conclude that the adoption of unemployment compensation systems (that is, systems under which money is regularly contributed to a fund held to pay benefits to workers when they became unemployed) would mitigate the severity of depressions and the drain on the federal treasury in two ways: first, they would prevent that exhaustion of the resources of workers, charities and local governments which now occurs in ordinary periods of occasional unemployment long before any cyclical depression,[63] and second, such systems would prevent the onset, or lessen the destructive effect of, cyclical depressions by making available to meet the emergency a stored-up fund of consumer purchasing power.[64]

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[62] *Report of the President's Committee on Economic Security* (1935) pp. 13–14; S. Rep. No. 628, 74th Cong., 1st Sess., p. 11; H. Rep. No. 615, 74th Cong., 1st Sess., p. 7.

[63] See Lubin, I., *The Absorption of the Unemployed by American Industry* (1929); Clague, E., Couper, W. J., Bakke, E W., *After the Shutdown* (1934); and see authorities collated in footnote 45, page 19, *supra*.

[64] See Senate Rep. No. 628, *supra*, p. 12; Slichter, *Towards Stability* (1934), p. 150; Aldrich, Winthrop W, *The Monitor* (publication of Assoc. Industries of N. Y.), August 1936; N. Y. brief in No. 49, pp. 46, 155–156.

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Moreover, such systems would be more economical than relief, would improve the organization of the free labor market, would reduce malingering and would improve the morale of the workers.[65] These conclusions of experts corresponded with the judgment of men of affairs [66] and with experience in no less than 18 foreign countries.[67]

The difficulty in adopting them was that each State, although usually sympathetic to proposals for unemployment compensation,[68] hesitated to act individually or without the encouragement of the national government for one or more of the following reasons: (1) the financial burden of the system would, unless paralleled throughout the country, handicap the competitive position of its own industries and would discourage the coming of new industries; [69] (2) it could not afford the necessary

[65] N. Y. Brief in No. 49, pp. 120–125.

[66] *Id.*, pp. 141–145.

[67] *Id.*, pp. 170–171, 146–162; Senate Rep. No. 628, *supra*, pp. 10–11.

[68] The large number of unemployment compensation bills introduced into the New York State Legislature between 1921 and 1936 (Ibid, pp. 176–183) is typical of the local interest in inaugurating state unemployment compensation systems. Senate Rep. No. 628, *supra*, p. 11.

[69] The burden of a 3 percent pay roll tax is conservatively estimated in the N. Y. Brief in No. 49, their table 18, p. 135. In some industries, where the labor cost is high, the tax would curtail or eliminate the profits of an enterprise experiencing severe competition, a curtailed market or bad management. Standard Statistics Co., *Standard Trade and Securities Bulletin*, April 6, 1936, p. 249, May 11, 1936, p. 167. Such an effect on profits (judging from recent Federal Trade Commission and National Industrial Re-

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technical advice and early administrative costs necessary to establish such a program on a sound footing;[70] (3) if it placed this new burden on its own industries it could not protect them by an embargo on goods coming from States where competitive industries were not covered by unemployment compensation;[71] (4) perhaps it could not, without permission from Congress, include in any unemployment compensation system a tax upon

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covery Administration reports) might be particularly severe in the cotton textile and coal industries, where the margin of profit in some competitive areas is very low. At any rate, it is obvious that the fear of competition of industries in other States was an important deterrent to the enactment of unemployment compensation laws. Massachusetts Special Commission on Unemployment, *Unemployment Compensation and The Minimum Wage* (1933), p. 45; Clausen, F. H., *For the Enlightenment of Those Who Have not yet Familiarized Themselves with this Dangerous Proposal* (Wisc. Mfrs. Assn., 1921); Mfrs. Assn. of Conn, *Unemployment and Its Problems* (1933) pp. 129–130; Douglas, P. H., *Social Security in the United States* (1936) p. 4; House R. No. 615, 74th Cong., 1st Sess, p. 5; Senate Rep. No. 628, *supra*, p. 11. Gov. E. W. Marland, Proceedings of the 28th Annual Conference of the Nat. Tax Assn. (1935) p. 5; Seligman, E R. A, lecture on *The Fiscal Outlook and Coordination of Public Revenues*, in *Recent Problems in Public Finance* (1933) p. 272; Groves, H. M., lecture on *Uniformity in State and Local Taxation*, *ibid.*, p. 282. And see the recitals in state unemployment laws showing legislative recognition of the alleged competitive danger. Calif. Laws of 1935, c. 352, Art. I, Sec. 1; Mass. Gen. Laws, c. 151A, Sec. 53, as amended; Idaho Laws of 1936, c. 12, Sec. 26; Miss. Laws of 1936, c. 176, as amended by Act of Sept. 19, 1936, Sec. 2 (b).

[70] House Rep. No. 615; *supra*, p. 9.

[71] *Baldwin* v. *Seelig*, 294 U. S. 511.

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employers [72] or employees [73] engaged exclusively in interstate commerce; and (5) it might not be to the narrow self-interest of its own citizens to establish any such system so long as the national government, without collecting any special tax, used its general resources to care for the unemployed within the States' borders.[74]

The situation was one in which action by the national government was urgent. Three principal methods were actually proposed: [75] (1) without imposing any special tax, the national government might transmute the relief system into unemployment compensation, and have the benefits administered either by the nation or by the States operating on a subvention plan; (2) the national government might impose an excise tax and use the proceeds for an unemployment compensation system set up either by the nation or by the States operating on a subvention plan; or (3) the national gov-

[72] Compare *Ingels* v. *Morf*, No. 439, October Term, 1936, March 1, 1937.

[73] *Robbins* v. *Taxing District of Shelby County*, 120 U. S. 489.

[74] For many States a system of federal relief is probably a better bargain than an unemployment compensation system. Several States contribute less than 5 percent of the relief funds spent within their borders. Appendix, pages 74–75, Table 17. Since their citizens also pay a very small part of the federal internal and external revenue taxes, it is obvious that they are securing a benefit at the expense of citizens elsewhere in the Union.

[75] *Report of the President's Committee on Economic Security*, *supra*, pp. 14, 17.

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ernment might impose an excise tax and, by allowing against it a credit for amounts contributed to a state unemployment compensation system, encourage the establishment of such systems.

Congress chose the third and most conservative alternative for reasons of policy and for reasons of law. So far as policy is concerned, it recognized that under the third alternative: (1) each State would be free to determine what, *if any,* system of unemployment compensation it would have; (2) the diversity of state plans would give the country the benefit of experimentation in a new field;[76] (3) local administration would promote efficiency, would encourage local persons to watch income and outgo with vigilance, and would breed responsible local leadership; and (4) a truly "federal" remedy was being applied to a problem which had become the cooperative concern of both parts of our dual government.

So far as law is concerned, Congress relied squarely on the precedent of the Federal Estate Tax, Section 301 of the Revenue Act of 1926, which Congress knew[77] had been upheld in *Florida* v. *Mellon,* 273 U. S. 12. That statute imposes a tax upon the transfer of a decedent's estate, while at the same time permitting a credit, not exceeding 80 percent for "the amount of any estate, inheritance, legacy, or succession taxes actually paid to

[76] *Report of the President's Committee on Economic Security*, *supra*, p. 23.

[77] Senate Rep. No. 628, *supra*, p. 12.

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any State or Territory." As we shall show in detail in the argument, the large credit there given not only has had the effect of reducing substantially the Federal revenues, but also has operated to remove the incentive for wealthy persons to move to States having no death taxes, and has induced such States to levy death taxes. That is, that tax, like this tax, effectuates several policies.

SUMMARY OF ARGUMENT

I

Title IX is a valid exercise of the power of Congress "to lay and collect Taxes * * * and Excises, to pay the Debts and provide for the common Defence and general Welfare of the United States." Constitution, Article I, Section 8, Clause 1.

This tax has the indicia of a revenue measure. Being laid upon the privilege of receiving services it is a valid excise, and, under the rule enunciated in *Florida* v. *Mellon,* 273 U. S. 12, it satisfies the constitutional canon of uniformity. It will raise substantial revenue, for even if the maximum available credits are utilized it will yield the Treasury of the United States amounts estimated to range from $22,000,000 to $90,000,000. Even if, in laying the tax, Congress acted with an eye to public policy, this Court will not on that account invalidate the tax. *Sonzinsky* v. *United States,* No. 614, October Term, 1936, March 29, 1937; *Florida* v. *Mellon, supra.*

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If the policies of Congress in enacting this tax are to be considered, they bear a reasonable relation to the power granted in Article I, Section 8, Clause 1, since they are concerned only with the raising and spending of money for the general welfare of the United States. One policy is to make financial provision for the unemployed, thus relieving a drain which creates "unparalleled demands for relief" from the federal treasury. *West Coast Hotel Co.* v. *Parrish,* No. 293, October Term, 1936, March 29, 1937. Another policy is to mitigate double taxation. *Florida* v. *Mellon, supra.*

These policies are not only reasonably related to the power conferred by Article I, Section 8, Clause 1, but have been executed in a method specifically sanctioned by this Court. It is already established by decisions that a policy relating to the taxing and spending powers may be executed by a tax and credit. *Florida* v. *Mellon, supra.* Moreover, where the credit is made available only where the financial needs of the national government are met by the States, the tax and credit must be regarded as valid in view of the words of the Constitution, the expressions of the Framers of the Constitution (*Federalist,* Lodge ed., Nos. 36 and 45; *Farrand, Records* of the *Constitutional Convention,* Vol. 3, pp. 99–100), nineteenth century legislative precedent (Act of May 13, 1862, c. 66, 12 Stat. 384) and the plain objective of Article I, Section 8, clause 1.

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II

Title IX is consistent with the Fifth Amendment. Since the proceeds are not earmarked in any way, but are commingled in the Treasury of the United States, it is unnecessary to consider the possible challenge that there is a taking of property from one class for the benefit of another.

As a result of the definitions in Section 907, the tax is not applicable in the case of employers of less than eight, agricultural labor, domestic service and other specified types of employment. Those selections, together with the 90 per cent credit and related classifications, constitute the substance of attack under the due process clause. Our answer is two-fold.

