The Power to Tax

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JUDGE COOLEY in his memorable work on the law of taxation\(^2\) states: "Taxation is a mode of raising revenue for a public purpose. The term is ordinarily used to express the exercise of the sovereign power to raise revenue for the expenses of government . . . . The power of taxation is an essential and inherent attribute of sovereignty belonging as a matter of right to every independent government . . . . In fact, the power of taxation may be defined as the power inherent in the sovereign state to recover a contribution of money or other property in accordance with some reasonable rule of apportionment from the property or occupations within its jurisdiction for the purpose of defraying the public expenses." It is indispensable to the existence of every civilized government.\(^2\) It belongs to every independent sovereignty and is of necessity an essential to the support and maintenance of government.\(^3\) It is of such a fundamental nature and imperious necessity of all government as not to be restricted by mere legal fiction.\(^4\) Scientifically considered, taxation is the taking or appropriating of such portions of the products or property of a country or a community as is necessary for the support of its government by methods that are not in the nature of extortions, punishments or confiscations.\(^5\)

In an early case, decided in 1874, Justice Miller of the United States Supreme Court used these pregnant words to drive home his propositions:\(^6\) "The power to tax is, therefore, the strongest, the most pervading of all the powers of government, reaching directly or indirectly to all classes of people . . . . To lay with one hand the power of the government on the property of the citizen and with the other to bestow it upon the favored individuals, to aid private enterprises and build up private fortunes, is none the less a robbery because it is done under the form of law and is called taxation. This is not

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*This article is the introductory chapter of the thesis written by the author when he was a graduate student at the Cornell University Law School. Another chapter of this thesis is in this volume of the MARQUETTE LAW REVIEW on page 1.

1 COOLEY, TAXATION (4th ed.) 72, 149, 150. For similar definitions, see Citizens’ Savings and Loan Association v. Topeka, 20 Wall. 655, 664 (1874); State Board of Tax Commissioners v. Jackson, 283 U.S. 527 (1931).

2 Union Refrigerating Transit Co. v. Kentucky, 199 U.S. 194 (1905).


5 WELLS, THEORY AND PRACTICE OF TAXATION 204.

6 Citizens Savings and Loan Association v. Topeka, 20 Wall. 655, 662, 664 (1874).
legislation. It is a decree under legislative forms . . . We have established, we think, beyond cavil that there can be no lawful tax which is not laid for a public purpose."

Chief Justice John Marshall, in the famous case of *McCulloch v. State of Maryland*, laid down some fundamental principles as to the power of taxation residing in the several states of the union and as vested in the United States. The web of argument is so finely spun as to require a quotation *in extenso* to assure the proper grasp and full import of the language used. He states: “But taxation is said to be an absolute power, which acknowledges no other limits than those expressly prescribed in the Constitution, and like sovereign power of every other description, is trusted to the discretion of those who use it. But the very terms of this argument admit that the sovereignty of the state, in the article of taxation itself, is subordinate to, and may be controlled by the Constitution of the United States. How far it has been controlled by that instrument must be a question of construction. In making this construction, no principle not declared can be admissible, which would defeat the legitimate operations of a supreme government. It is of the very essence of supremacy to remove all obstacles to its action within its own sphere, and so to modify every power vested in subordinate governments as to exempt its own operations from their own influence. This effect need not be stated in terms. It is so involved in the declaration of supremacy, so necessarily implied in it, that the expression of it could not make it more certain. We must, therefore, keep it in view while construing the Constitution . . .

“It is admitted that the power of taxing the people and their property is essential to the very existence of government, and may be legitimately exercised on the objects to which it is applicable, to the utmost extent to which the government may choose to carry it. The only security against the abuse of this power is found in the structure of the government itself. In imposing a tax the legislature acts upon its constituents. This is in general a sufficient security against erroneous and oppressive taxation.