First, the Fifth Amendment does not apply to selections and there is grave doubt whether it applies to classifications in a federal taxing statute. *Flint* v. *Stone Tracy Co.,* 220 U. S. 107, 158. Although the Fifth Amendment may apply where the supposed tax is merely a confiscation of property, this Court has often recognized the broad powers of selection, and has frequently indicated the inapplicability of the Fifth Amendment to classifications. *Flint* v. *Stone Tracy Co., supra; Billings* v. *United States,* 232 U. S. 261, 282.

Second, even if the various selections and classifications are examined under the Fifth Amend-

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ment, they will be found reasonable and amply justified by precedent. *Knowlton* v. *Moore,* 178 U. S. 41; *Brushaber* v. *Union Pac. R. R.,* 240 U. S. 1. The Section 907 definitions all find counterpart in similar provisions repeatedly approved by this Court. The 90 percent credit not only is founded upon the familiar policy of avoiding double taxation, but is also based upon fiscal considerations of perhaps an even more fundamental character. To the extent that taxpayers make contributions to state unemployment compensation funds, the drain upon the federal treasury for relief funds is diminished. That this fact was uppermost in the mind of Congress in permitting the 90 percent credit is apparent from an examination of the reports of both the Senate Finance Committee and the House Committee on Ways and Means.

The conditions in Section 903 (a) are designed to allow the 90 percent credit only where the state fund to which contributions have been made is a true unemployment compensation measure. Otherwise, if the state statute were merely masquerading as an unemployment compensation law, and had been enacted merely to enable local employers to take advantage of the credit or for some other foreign purpose, the federal fiscal purpose which the 90 percent credit is calculated to serve would be frustrated.

III

A. The Tenth Amendment cannot be considered in connection with the exercise of a granted power.

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Ashwander v. *Tennessee Valley Authority,* 297 U. S. 288, 330; *United States* v. *California,* 297 U. S. 175; *Everard's Breweries* v. *Day,* 265 U. S. 545, 548. But if it has any application to an exercise of granted powers it does not apply here.

The tax does not in any sense constitute a penalty. It cannot be avoided by voluntary action, for whether or not the State enacts an unemployment compensation law, the taxpayer pays the same amount. It cannot be contended that the taxpayer will be "penalized" if his State enacts a law which does not meet the standards set forth in Section 903 (a). If the contention is open to petitioner, it is unsound, since federal tax laws may permit deductions which are available to persons in some States and not in others. *Crooks* v. *Harrelson,* 282 U. S. 55; *Brown* v. *Helvering,* 291 U. S. 193, 201; *New York Ins. Co.* v. *Edwards,* 271 U. S. 109. Since the taxpayer is not given the option of escaping the tax by adopting an alternative course of conduct or submitting to regulation, the *Child Labor Tax Case,* 259 U. S. 20; *Hill* v. *Wallace,* 259 U. S. 44; and *United States* v. *Constantine,* 296 U. S. 287, are not applicable.

Nor does the credit under Section 902 constitute "economic coercion" of the taxpayer. He is offered no inducement which restricts his voluntary choice; at most, the knowledge that the tax is applicable throughout the United States will remove the fear of competition which would otherwise con-

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stitute his objection to the enactment of an unemployment compensation law by his own State. The case is thus entirely different from *United States* v. *Butler,* 297 U. S. 1, where the power to confer or withhold benefit payments to the individual farmer amounted to a power to coerce him into accepting a system of regulation of production.

There is, obviously, no attempt by Congress here to regulate directly the relationship of employer and employee since Congress has not established an unemployment compensation system to operate in any State. Consequently, *Carter* v. *Carter Coal Co.,* 298 U. S. 238, and *Schechter Corp.* v. *United States,* 295 U. S. 495, have no application. Nor is Congress attempting an indirect regulation of the relationship of employer and employee. The mere fact that Congress, in the exercise of a federal power, takes into account the existence of local regulatory measures does not transform these measures into national regulations. *Crooks* v. *Harrelson,* 282 U. S. 55; *Florida* v. *Mellon,* 273 U. S. 12; *Poe* v. *Seaborn,* 282 U. S. 101; *Hanover National Bank* v. *Moyses,* 186 U. S. 181; *In re Rahrer,* 140 U. S. 545; *Whitfield* v. *Ohio,* 297 U. S. 431.

B. The tax and credit do not violate the principle of the dual system of our government. That principle has never been applied to denounce action by either the States or the Federal Government by which greater cooperation between them can be secured. *Clark Distilling Co.* v. *Western*

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Maryland Ry. Co., 242 U. S. 311, 331; *Whitfield* v. *Ohio*, 297 U. S. 431.

The Act is cooperative rather than coercive, and actually increases the freedom of the States. Prior to the passage of Title IX, a State, by enacting an unemployment compensation law, might seriously have prejudiced its domestic producers. This economic coercion of the commerce clause is effectively eliminated by Title IX. Compare *Kentucky Whip & Collar Co.* v. *Illinois Central R. R. Co.*, No. 138, October Term 1936, January 4, 1937. Noteworthy evidence of the lack of coercion of the federal statute is to be found in the fact that several States have refused to pass unemployment compensation laws, and in the fact that the highest courts of two States have held that they did not consider their States coerced. *Howes Brothers Co.* v. *Mass. U. C. Comm.*, (Mass. Sup. Jud. Ct., Dec. 30, 1936), 5 N. E. (2d) 720; *Gillum* v. *Johnson* (Calif. Sup. Ct.), 62 P. (2d) 1037.

The conditions contained in Section 903 (a) are merely designed to insure that the credit is allowed only in connection with a genuine unemployment compensation law. Existing State unemployment compensation laws show a marked diversity of systems and provisions and demonstrate clearly that the States are in no way subject to Federal "dictation".

Even if the tax levied by Title IX be considered as a factor which makes it more desirable for a

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State to enact an unemployment compensation law, nevertheless its validity is established by decisions of this Court. If there be any inducement, it cannot in any sense be called coercion, which is an inducement to submit to regulation as the price of escaping a crushing burden. A State which does not enact an unemployment compensation law can suffer little, if any, detriment; the tax burden on its citizens remains the same, and the relief of its unemployed will, in all probability, still be undertaken in large part by the Federal Government. The inducement is consequently no greater than that of a grant-in-aid, which this Court has expressly stated to be not coercive in *Massachusetts* v. *Mellon,* 262 U. S. 447. Moreover, since the Federal Government is enabled under its power to appropriate for the general welfare to spend money for the relief of the unemployed, it cannot be said that it has gone beyond its power if it enacts legislation inducing the States to make expenditure for this same purpose.

Finally, Title IX is supported by the direct precedent of the Estate Tax provided in Section 301 of the Revenue Act of 1926 and sustained by this Court in *Florida* v. *Mellon,* 273 U. S. 12. We submit that this decision governs the case at bar.

IV

Title III authorizes an annual appropriation of $49,000,000 "for the purpose of assisting the States in the administration of their unemployment com-

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pensation laws." These subventions do not affect the validity of the tax imposed by Title IX.

A. Title III is, in fact, wholly separate from Title IX. The proceeds of the Title IX tax go into the general funds of the Treasury, unearmarked in any way. The subventions are appropriated out of general funds. They may, and have in fact, varied widely from the authorization in Title III, but even if the authorization be taken as a criterion, there is no equivalence between the proceeds of the tax and the appropriation. Indeed, as the tax proceeds *decrease* due to imposition of state taxes which may be credited against the Title IX tax, the payments under Title III, *pari passu,* increase. The case is governed by *Frothingham* v. *Mellon,* 262 U. S. 447.

Moreover, Title IX is, in law, separable from Title III. The facts do not rebut, but strengthen the presumption of separability from the separability clause. Section 1103. Title IX can operate alone, and, assuming that it had a policy of making it possible for the States to enact unemployment compensation laws, can achieve that policy independently of Title III. At most, Title III is merely cumulative. Cf. *Liggett Co.* v. *Lee,* 288 U. S. 517; *Sonzinsky* v. *United States,* No. 614, October Term, 1936, March 29, 1937.

B. In any event, Title III is valid. Certainly the maintenance by the States of unemployment compensation laws will, by some "reasonable possibility" (*United States* v. *Butler,* 297 U. S. 1, 67) conduce to the general welfare. And the form of

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the present appropriation—subventions to States to pay administrative expenses under state laws—is clearly valid. Grants-in-aid to the States for a variety of purposes have been common since the first Congress, particularly in the last century—a course of legislation which is very persuasive evidence that the practice is valid. *United States* v. *Curtiss-Wright Export Corp.,* No. 98, October Term, 1936, December 21, 1936. The same answer may be given to the contention that the Federal government may not attach conditions designed to insure that the money be spent for the purposes for which it was appropriated. Reasonable conditions of this sort do not amount to regulation. *United States* v. *Butler,* 297 U. S. 1, 73.

Since Congress was empowered to make the grants under Title III it was necessarily empowered to levy a tax to raise the necessary revenue. Assuming that petitioner can establish that the tax under Title IX is related to the subvention under Title III, there is nothing unnatural or improper in relating anticipated revenues to anticipated expenditures. Such a relation is common in England, in the States and in prior acts of Congress, and has been recognized as normal by this Court. *Knights* v. *Jackson,* 260 U. S. 12, 15; *Patton* v. *Brady,* 184 U. S. 608, 620.

Nor does Section 302 (a) of Title III contain any improper delegation of legislative power. The Constitution does not require that Congress specify the details of the expenditure of public money.

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The discretionary character of the power of appropriation is borne out not only by the practice in England prior to the Constitution (Stubbs, *Constitutional History,* Vol. II, pp. 523, 565–568; Civil List Act of 1782, 22 Geo. III, c. 82; 27 Geo. III, c. 33), but also by the consistent exercise by Congress of such a power under the Constitution (*e. g.,* Act of August 7, 1789, c. 9, 1 Stat. 53; Act of March 26, 1790, c. 4, 1 Stat. 104; Act of July 31, 1861, c. 28, 12 Stat. 283). In any event, the standards set forth in the challenged section are well within the prior decisions of the Court. *Hampton & Co.* v. *United States,* 276 U. S. 394; *Field* v. *Clark,* 143 U. S. 649, 692.

ARGUMENT

INTRODUCTORY

Reduced to its essentials, Title IX imposes an excise tax upon the receipt of services by an employer, but permits a deduction, not exceeding 90 percent of the tax, for amounts paid by him pursuant to a state unemployment compensation law.

We shall show (1) that the excise is a true "tax" within the power of Congress under Article I, Section 8, Clause 1; (2) that the tax does not violate the "due process" clause of the Fifth Amendment; (3) that, if a power specifically granted to Congress can be limited by the Tenth Amendment or by some analogous doctrine applicable to a dual system of government, there is no ground for invoking such limiting principles here; and (4) that, if it be assumed that the proceeds of this tax are in

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part used to defray the subventions provided for in Title III, and if it be further assumed that this petitioner may question such subventions, they and this tax are nonetheless valid exercises of congressional power under Article I, Section 8, Clause 1, of the United States Constitution.

I

TITLE IX IS A VALID EXERCISE OF THE POWER CONFERRED ON CONGRESS BY UNITED STATES CONSTITUTION, ARTICLE I, SECTION 8, CLAUSE 1

Title IX is an exercise of the power of Congress "To lay and collect Taxes * * * and Excises, to pay the Debts and provide for the common Defence and general Welfare of the United States." Constitution, Article I, Section 8, Clause 1.

We shall here show that Title IX lays a true "tax": it has the indicia of a tax, it is laid upon a proper subject for an excise, it is uniform, and it produces revenue. If it is proper, which we submit it is not, to consider the policies that led Congress to enact this statute, we then show that the policies correspond both in purpose and in the method of execution with the letter and the spirit of Article I, Section 8, Clause 1.

Like all revenue measures, this statute originated in the House of Representatives.[78] Hearings were had before the House Committee on Ways

[78] The bill which was finally enacted was introduced in the House of Representatives as H. R. 7260 on April 4, 1935, 74th Cong., 1st Sess.

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and Means and before the Senate Committee on Finance,[79] these being the committees generally charged with the consideration of tax statutes.[80]

Title IX on its face as well as in its operation is a true exercise of the taxing power. It imposes an excise tax on the receipt of services or on the privilege of employing individuals. That the subject is a proper one for an excise is indicated by *Sonzinsky* v. *United States,* No. 614, October Term, 1936, March 29, 1937, and the authorities collected in Appendix C. Moreover, it is clear that the excise satisfies the canon of uniformity, inasmuch as "the rule of liability is the same in all parts of the United States." [81]

The amount of the tax is proportioned to the extent that the privilege is utilized. Section 901. The Bureau of Internal Revenue under the direction of the Secretary of the Treasury is charged with the duty of collection. Section 905 (a). The administrative provisions generally found in revenue statutes relating to the filing of returns, refunds, penalties and the like are likewise present here. Section 905. The tax proceeds are paid

[79] The House hearings (January 21 to February 12, 1935) were held on H. R. 4120, and the Senate hearings (January 22 to February 20, 1935) were held on S. 1130, both bills being predecessors of the bill finally enacted.

[80] Contrast in this respect the Agricultural Adjustment Act, which, although in form a revenue measure, was handled by the respective committees on Agriculture in the House and Senate.

[81] *Florida* v. *Mellon*, 273 U. S. 12, 17; *Poe* v. *Seaborn*, 282 U S. 101, 117; *Knowlton* v. *Moore*, 178 U. S. 41.

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into the Treasury of the United States as internal-revenue collections. Section 905 (a). Being mingled in the Treasury with other internal-revenue collections, these proceeds, unlike those considered in *United States* v. *Butler,* 297 U. S. 1, 61, are not ear-marked or related in any way to some special purpose, but are subject to any appropriation for the general support of the Government.

Further, Title IX is so constructed as to produce substantial revenue. From the outset Congress was deeply concerned with anticipated yield. Estimated receipts, without taking into account the 90 percent deduction, range from over $225,000,000 in the first year to over $900,000,000 after the Act has been in operation for a period of years.[82] Thus,

[82] The Senate Committee on Finance, recommending a tax on employers of *four* or more, estimated the yield as follows (S. Rep. No. 628, 74th Cong., 1st Sess., p. 27):

TABLE XII.—*Revenue estimates (from tax on employers of 4 or more under title IX, with no allowance for 90-percent credit)*

Calendar year with respect to which tax is levied	Fiscal year received into Treasury	Estimated receipts	Rate of tax
			Percent
1936	1937	$247,000,000	1
1937	1938	596,000,000	2
1938	1939	826,000,000	3
1939	1940	831,000,000	3
1940	1941	838,000,000	3
1942	1943	849,000,000	3
1945	1946	876,000,000	3
1950	1951	908,000,000	3

NOTE.—The tax levied by title IX is subject to a credit of 90 percent of the amount of such tax for contributions into State unemployment funds Therefore the minimum amount of

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even if the maximum credits are available to all taxpayers in all States, the minimum estimated receipts from Title IX would range from at least $22,000,000 to at least $90,000,000.

These receipts pass unrestricted into the Treasury of the United States and are available for the general support of the Government. Even if, by a *tour de force* which ignores the separable nature of the statute, expenditures under Title III are debited entirely to the funds raised by Title IX, there will still remain a substantial balance for other governmental purposes. See Point IV, pp. 122–123, *infra.*

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revenue each year from this tax will be 10 percent of the above amounts What part of the above estimates, greater than 10 percent of same, will be retained by the Treasury is problematical, being dependent on the number of States enacting unemployment insurance laws, and the rates and coverage thereof

The House Committee on Ways and Means, recommending a tax on employers of *ten* or more, estimated the yield as follows (H. Rep. No. 615, 74th Cong., 1st Sess., p. 15):

TABLE XI —*Revenue estimates (from tax on employers of 10 or more under title IX, with no allowance for 90-percent credit)*

Calendar year with respect to which tax is levied	Fiscal year received into Treasury	Estimated receipts	Rate of tax
			Percent
1936	1937	$228,000,000	1
1937	1938	501,000,000	2
1938	1939	786,000,000	3
1939	1940	803,000,000	3
1940	1941	820 000,000	3
1942	1943	846,000,000	3
1945	1946	872,000,000	3
1950	1951	906,000,000	3

NOTE —The tax levied by title IX is subject to a credit of 90 percent of the amount of such tax for contributions into State unemployment funds Therefore the minimum amount of revenue each year from this tax will be 10 percent of the above amounts What part of the above estimates greater than 10 percent of same, will be retained by the Treasury is problematical, being dependent on the number of States enacting unemployment insurance laws, and the rates and coverage thereof

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That Congress was concerned with such anticipated yield to be paid into the general treasury is significant, apart from any other reason that might have induced it to pass this statute. The importance of this fact is strikingly illustrated by *Nigro* v. *United States,* 276 U. S. 332, where the Court had before it the Harrison Narcotic Drug Act which it had previously declared constitutional in *United States* v. *Doremus,* 249 U. S. 86. The Court pointed out (p. 353) that the Act had been amended since the earlier decision, and that under the amended statute there had been realized approximately a million dollars a year. It adverted to the fact that, if there had previously been any doubt as to the Act being a revenue measure, that doubt had been removed by the amendment yielding such substantial revenue. *Ibid.* Certainly, the estimated receipts under Title IX are many times greater than those yields and greatly exceed the amounts realized under various other tax statutes,[83] including Section 2 of the National Firearms Act which yielded to the Treasury only $5,400 in 1934 and $4,400 in 1935. *Sonzinsky* v. *United States,* No. 614, October Term, 1936, March 29, 1937, footnote 1.

But the petitioner suggests that though a levy bears all the earmarks of a tax, and does in fact

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[83] The Annual Report of the Commissioner of Internal Revenue for the Fiscal Year Ended June 30, 1935 (pp 56–67), and Internal Revenue Collections, Fiscal Year 1936,

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raise revenue, it is not an exercise of the power vested in Congress by Article I, Section 8, Clause 1, if Congress, in laying the levy, had in mind not merely revenue but also another policy. To this suggestion a host of cases, culminating in *Sonzinsky* v. *United States,* No. 614, October Term, 1936, March 29, 1937, furnish a decisive answer. The true rule, so recently stated, is that:

> Inquiry into the hidden motives which may move Congress to exercise a power constitutionally conferred upon it is beyond the competency of courts. *Veazie Bank* v. *Fenno, supra; McCray* v. *United States, supra,* 56–59; *United States* v. *Doremus, supra,* 93–94; see *Magnano Co.* v. *Hamilton,* 292 U. S. 40, 44, 45; cf. *Arizona* v. *California,* 283 U. S. 423, 455; *Smith* v. *Kansas City Title Co.,* 255 U. S. 180, 210; *Weber* v. *Freed,* 239 U. S. 325, 329–330; *Fletcher* v. *Peck,* 6 Cranch 87, 130. They will not undertake, by collateral

Preliminary Statement (pp. 26–37) disclose the following collections:

	1935	1936
Adulterated butter	$3,992 55	$4,664 11
Filled cheese	1,003 58	148 40
Oleomargarine	2,048,976 50	2,203,804 01
Mixed flour	4,525 93	5,582 59
Future delivery	3,950,544 00	2,943,542 37
Playing cards	4,351,299 40	4,143,698 44
Matches	6,000,101 30	6,885,811 92
Furs	2,675,731 07	3,321,057 14
Jewelry	2,010,122 98	3,110,604 75
Firearms	2,143,007 67	2,494,574 54
Cameras and lenses	343,387 66	677,925 70
Chewing gum	757,182 50	807,279 40

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> inquiry as to the measure of the regulatory effect of a tax, to ascribe to Congress an attempt, under the guise of taxation, to exercise another power denied by the Federal Constitution. *McCray* v. *United States, supra;* cf. *Magnano Co.* v. *Hamilton, supra,* 45.

Of the cases cited in this quotation, and the others referred to in the margin,[84] *Florida* v. *Mellon* and *United States* v. *Doremus* sufficiently illustrate the principle that the Federal Government may tax with an eye to broad public policy.[85] In the statute considered in the former case, the Congress provided a tax on the transmission of estates, but allowed a deduction up to 80 percent for amounts paid under state death tax laws. This statute, as its legislative history [86] no less than its structure, reveals, was enacted less with an eye to increasing revenue than to encouraging States to impose local estate and succession taxes. In the *Doremus* case Congress laid a tax on persons dealing with opium, but exempted those who, in addition to having registered with federal authorities, *had procured a*

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[84] *Florida* v. *Mellon*, 273 U. S. 12; *Alexander Theatre Ticket Office* v. *United States*, 23 F. (2d) 44 (C. C. A. 2d); *McKenna* v. *Anderson*, 31 F. (2d) 1016 (C. C. A. 2d), certiorari denied, 279 U. S. 869; *Apollo Operating Corp.* v. *Anderson*, 55 F. (2d) 66 (C. C. A. 2d); *United States* v. *Adams*, 11 Fed. Supp. 216 (S. D. Fla.). See also Story, *Commentaries on the Constitution* (5th ed.), Vol. 1, § 965.

[85] See the same rule applied to state taxation in *Fox* v *Standard Oil Co.*, 294 U. S. 87, 100.

[86] See footnote 13, p. 118, *infra.*

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state license to practice medicine. Thus the levy not only took a general public policy into account, but depended for its incidence on state regulation which in no sense related to a power vested in Congress.

If, contrary to the rule enunciated in these cases, this Court were to consider the various policies which Congress had in mind when it enacted Title IX of the Social Security Act, we submit that the policies are reasonably related to the specific power conferred by Article I, Section 8, Clause 1 since they are concerned only with the raising and spending of money for the general welfare of the United States.

The policy of the clause is clearly stated in the Constitution. The power given to Congress is a power to tax "to provide for the general Welfare of the United States." Or, as this Court has said, the power "granted is the power to tax for the purpose of providing funds for payment of the nation's debts and making provision for the general welfare." *United States* v. *Butler,* 297 U. S. 1, 64.

Before examining the policies involved in the statute at bar, we pause to make explicit the narrow interpretation of these quotations which will serve to support our argument. We understand that the Constitution and this Court have sanctioned a tax which provides *funds* for the general welfare. Beyond this we do not need to go. We do not need to assert, and we do not here assert,

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that Congress has the power to formulate any substantive regulations which may, in a loose or popular sense, be regarded as "for the general welfare", and then attach to such regulations penalties in the guise of taxes or rewards in the guise of credits. Compare *The Child Labor Tax Case,* 259 U. S. 20; *United States* v. *Butler,* 297 U. S. 1, 64; *Carter* v. *Carter Coal Co.,* 298 U. S. 238, 292. We make only this point, that if the policies of a tax are to be considered, the policies here involved relate to providing *funds* for the general welfare.

In the first place, the policy of the tax and credit is to remove obstacles which have prevented States from enacting their own unemployment compensation laws, and to encourage them to take such action.[87] The enactment of such state laws will make financial provision which, in view of the economic data already presented, is plainly financial provision for the general welfare of the United States. We have shown that when the unemployed are without funds, "the individual health, safety and

[87] It will be recalled that under Section 902 a credit against the Title IX tax "shall be allowed only for contributions made under the laws of States certified for the taxable year as provided in Section 903" And Section 903 (a) (4) limits a certification to cases in which the state law provides that all contributions "shall be used solely in the payment of compensation," that is, in "cash benefits payable to individuals with respect to their unemployment." Section 907 (g). In short, these statutory clauses make it clear that the credit, taken together with the state law, is designed to provide funds for unemployed persons. See also the Senate Committee report quoted at length in footnote 97a, p. 69, *infra.*

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welfare are sacrificed or neglected'', and from these individual disasters, the nation suffers since "the whole is no greater than the sum of all its parts''. *Holden* v. *Hardy,* 169 U. S. 366, 397, quoted with approval in *West Coast Hotel Co.* v. *Parrish,* No. 293, October Term, 1936, March 29, 1937. Moreover, we have shown that in our present economy, when States neglect to make timely provision for the unemployed, a drain such as we have already experienced *upon the national treasury is correspondingly increased.* The unemployed workers cannot be left to starve. Their misfortune "casts a direct burden for their support on the community''. *Ibid.* As this Court stated in the *Parrish* case:

> What these workers lose in wages the taxpayers are called upon to pay. The bare cost of living must be met. We may take judicial notice of the unparalleled demands for relief which arose during the recent period of depression and still continue to an alarming extent despite the degree of economic recovery which has been achieved. It is unnecessary to cite official statistics to establish what is of common knowledge through the length and breadth of the land.

In the second place, the policy of the tax and credit minimize what is, in effect, double taxation. In a State that has an unemployment compensation law, the State is already requiring the taxpayer to make financial contribution for the general welfare. It seems most unjust to impose a substantial

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additional burden on him, particularly when the burden is to furnish revenue which, like other revenue, will be used by the nation less in his State than in States which have neglected to make timely provisions for the unemployed. The avoidance of double taxation has always been regarded as a policy peculiarly appropriate to the purposes of the congressional taxing power.

Even before the Constitution was ratified by the requisite number of States, double taxation was an object of deep concern. Hamilton recognized that the two governments might effectuate "an improper accumulation of taxes on the same object," but he "hoped and presumed, however, that mutual interest would dictate a concert in this respect which would avoid any material inconvenience." *Federalist* (Lodge ed.) No. 33, p. 194. See also No. 32, pp. 188–189; No. 36, p. 211. And Edmund Randolph, in discussing in the Virginia Convention the question of the power of taxation enjoyed by both nation and State, said that "It will most certainly be the interest of either to avoid imposing a tax on an article, which shall have been previously taxed by the other." Remarks of Edmund Randolph in the Virginia Convention, June 7, 1788, Farrand, *Records of the Federal Convention,* Vol. 3, p. 309.

Moreover, the more equitable distribution of tax burdens through the avoidance of double taxation, long a matter of legislative solicitude, has justified many classifications in tax statutes.

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Again, on this point, *Florida* v. *Mellon,* 273 U. S. 12, is an authority. Other examples are collected in the margin.[58]

Continuing on the assumption that this Court, in reviewing a tax statute, will examine the congressional policies, we next turn to the issue whether, if the policies here involved are related to the specific power conferred by Article I, Section 8, Clause 1, they have been executed in accordance with one of the ways in which that clause was intended to operate.

The petitioner may contend that the policies cannot be carried out by means of a credit. This issue, we think, is settled in this Court. Congress can carry out its policy by a credit against, or exemption from, a tax, just as it can by the tax itself. This is shown by a host of precedents, including *Florida* v. *Mellon, supra; Brushaber* v. *Union Pacific R. R.,* 240 U. S. 1; *Flint* v. *Stone*

[58] Revenue Act of 1936, Secs. 23 (c), 26 (b), 31 and 131; Revenue Act of 1934, c. 277, 48 Stat. 680, Secs. 23 (c), 31, 102 (h) and 131. Report of the House Committee on Ways and Means on Double Taxation (1933). See also those cases in which it has been held that the avoidance of double taxation furnishes a proper basis for a classification in a state tax law. *Kidd* v. *Alabama*, 188 U. S. 730; *Travellers' Ins. Co.* v *Connecticut*, 185 U. S. 364; *Darnell* v. *Indiana*, 226 U. S. 390, 398; *Watson* v. *State Comptroller*, 254 U. S. 122, 124–125; *Klein* v. *Board of Tax Supervisors*, 282 U. S 19; *Lawrence* v. *State Tax Commission*, 286 U. S. 276, 284; *Liggett Co.* v. *Lee*, 288 U. S. 517, 533; *Colgate* v. *Harvey*, 296 U S. 404, 419–422; *State Board* v. *Young's Market Co.*, 299 U. S. 59, 64; *Henneford* v. *Silas Mason Co.*, No. 418, October Term, 1936, March 29, 1937.

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Tracy, 220 U. S. 107; *Spreckels Sugar Refining Co.* v. *McClain,* 192 U. S. 397; and *Knowlton* v. *Moore,* 178 U. S. 41. And the available credit or exemption can be a very substantial one: in *Florida* v. *Mellon,* it was 80 per cent; in the *Spreckels* case, it was $250,000.

Moreover, quite apart from these adjudged cases, and as an alternative, we submit that a statute which lays a tax and allows a credit to taxpayers in States that provide funds for the general welfare is a valid exercise of the power conferred in Article I, Section 8, Clause 1. The clause on its face merely requires that the power be so exercised as to "provide [funds] for the general welfare." See page 47, *supra.* The Constitution does not stipulate who shall make the provision or under whose rules the funds shall be either collected or applied. This Court has already, in *Massachusetts* v. *Mellon,* 262 U. S. 447, refused to read into the Constitution a stipulation that the *application* of the funds must be by the nation, and not by the States. And the contemporaneous exposition of the Constitution by the Framers, the precedents of nineteenth century legislation, and the objective of the constitutional power here involved, show that there should not be read into the Constitution a stipulation that the *collection* of funds must be by the nation, and not by the States.

The Federalist papers of Hamilton (*Federalist,* Lodge ed., No. 36, pp. 211, 212) and Madison (*Id.,* No. 45, p. 290) and the joint report of Roger Sher-

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man and Oliver Ellsworth to the Governor of Connecticut, dated September 26, 1787 (Farrand, *supra,* Vol. 3, pp. 99–100), make it appear that the Framers contemplated that three methods would be available to provide funds for the general welfare of the United States: (1) taxation entirely prescribed by Congress and entirely collected by federal officers [this system is almost universally followed today]; (2) taxation prescribed by Congress, but collected by state officers acting either as federal agents or under the regulations of the States [this system was apparently never followed, although it was considered in the debates of the first Congress. 1 *Annals of Congress* 367, May 18, 1789] and (3) taxation prescribed by Congress with an option to the States to secure for themselves and their citizens tax exemption or tax remission where they make their own financial provision "for the general welfare of the United States."

Title IX may be regarded as falling within this third class. This statute remits in part the exercise of the federal power to collect taxes in a State that has provided its financial quota for the general welfare of the United States. In the words of Sherman and Ellsworth, Congress has provided that its collecting "authority need not be exercised, if each state will furnish its quota." Farrand, *supra,* Vol. 3, p. 100. Or, as Hamilton said, "When the States know that the Union can apply itself without their agency, it will be a powerful motive

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for exertion on their part." *Federalist,* No. 36, p. 211.

A method corresponding in principle with the one here employed was evolved in connection with direct taxes imposed by Congress in the nineteenth century.[59] During the Civil War period, Congress imposed direct taxes under which the States were given the right to assume the tax and receive a credit for prompt payment. Act of Aug. 5, 1861, c. 49, 12 Stat. 292, and Act of May 13, 1862, c. 66, 12 Stat. 384. It is interesting to note that when the first of these two taxes was under consideration in the House of Representatives, Representative Roscoe Conkling of New York offered (and, ex-

[59] The first direct tax was laid by the Act of July 14, 1798, c 75, 1 Stat. 597 Although it had been suggested that the States themselves assume and pay the quota imposed upon their citizens, this suggestion was rejected in view of the unsatisfactory experience with that procedure under the Articles of Confederation. *Report of Oliver Wolcott, Jr, Secretary of the Treasury, to the House of Representatives, Dec. 14, 1796*, American State Papers, Finance, Vol. 1, pp 414, 436.

Direct taxes thereafter fell into disuse until the War of 1812. Then in the direct tax acts of August 2, 1813, c. 37, 3 Stat 53; January 9, 1815, c. 21, 3 Stat. 164; and March 5, 1816, c. 24, 3 Stat. 255, Congress permitted the States to assume and pay the amounts apportioned them, and, indeed, allowed to each State a deduction of 15 per cent if it made the payment promptly. 3 Stat. 71, 179, 256. Seven States took advantage of this method of payment in 1814; and four took advantage in 1815 and 1816. Adams, Henry Carter, *Taxation in the United States, 1789–1816*, page 68.

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cept for administrative reasons presented by the Treasury, would probably have carried) a proposal to allow the same sort of assumption by the States of federal *excise* taxes due from their citizens.[90] What is even more interesting, and for purposes of this case extremely significant, is that, from this 1862 tax, which, like the present tax, was upon individuals (*United States* v. *Louisiana,* 123 U. S. 32, 38), Congress provided that there should be deducted as a credit all amounts incurred by States "in enrolling, subsisting, clothing, supplying, arming, equipping, paying and transporting its troops employed in aiding to suppress the present insurrection against the United States." 12 Stat. 384. This deduction, like the present credit, was given for amounts collected and expended by a State to provide for the common defence and general welfare of the United States", and redounded to the benefit, presumably *pro rata,* of individual citizens. Every State in the Union except Delaware indicated that it would take advantage of the right to assume and pay its quota of the direct tax,[91] and the following States paid all or most of their direct tax by application of claims against the United States for expenses in connec-

[90] *Congressional Globe,* 37th Cong., 1st Sess., p. 247, col. 1; Smith, Harry Edwin, *United States Federal Internal Revenue Tax History from 1861 to 1871*, p. 71.

[91] Senate Ex. Doc. No. 24, 46th Cong., 1st Sess. (1879) p. 13.

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tion with the troops they sent to the federal army: New Hampshire (see New Hampshire Laws, 1862, p. 2639), New York (see New York Senate Ex. Doc., 1863, No. 4, pp. 7–10), Pennsylvania (see Pennsylvania Laws, 1862, p. 18), West Virginia (see Act of June 21, 1866, c. 128, 14 Stat. 68), Michigan (see Michigan Laws, 1862, pp. 1–2), Wisconsin (see Wisconsin Laws, 1862, p. 127), Indiana (see Indiana Laws, 1865, p. 47), Maine (see Maine Acts and Resolves, 1862, p. 173), Missouri (see Act of April 17, 1866, c. 46, 14 Stat. 39). These facts were reported to Congress.[92] Moreover, although the credit was never judicially passed upon, this Court apparently did regard the assumption by the States of the direct taxes owed by their citizens as authorized by the Constitution. *United States* v. *Louisiana*, 123 U. S. 32, 38.[93]

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[92] In his annual report on finances sent to Congress on December 10, 1863, Secretary of the Treasury Chase stated that direct tax receipts were estimated at $11,620,717, and that this amount, or nearly this amount, had been received in the form of payments for military supplies and services by the States, for which they were entitled to credit beyond their several proportions of the tax. He said, however, that in consequence of incomplete settlements, only the sum of $1,485,103 appeared on the books as received into the Treasury. Annual Report on Finances of the Secretary of the Treasury, December 10, 1863, 38th Cong., 1st Sess., House Executive Documents, Vol. 6, No. 3.

[93] "It allows, it is true, the different States to assume the amounts apportioned to them respectively, and to collect the same in their own way by their own officers. Many of the States did thus assume the amounts, and in such cases it may well be considered that for the sums assumed they be-

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The use of a tax credit where a State serves to relieve a drain on the national Treasury was indeed known and approved even before the Constitution.[94]

came debtors to the United States, and, so far as any portion of those sums has not been paid, that they still remain debtors. But, unless such assumption was had, no liability attached to any State in her political and corporate character. The liability was upon the individual land owners within her limits." 123 U. S 32, 38

[94] On September 4, 1782, it was resolved by the Continental Congress that a quota of $1,200,000 be imposed on the States and that the money so raised in each State should be applied for the payment of interest due on certificates issued from the loan office of such State and other liquidated debts of the *United States* contracted therein before any part thereof should be paid into the public treasury. It was further recommended to the several States that certain specified taxes be imposed by them, consisting of a tax on land, a poll tax, and an excise on liquors, and that *they* appropriate the money to arise therefrom to the payment of the debts of the United States. It was ordered that these resolutions be referred to the Grand Committee to assess and report the quota of each State. Journals of the Continental Congress, Vol. 23, 1782, pp. 545–546. On September 10, 1782, the Grand Committee reported the apportionment, which was confirmed. *Id.*, pp. 564–571.

These resolutions were referred to in a report on April 5, 1784 (Journals of the Continental Congress, Vol. 24, 1784, pp. 185–196) by a grand committee including, among others, Thomas Jefferson and Roger Sherman. The committee there said with regard to the 1782 resolutions (p. 188):

> This requisition gave license to the States, to apply so much as should be necessary of their respective quotas of it to the payment of interest due on Certificates issued from the Loan office of their own states, and other liquidated debts of the United States contracted therein. Hence they suppose it has happened, that the actual payment of these quotas, have been uncommunicated to the Office of finance for the United States.

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We thus see that it is not a novel idea for Congress to exercise its power to collect taxes in a manner that recognizes the cooperative role played by a State that has taken financial steps "to provide for the common defence and general welfare of the United States." Where a State itself directly raises and applies funds for the common defence and general welfare of the United States, thereby relieving *pro tanto* the Federal Treasury, Congress has in the past recognized the equitable claim of the State and its citizens to reduction of their tax burden. Such reduction clearly bears a reasonable relation to the taxing power and cannot be said to rob the tax of its constitutional character or to convert it into an attempted exercise of some other power not granted to Congress.

Even if there were not these two alternative bases of precedent, one based on the tax and credit upheld in *Florida* v. *Mellon,* and the other based on the direct tax of 1862, we submit that approval of this tax is required by a realistic interpretation of Article I, Section 8, Clause 1, of the Constitution. The objective or end of the clause is to make financial provision for the general welfare. It would be almost absurdly unrealistic to advance the novel principle of constitutional law that, though the national government may, out of its general revenue spend either directly or indirectly by grants to the States, for relief, it cannot by a tax and credit avoid a repetition of the present situation,

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which is so perilous to the finances of the nation and which involves a central administration inevitably more complex, and often less efficient, than local administration. To such unrealism, the answer is "that to a constitutional end many ways are open." *Carter* v. *Carter Coal Co.,* 298 U. S. 238, 291.

II

THE TAX IMPOSED BY TITLE IX DOES NOT CONTRAVENE THE FIFTH AMENDMENT

It is only in rare and exceptional circumstances that the Fifth Amendment operates as a limitation upon the taxing power (*Magnano Co.* v. *Hamilton,* 292 U. S. 40, 44), and then only if the challenged statute be so arbitrary or capricious as to compel the conclusion that it does not involve an exercise of the taxing power at all but constitutes a confiscation of property. *Helvering* v. *City Bank Co.,* 296 U. S. 85, 90; *Nichols* v. *Coolidge,* 274 U. S. 531.

The asserted absence of due process here arises primarily from two contentions: First, that property is arbitrarily taken from one class and given to another; and, second, that various selections and classifications in the Act are arbitrary.

A. There is no taking of property from one class for the benefit of another

It may be argued that the tax operates to take property from one class and bestow it upon another in violation of the Fifth Amendment.

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Such contention, however, would be based upon an assumption of fact which is wholly false, namely, that the tax proceeds are paid out to the employees as unemployment compensation. Wholly unlike the contributions involved in *Railroad Retirement Board* v. *Alton Railroad Co.,* 295 U. S. 330, no portion of the taxes collected under Title IX is made available in any form to employees. All unemployment insurance benefits to employees are paid out of local funds, no part of which ever consisted either directly or indirectly of Federal money. There is therefore no need to consider whether such expenditures would result in a violation of due process if paid out of the funds raised by this tax.

The only possible Federal expenditures under the Social Security Act that relate even remotely to unemployment insurance are authorized by Title III. There, Congress merely authorized appropriations, relatively small in amount, for state *administration* expenses. And, as we will later show in Point IV, *infra,* not only is the validity of Title IX wholly independent of Title III, but also the appropriations authorized in Title III are in any event proper.

B. The various selections and classifications do not violate the Fifth Amendment

By virtue of the definitions contained in Section 907, the tax is not applicable in the case of employ-

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ers of less than eight individuals, agricultural labor, domestic service, seamen, government service, employment by certain relatives, and employment by charitable and like organizations. These *selections* as well as the classification permitting the 90 percent credit and certain related classifications may perhaps be attacked as arbitrary and therefore violative of the due process clause.

While, as indicated above, it is clear that the due process clause may strike down a purported exercise of the taxing power where the statute amounts to a confiscation of property, the Fifth Amendment has never been thought to apply where Congress has merely *selected* the subjects for taxation, and there is grave doubt whether it applies to mere classifications in tax statutes.

As to selections in a Federal tax statute, it is clear that the taxing power would be crippled if an excise could be defeated merely by showing that Congress in imposing a tax on certain acts or privileges had failed to include certain other similar acts or privileges. To implement the taxing power, Congress must have plenary powers of *selection.* The Court was particularly directing its attention to this question when it said in *Flint* v. *Stone Tracy Co.,* 220 U. S. 107, 158:

> In levying excise taxes the most ample authority has been recognized from the beginning to select some and omit other possible subjects of taxation, to select one call-

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> ing and omit another, to tax one class of property and to forbear to tax another.
> * * *

Cf. *Sonzinsky* v. *United States,* No. 614, October Term, 1936, decided March 29, 1937.

That the Fifth Amendment does not apply in the case of *selections* is made clear by the many occasions on which the Court has approved the selection of specific subjects for Federal taxation without requiring the taxation of similar subjects. See *Flint* v. *Stone Tracy Co., supra,* at 159. Striking, indeed, is the stamp tax imposed upon "calls" but not upon "puts." *Treat* v. *White,* 181 U. S. 264. See also *Brushaber* v. *Union Pac. R. R.,* 240 U. S. 1. We submit, therefore, that the selections occasioned by the definitions in Section 907 of the Act should not be open to judicial scrutiny under the Fifth Amendment.

There is also grave doubt whether the Fifth Amendment applies to the classification resulting from the 90 percent credit and the conditions imposed by Section 903 (a). Classifications in *state* legislation are, of course, subject to the Fourteenth Amendment. But the Fourteenth Amendment, unlike the Fifth Amendment, contains, in addition to the due process clause, the *equal protection* clause. This Court, in considering the question of classification under the Fourteenth Amendment, has uniformly related that issue to the equal protection clause rather than to the due process clause. See, for example, *Colgate* v.

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Harvey, 296 U. S. 404, 419–422. It is true that the two clauses may, within certain limits, be co-extensive, but it is also true that the equal protection clause has an independent sphere of action. It is within that independent sphere that the classification questions fall. Such, no doubt, must have been the analysis of this Court when it declared through Mr. Justice Holmes in *La Belle Iron Works* v. *United States,* 256 U. S. 377, 392:

> The Fifth Amendment has no equal protection clause; and the only rule of uniformity prescribed with respect to duties, imposts, and excises laid by Congress is the territorial uniformity required by Art. I, § 8 * * *.

See also *Quong Wing* v. *Kirkendall,* 223 U. S. 59, 62. Indeed, the Court has often stated that no Fifth Amendment question is involved. *Treat* v. *White,* 181 U. S. 264, 269; *McCray* v. *United States,* 195 U. S. 27, 61; *Billings* v. *United States,* 232 U. S. 261, 282; *Brushaber* v. *Union Pac. R. R.,* 240 U. S. 1, 23–24; *Barclay & Co.* v. *Edwards,* 267 U. S. 442, 450–451.

However, even if the selections and classifications involved herein are examined under the Fifth Amendment, they will be found reasonable and amply justified by precedent.

1 The selections arising from the Section 907 definitions are reasonable

The exemption of employment by States is, of course, merely declaratory of their implied constitutional immunity from Federal taxation. Cf.

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Plummer v. *Coler,* 178 U. S. 115, 118. In exempting employment by the United States, Congress simply avoided the useless procedure of self taxation.

Exemptions of charitable organizations, agricultural labor, domestic service, seamen and service within the family are of a type long familiar in our internal-revenue laws. *Flint* v. *Stone Tracy Co.,* 220 U. S. 107; *Knowlton* v. *Moore,* 178 U. S. 41; *Brushaber* v. *Union Pac. R. R.,* 240 U. S. 1; *Bromley* v. *McCaughn,* 280 U. S. 124; *New York Trust Co.* v. *Eisner,* 256 U. S. 345. Comparable exemptions by state legislatures have been attacked and uniformly sustained under the Fourteenth Amendment. *Middleton* v. *Texas Power & Light Co.,* 249 U. S. 152, 159; *Aero Transit Co.* v. *Georgia Comm'n,* 295 U. S. 285, 291; *Utah Power & L. Co.* v. *Pfost,* 286 U. S. 165; *Citizens' Telephone Co.* v. *Fuller,* 229 U. S. 322; *Magoun* v. *Illinois Trust & Savings Bank,* 170 U. S. 283; *Billings* v. *Illinois,* 188 U. S. 97; *Keeney* v. *New York,* 222 U. S. 525; *Northwestern Life Ins. Co.* v. *Wisconsin,* 247 U. S. 132; *American Sugar Refining Co.* v. *Louisiana,* 179 U. S. 89.

Moreover these selections may be justified by the prohibitive practical administrative difficulties in such cases. Cf. H. Rep. No. 615, 74th Cong., 1st Sess., p. 33, and S. Rep. No. 628, 74th Cong., 1st Sess., p. 45, dealing with the similar exemptions to the tax levied by Title VIII of the Act. The

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difficulties in requiring the maintenance of proper records by housewives and farmers, and the almost impossible task of properly enforcing the Act as to them, give adequate basis for distinction. The expense of collection might well far exceed the revenue to be obtained. In the case of officers and members of the crew of vessels engaged in the foreign or coasting trade, administrative obstacles would be encountered in segregating the services performed within and without the United States. Considerations of administrative difficulties such as these have often been held to afford a proper basis for classification. *Hatch* v. *Reardon,* 204 U. S. 152; *Continental Baking Co.* v. *Woodring,* 286 U. S. 352; *La Belle Iron Works* v. *United States,* 256 U. S. 377; *Aero Transit Co.* v. *Georgia Comm'n,* 295 U. S. 285.

The fact that the exemption of small employers is fixed numerically at eight in no way operates against the validity of the classification. Congress might distinguish between large employers and small employers on the ground of administrative convenience, or for the recognized reason that large employers have a higher percentage of unemployment, and so create a greater drain on the Federal Treasury.[95] This Court has held in like situations that it is within the discretion of the legislature to designate the number which will constitute the

[95] The following table, the result of a thoroughgoing nation-wide study of all industries, depicts the effects of the

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dividing line. *Jeffrey Mfg. Co.* v. *Blagg,* 235 U. S. 571; *Quong Wing* v. *Kirkendall,* 223 U. S. 59; *St. Louis Cons. Coal Co.* v. *Illinois,* 185 U. S. 203; *Middleton* v. *Texas Power & Light Co.,* 249 U. S. 152, 159; *Miller* v. *Strahl,* 239 U. S. 426, 434; *McLean* v. *Arkansas,* 211 U. S. 539, 551; *Booth* v. *Indiana,* 237 U. S. 391, 397. Cf. *Brushaber* v. *Union Pac. R. R.,* 240 U. S. 1; *Knowlton* v. *Moore,* 178 U. S. 41; *Spreckels Sugar Refining Co.* v. *McClain,* 192 U. S. 397; *Bromley* v. *McCaughn,* 280 U. S. 124.

The selections arising out of Section 907 are, therefore, in no way arbitrary or capricious. They

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1920–21 depression, and gives ample foundation for a distinction between large and small firms:

per quarter year

A comparison of the volume of employment at the peak and in the trough for leading industrial groups (1920–1921 depression)

Employees per concern	Full Time Hours (Millions)			Hours Actually Worked (Millions)		
	Peak	Trough	Percent Decline	Peak	Trough	Percent Decline
0–20	7.105	6.892	3 00	6.956	6.742	3 08
21–100	3 132	2 640	15 71	2.926	2.521	13 84
Over 100	9.215	6.997	24 07	9.181	6 589	28 23

King, *Employment Hours and Earnings in Prosperity and Depression, United States 1920–1922*, p. 60. Results of an inquiry conducted by the National Bureau of Economic Research with the help of the Bureau of Markets and Crop Estimates and the Bureau of the Census for the President's Conference on Unemployment.) The difference between the Full Time Hours and Hours Actually Worked represents the amount of work gained through overtime, or lost through part-time work.

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are of the type repeatedly sustained, and should be approved here.

2. The 90 percent credit

While the most that the due process clause can require of a classification in a tax statute is that it be reasonable—and the reasonable basis for the classification may be founded on policies entirely unrelated to the production of revenue [96]—we have

[96] For example, charitable corporations pay no income taxes See, *e. g.*, Revenue Act of 1936, Sec. 101; Revenue Act of 1934, Sec. 101, c. 277, 48 Stat. 680. And, within certain limits, gifts to charity are deductible under the income, estate and gift tax laws See, *e g.*, Revenue Act of 1936, Sec. 23 (o), (q); Revenue Act of 1935, Sec. 102 (c), amending Sec 23 of the Revenue Act of 1934, *supra.* Such exemptions, it is plain, are based upon broad social aims, entirely unrelated to revenue measures as such.

Similarly, the exemption of yachts of domestic construction in the tax on the use of yachts was predicated upon a similar policy of encouraging shipbuilding in this country See *Billings* v. *United States*, 232 U. S. 261. Again, the differences in rate of tax on colored and uncolored oleomargarine were not founded on fiscal policy. See *McCray* v. *United States*, 195 U. S. 27.

Revenue acts frequently grant exemptions to certain classes in a way that is justified only by a general sense of fairness. Thus the $3,000 exemption to unmarried persons and the $4,000 credit to married persons did not invalidate the Revenue Act of 1913 (c. 16, 38 Stat. 166). *Brushaber* v. *Union Pac. R. R.*, 240 U. S. 1. The $40,000 exemption as to insurance under the estate tax law does not affect its validity. *Chase National Bank* v. *United States*, 278 U. S. 327.

Many other revenue statutes containing classifications wholly unrelated to Federal taxation have received judicial

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already shown that the 90 percent credit is predicated upon two predominantly fiscal policies.

1. The first justification for the 90 percent credit may be found in the general policy of reducing double taxation. (See pages 49–51, *supra.*) If no such credit were allowed, an employer in a State having an unemployment insurance measure would have to pay twice, once to the state fund and then to the Federal Government. Such a result not only would impose a disproportionate financial burden upon such employers, but also would subject them to a business disadvantage in competition with other employers.[97]

2. In addition, the 90 per cent credit may be justified under the fiscal powers in another and perhaps more significant manner. To the extent that em-

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approval. Thus a statute taxing sales made at commodity exchanges but not elsewhere has been upheld. *Nicol* v. *Ames*, 173 U. S. 509. A stamp tax upon "calls" but not upon "puts" has been sustained. *Treat* v. *White*, 181 U. S. 264 Allowances for depreciation have been permitted while denied as to depletion in connection with an income-tax statute. *Von Baumbach* v. *Sargent Land Co.*, 242 U. S. 503. A striking classification has been sustained between corporations obtaining funds by issuing bonds and those issuing stock. *Anderson* v. *Forty-Two Broadway Co.*, 239 U. S. 69. An income-tax statute permitting depletion allowances but limiting such allowances to 5 percent of the gross output has been upheld. *Stanton* v. *Baltic Mining Co.*, 240 U. S. 103.

[97] See Message of the President recommending Legislation on Economic Security, January 17, 1935, H. Doc. No. 81, 74th Cong., 1st Sess., p. 3; Senate Report No. 628, 74th Cong., 1st Sess., p. 13.

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ployers make contributions to state funds, the Federal Government makes substantial financial gains, for the operation of these funds will result in a reduction of relief expenditures of the Treasury. In recent years these expenditures have been enormous, and in future years, unless provision is made, they may continue to be large. See pp. 22–24, *supra*.[97a]

In short, the amounts not paid as a tax, but credited against it serve a very real Federal *fiscal* purpose.[98]

[97a] Congress was very much aware of the *fiscal* purposes that would be served by the credit. The report of the Senate Committee on Finance declares (S. Rep. No. 628, pp. 15–16): "This country has expended far more for unemployment relief during this depression than the total expenditures of all other countries that have unemployment compensation systems during the entire time these systems were in operation. Unemployment compensation will not completely eliminate the necessity for unemployment relief. To the extent, however, that unemployment reserves are accumulated, they will reduce the necessity for relief In normal periods, unemployment compensation will provide a sufficient safeguard for most of the unemployment that will occur, and in depression periods, will very materially reduce the burden of relief costs. * * *" See also H. Rep. No. 615, *supra*, p. 16.

[98] The custom of giving a deduction from taxes to those whose conduct serves a Federal purpose is as old as the Congress itself. The very first Congress, presumably actuated by a desire to avoid the expense of building a large navy, and a desire to stimulate citizens to build or to purchase ships, provided that "a discount of ten percent on all the duties imposed by this [tariff] act, shall be allowed on such goods, wares and merchandises, as shall be imported in

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3. The conditions in Section 903 (a)

In order that a taxpayer may avail himself of the 90 percent credit offered in Section 902, it is necessary that the state law under which he has made his contribution shall comply with certain minimum criteria contained in Section 903 (a). Those criteria (most of them merely definitional in character) are valid classifications not only because they are reasonable, but also because they were designed to advance the fiscal policy of the Federal Government.

Moreover, the conditions are clearly separable from the remainder of the statute. The intention of Congress that the various provisions of the Act should be separable is plainly stated in Section 1103. And unless clear evidence of structural inseparability should appear to overcome the prima facie meaning of the language of Congress, such legislative intention must be given effect. See *Carter* v. *Carter Coal Co.,* 298 U. S. 238, 312–313; *Williams* v. *Standard Oil Co.,* 278 U. S. 235, 241. This Court has often refused to strike down a statute merely because of the invalidity of conditions therein, where such conditions do not go to the heart of the statute, and are subordinate in charac-

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vessels built in the United States, and which shall be wholly the property of a citizen or citizens thereof, or in vessels built in foreign countries, and on the sixteenth day of May last, wholly the property of a citizen or citizens of the United States, and so continuing until the time of importation." Section 5 of Act of July 4, 1789, c. 2, 1 Stat. 24.

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ter. See *Utah Power & L. Co.* v. *Pfost,* 286 U. S. 165, 185; *Huntington* v. *Worthen,* 120 U. S. 97, 102; *Highland Farms Dairy, Inc.* v. *Agnew,* No. 573, October Term, 1936, March 29, 1937. *Cf. Tiernan* v. *Rinker,* 102 U. S. 123; *National Life Ins. Co.* v. *United States,* 277 U. S. 508; *United States* v. *Chicago, etc. R. Co.,* 282 U. S. 311. The instant case is much stronger, for the very theory that might operate to invalidate these conditions—namely, that they are wholly unrelated to unemployment compensation—would establish their secondary character, and thus render them separable. And, finally, the presumption of separability of secondary conditions operates even more strongly in the case of a revenue measure of general application. See *Field* v. *Clark,* 143 U. S. 649, 696–697.

Section 903 (a) is divided into six clauses, of which five (clauses 1, 2, 4, 5 and 6) are closely related. Clause (3) is related to the Federal fiscal powers in a somewhat different way and will be discussed separately.

A. Clauses (1), (2), (4), (5), and (6) of Section 903 (A)

We have shown above that the 90 per cent credit constitutes a reasonable classification, since the necessity of Federal expenditures for unemployment relief is diminished by the operation of state unemployment compensation laws. In allowing that credit it is essential, therefore, to make certain that the state law under which the taxpayer makes

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his contribution is a genuine and workable unemployment insurance measure. For, if the state statute were merely masquerading as an unemployment compensation law and had been enacted only to enable the taxpayer to take advantage of the credit or for some other foreign purpose, the Federal fiscal policies which the 90 percent credit is calculated to serve would be frustrated. Accordingly, clauses (1), (2), (4), (5) and (6) of Section 903 (a), merely set up a series of five tests to determine whether the state unemployment compensation law is genuine and workable.

Briefly stated, an unemployment compensation law is a law which provides for the accumulation of reserves for the payment of benefits to involuntarily unemployed persons. Each of the provisions listed in Section 903 (a) (with the possible exception of Clause (3), which will be discussed later) will be found, upon analysis, to constitute an element necessary in showing that the law in question is a proper and workable enactment designed to serve the purpose mentioned, and not some other or different purpose. Accordingly, since they represent merely definitional criteria of what is a true unemployment compensation measure, they are proper classifications, reasonable in character and related to the federal fiscal power.

First.—Obviously, the first step in any unemployment compensation plan is that the funds must be provided. Because of the impossibility of foresee-

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ing future developments in the labor market and the thorough unpredictability of general business activity, the burden of unemployment compensation and the extent of the drain upon an unemployment fund will vary greatly from year to year. In order to assure the solvent operation of the law for a reasonable period, it is therefore essential that a reasonable reserve be accumulated in the fund before compensation becomes payable.[99]

Thus Section 903 (a) (2), which provides that no compensation shall be payable until two years after contributions begin to accrue, merely embodies the first essential of an unemployment compensation plan, namely, that a fund be accumulated.

Second.—When a fund has been accumulated, the most fundamental element of an unemployment compensation plan must be that the money be used for the purpose of paying benefits to unemployed individuals, and not for some other or totally different purpose. Clause (4) of Section 903 (a) supplies this vital criterion by providing that all money in the state unemployment fund shall be used solely in the payment of unemployment compensation.

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[99] Experience abroad has shown that solvent operation cannot be accomplished unless a reserve is accumulated at the outset by commencing the collection of contributions a considerable time before the payment of compensation begins. See Hansen, Murray, Stevenson, and Steward, *A Program for Unemployment Insurance and Relief in the United States* (1934), pp. 74–75.

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Third.—Equally fundamental in the theory of unemployment compensation is the necessity that compensation be paid, not to the merely idle or shiftless, but only to the unemployed—i. e., to persons who are willing and able to take work, but not able to find it. There is only one objective test for determining whether a man is willing to work, and that is to offer him a job and see whether he takes it. For this reason the agency through which unemployment compensation is paid must be coordinated with an agency which is in a position to determine what work is available and to offer such work to applicants for benefits. At some point prior to the actual payment of compensation, contact between the claimant and such an agency is essential. Consequently Clause (1) of Section 903 (a) provides that "compensation is to be paid through public employment offices in the State or such other agencies as the Board may approve." It does not require that compensation be paid *at* the employment office. The actual payment might be made at any office or by any means the State sees fit. On the other hand, agencies other than public employment offices might be able to test a claimant's genuine involuntary unemployment by offering him work. In order that the use of such agencies might not be precluded to the States, the Social Security Board is authorized to approve such other agencies.

Fourth.—Incidental to testing the genuineness of claimant's involuntary unemployment by offer-

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ing him a new job is some workable standard for determining the suitability of the new job offered. Manifestly benefits should not be denied to a man who refuses unsuitable work, if he is otherwise eligible. A law without a standard for determining the suitability of the new work offered could not constitute a genuine unemployment compensation law. And since the number of claims will be large but the amount of compensation that will be payable to each individual claimant will be comparatively small, an unemployment compensation law would not constitute a workable law unless the standards of suitability governing the new work offered were self-evident and comparatively automatic in their operation.

The only simple objective test, which depends upon external evidence rather than an exercise of individual judgment, and which, for many years, has been used as a standard in government contracts, is that the wages, hours, and other conditions shall not be substantially less favorable than those prevailing for similar work in the locality at the time. Clause (5) of Section 903 (a) contains this condition. In addition, under the same clause, the state law must provide that benefits shall not be denied to an otherwise eligible individual for refusing to accept work in connection with which he would be compelled to engage in strike-breaking activities or to sign a yellow-dog contract. The purpose of these latter provisions (which are dis-

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cussed in more detail *infra,* pp. 111–112) is to assure that, at least in the respects indicated, a state unemployment compensation law shall be confined to its proper purpose, and shall not be used as a labor relations act or as an instrument of labor policy. A State might include any number of other standards. The inclusion of these minimum standards in the state law in no way precludes the worker from accepting the new work offered. Such standards merely provide a workable objective test for determining the conditions under which an otherwise eligible claimant of compensation may refuse to accept the job offered to him without disqualifying himself from receiving compensation.

Fifth.—Finally, the last essential attribute of an unemployment compensation law is that in order to be workable over any period of time it be subject to modification. Experience in other countries in unemployment compensation has demonstrated conclusively that it is a very difficult legislative task to create an unemployment compensation system which is practicable in all of its details, and which is responsive to economic changes. This experience, together with the lack of adequate statistical information in this country and the fact that unemployment compensation is a comparatively new undertaking here, indicates the absolute need for the provision that there must be no finality in the initial legislation enacted. Clause (6) of Section 903 (a). The fifth attribute of an unemploy-

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ment compensation law is simply that its flexibility be preserved, so as to permit change in the particular provisions of the law.

Thus, the provisions enumerated in Section 903 (a) merely serve as a definition or description of an unemployment compensation law. They enumerate the distinguishing qualities which differentiate such a law from a law for a different or other purpose. Since they thus operate to insure the existence of a *bona fide* state unemployment compensation measure, they are reasonable provisions, related to the federal fiscal powers by reducing substantially the necessity for federal expenditures. As such they constitute reasonable classification complying fully with the requirement of due process in the Fifth Amendment.

B. Clause (3) of Section 903 (A)

The provision, embodied in Section 903 (a) (3), that amounts paid to a state unemployment fund shall not be credited unless "all money received in the unemployment fund shall immediately upon such receipt be paid over to the Secretary of the Treasury to the credit of the Unemployment Trust Fund established by section 904" stands on a footing somewhat different from the other provisions in Section 903 (a).

It is not entirely different, to be sure. This provision, in common with the other provisions, is designed to make certain that no credit is given unless the law adopted by the State is workable and

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will in fact relieve the drain on the federal treasury. The provision is designed to avoid the danger that the state system will break down because the funds raised are not invested with due regard to safety and liquidity. Unemployment funds are peculiarly subject to the possibility of losses even when invested carefully, for they must be built up during periods of prosperity and high prices, and liquidated during times of business recessions, when prices of securities have fallen. This difficulty is avoided by clause (3).

But Section 903 (a) (3) represents something more than the other provisions, for it involves direct participation by the Federal Government in one aspect of the state law. Read together with Section 904, this section in effect provides that credit will be given for payments only under such state laws as stipulate that the funds collected must be invested in certain types of United States bonds. So stated it is obvious that this provision does not involve an arbitrary exercise of the federal power. In one sense, *it is offering a bounty to those who create a market for government securities.*

Section 903 (a) (3), however, is primarily designed to enable the Federal Government to continue its effective regulation of the amount and flow of credit. *Norman* v. *B. & O. R. Co.,* 294 U. S. 240, 303; *Juilliard* v. *Greenman,* 110 U. S. 421; *McCulloch* v. *Maryland,* 4 Wheat. 316. The accumulation of unemployment compensation funds

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under the uncoordinated managements of the respective States and their investment in miscellaneous securities would obstruct federal regulation of credit and lessen federal protection of the market for government bonds. Under these circumstances, Congress has power to adopt such measures as are reasonably necessary to the execution of its expressly delegated powers.

It has been estimated that had an unemployment compensation law or laws been in effect in the United States during the years 1922 to 1929, under which contributions at the rate of three percent on payrolls were required, between $2,000,000,000 and $2,500,000,000 would have been accumulated and been in the fund or funds in 1929 (Report of the Committee on Economic Security (1935), 74th Cong., 1st Sess., page 14).

Irrespective of the manner in which such a substantial sum had been invested, its investment and sudden liquidation during a major depression period might have substantial effects upon the entire monetary system. If invested in government bonds, their appearance in large blocks on the market at a time of financial crisis might seriously impair the efforts of the government to borrow money and might hamper the efforts of the Federal Reserve System to control the credit situation. The Federal Reserve System would probably absorb the government bonds, but their volume might well be so large as to interfere seriously with the

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policy of its Open Market Committee of buying government bonds to mitigate deflationary tendencies during the period of business recession.

The withdrawal from commercial and savings banks of these large sums would encroach substantially upon the total quantity of bank credit available during a business recession. If invested in state, municipal, or private securities, the liquidation of such securities at the very time that the securities market was at its lowest point would increase deflationary tendencies and might further impair the operations of the Open Market Committee of the Federal Reserve System. If hoarded in cash the withdrawal from circulation of so substantial a part of the basic money supply would have disastrous effects and might wholly nullify the Federal Reserve System as a measure to control the credit system.

The considerations which influenced Congress to create the Trust Fund were summarized by the Committee on Ways and Means of the House of Representatives as follows: [1]

> This last provision will not only afford maximum safety for these funds but is very essential to insure that they will operate to promote the stability of business rather than

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[1] H. Rep. No. 615, 74th Cong., 1st Sess., p. 9 A similar statement appears in the report of the Committee on Finance of the Senate. S. Rep. No. 628, 74th Cong., 1st Sess., pp. 14–15.

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the reverse. Unemployment reserve funds have the peculiarity that the demands upon them fluctuate considerably, being heaviest when business slackens. If, in such times, the securities in which these funds are invested are thrown upon the market for liquidation, the net effect is likely to be increased deflation. Such a result is avoided in this bill through the provision that all reserve funds are to be held by the United States Treasury, to be invested and liquidated by the Secretary of the Treasury in a manner calculated to promote business stability. When business conditions are such that investment in securities purchased on the open market is unwise, the Secretary of the Treasury may issue special nonnegotiable obligations exclusively to the unemployment trust fund. When a reverse situation exists and heavy drains are made upon the fund for payment of unemployment benefits, the Treasury does not have to dispose of the securities belonging to the fund in open market but may assume them itself. With such a method of handling the reserve funds, it is believed that this bill will solve the problem often raised in discussions of unemployment compensation, regarding the possibility of transferring purchasing power from boom periods to depression periods. It will in fact operate to sustain purchasing power at the onset of a depression without having any counteracting deflationary tendencies.

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If the measures adopted by the Congress for the execution of its expressly delegated powers bear a reasonable relation to that end and are not arbitrary or capricious, the decisions of the Congress as to the degree of the necessity for such measures, and the choice of the measures to be adopted, are not subject to judicial review. The mere possibility of the results described above constitutes a reasonable basis for the Congressional determination that the maintenance of such separate funds might impair or obstruct the power of the Federal Government to borrow money, the regulation by the Federal Government of the value of money and of the flow of credit, and the execution by the Federal Government of its monetary and other powers.

The choice of the means of avoiding such interference, so long as such means are not arbitrary or capricious, is within the exclusive domain of Congress. The fact that other means might have been adopted is immaterial. See *Norman* v. *B. & O. R. Co.,* 294 U. S. 240, 311; *Stafford* v. *Wallace*, 258 U. S. 495, 521; *McCulloch* v. *Maryland,* 4 Wheat. 316, 421, 423.

Thus, in addition to being a reasonable essential of a workable state unemployment compensation law, the condition requiring the deposit of state-collected contributions in the Unemployment Trust Fund is independently justified as an exercise of the power of Congress to protect the finances and credit of the United States.

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III

THE TAX AND CREDIT ARE NOT IN VIOLATION OF THE TENTH AMENDMENT AND ARE CONSISTENT WITH THE PRINCIPLE OF THE DUAL SYSTEM OF OUR GOVERNMENT

Petitioner asserts that even though Title IX be an exercise of the taxing power conferred by Section 8 of Article I of the Constitution, nevertheless it is invalid for two reasons. First, it contends that the tax coerces *individual* action, and thereby effectuates federal regulation of matters not within the power of Congress in violation of the Tenth Amendment. Second, it urges that the tax, by coercing *state* action, violates the fundamental principle that government under the Constitution is dual—that the States must continue to exist and function in certain fields without interference by the Federal Government. We believe that these arguments, severally or in conjunction, are wholly inadequate to sustain petitioner's burden of showing the invalidity of Title IX.

A. The tax and credit do not violate the Tenth Amendment.

Petitioner urges that the tax and credit here involved effectuate the federal regulation of matters not within the power of Congress by resorting to penalties and economic coercion on individuals in violation of the Tenth Amendment. In our opinion it is improper and unnecessary to consider the Tenth Amendment, which does not apply where

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Congress acts under a granted power. *Ashwander* v. *Tennessee Valley Authority,* 297 U. S. 288, 330; *United States* v. *California,* 297 U. S. 175; *McCulloch* v. *Maryland,* 4 Wheat. 316, 406. As this Court said in *Everard's Breweries* v. *Day,* 265 U. S. 545, 548:

> And if the Act is within the power confided to Congress, the Tenth Amendment, by its very terms, has no application, since it only reserves to the states "powers not delegated to the United States by the Constitution."

But, if the Tenth Amendment has any application to exercises of granted powers, it does not apply here.

1. There are no penalties

The tax has on its face none of the invidious elements associated with a penal law. It must be paid by every taxpayer regardless of his mental attitude. It can never be entirely escaped. This tax cannot be reduced by submission to regulation; a reduction is possible only if a sovereign State enacts an unemployment compensation law, and the taxpayer as a result thereof undergoes a corresponding financial detriment. It does not supplement or perform the function of a state criminal or regulatory law. It is never exorbitant. It is not arbitrary in amount, but varies in direct proportion to the extent that the taxable privilege is utilized.

Nor can it rightly be said that, though the form lacks a penal aspect, the substantial effect is to

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threaten the taxpayer with a penalty unless the State in which he carries on business enacts a particular type of unemployment compensation law. Clearly, the taxpayer is not penalized if his State fails to enact any unemployment compensation law whatsoever. Under those circumstances he pays no more than does his competitor in a neighboring State which has such a law. He pays to the federal collector of taxes the full amount due under Section 901 of the Social Security Act; while his competitor, as a result of the credit provided in Section 902, pays the same total but divides it so that part of it goes to the federal collector and part to the state agency collecting unemployment contributions.

But it is further said that the taxpayer will be "penalized" if his State should later enact an unemployment compensation law which does not meet the standards set forth in Section 903 (a). He then would be paying more than his competitor in a neighboring State that has a statute complying with that section. If this argument were sound, it would not be open to the petitioner in the case at bar, for it has not been subjected to, nor is it now threatened by the enactment of, a state law which does not meet the standards of Section 903 (a). One who would strike down a statute as unconstitutional must show that the alleged unconstitutional feature injures him. *Premier-Pabst Sales Co.* v. *Grosscup,* 298 U. S. 226; *Hatch* v.

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Reardon, 204 U. S. 152, 160, 161; *Massachusetts* v. *Mellon,* 262 U. S. 447; *Virginian Railway* v. *System Federation,* No. 324, October Term 1936, March 29, 1937.

But in any event the argument is unsound. In a number of comparable cases this Court has, without special comment, applied federal tax laws under which deductions were available to persons in some States and not in others. Thus the federal estate tax law formerly required the inclusion of a decedent's real estate in the gross estate only if, under state law, it could be sold to pay expenses of administration. *Crooks* v. *Harrelson,* 282 U. S. 55; *Continental Illinois Bank & Trust Co.* v. *United States,* 65 F. (2d) 506 (C. C. A. 7th), certiorari denied, 290 U. S. 663. Again, the federal income tax on life insurance corporations allowed deductions for reserve funds only if such reserves were required under state laws. *Brown* v. *Helvering,* 291 U. S. 193, 201; *New York Ins. Co.* v. *Edwards,* 271 U. S. 109. And compare *Florida* v. *Mellon,* 273 U. S. 12; *Poe* v. *Seaborn,* 282 U. S. 101; *Rouse* v. *United States,* 65 C. Cls. 749, certiorari denied, 278 U. S. 638.

The foregoing analysis shows that the tax does not fall within the principle that the petitioners derive from the *Child Labor Tax Case,* 259 U. S. 20; *Hill* v. *Wallace,* 259 U. S. 44; and *United States* v. *Constantine,* 296 U. S. 287. This is plain from a statement of each of these cases.