“The people of a state, therefore, give to their government a right of taxing themselves and their property, and as the exigencies of government cannot be limited, they prescribe no limits to the exercise of this right, resting confidently on the interest of the legislator, and on the influence of the constituents over their representative, to guard them against its abuse. But the means employed by the government of the Union have no such security, nor is the right of a state to tax them sustained by the same theory. Those means are not given by the people of a particular state, nor given by the constituents of the legis-

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7 4 Wheat. 316-437 (1819).
lature, which claim the right to tax them, but by the people of all the states. They are given by all for the benefit of all—and upon theory, should be subjected to that government only which belongs to all . . .

"This is true. But to what source do we trace this right? It is obvious that it is an incident of sovereignty and is co-extensive with that to which it is an incident. All subjects over which the sovereign power of a state extends, are objects of taxation; but those over which it does not extend, are, upon the soundest principles, exempt from taxation. This proposition may almost be pronounced self-evident . . .

"If we measure the power of taxation residing in a state, by the extent of sovereignty which the people of a single state possess, and can confer on its government, we have an intelligible standard, applicable to every case to which the power may be applied. We have a principle which leaves the power of taxing the people and property of a state unimpaired; which leaves to the state the command of all its resources, and which places beyond its reach, all those powers which are conferred by the people of the United States on the government of the Union, and all those means which are given for the purpose of carrying those powers into execution. We have a principle which is safe for the states, and safe for the Union. We are relieved, as we ought to be, from clashing sovereignty; from interfering powers; from a repugnancy between a right in one government to pull down what there is in an acknowledged right in another to build up; from the incompatibility of a right in one government to destroy what there is a right in another to preserve. We are not driven to the perplexing inquiry, so unfit for the judicial department, what degree of taxation is a legitimate use, and what degree may amount to an abuse of the power. The attempt to use it on the means employed by the government of the Union, in pursuance of the Constitution, is itself an abuse, because it is the usurpation of a power which the people of a single state cannot give . . .

"That the power to tax involves the power to destroy; that the power to destroy may defeat and render useless the power to create; that there is a plain repugnance, in conferring on one government a power to control the constitutional measures of another, which other, with respect to those very measures, is declared to be supreme over that which exerts the control, are propositions not to be denied."

In concluding that the State of Maryland had not the right to tax the Bank of the United States, an instrumentality of the federal government, this famous jurist concluded: "The people of all the states have created the general government, and have conferred upon it the general power of taxation. The people of all the states, and the states themselves, are represented in Congress, and, by their representatives,
exercise this power. When they tax the chartered institutions of the states, they tax their constituents; and these taxes must be uniform. But, when a state taxes the operations of the government of the United States, it acts upon institutions created, not by their own constituents, but by people over whom they claim no control. It acts upon the measures of a government created by others as well as themselves, for the benefit of others in common with themselves. The difference is that which always exists, and always must exist, between the action of the whole on a part, and the action of a part on the whole—between the laws of a government declared to be supreme, and those of a government, which, when in opposition to those laws, is not supreme."

Five years later in an equally famous case more recognition was given to the right of the states to tax by the same jurist, when he said: "Although many of the powers formerly exercised by the states are transferred to the government of the Union, yet the state governments remain, and constitute a most important part of our system. The power of taxation is indispensable to their existence, and is a power which, in its own nature, is capable of residing in, and being exercised by, different authorities at the same time. We are accustomed to see it placed for different purposes, in different hands. Taxation is the simple operation of taking small portions from a perpetually accumulating mass, susceptible of almost infinite division; and a power in one to take what is necessary for certain purposes, is not, in its nature, incompatible with a power in another to take what is necessary for other purposes. Congress is authorized to lay and collect taxes, etc., to pay the debts, and provide for the common defense and general welfare of the United States. This does not interfere with the power of the states to tax for the support of their own governments; nor is the exercise of that power by the states an exercise of any portion of the power that is granted to the United States. In imposing taxes for state purposes, they are not doing what Congress is empowered to do. Congress is not empowered to tax for those purposes which are within the exclusive province of the states. When, then, each government exercises the power of taxation, neither is exercising the power of the other."

More recently the decisions indicate that a state's power of taxation is as extensive as the range of subjects under which the power of the state governments extends. As to such subjects, and except insofar as a state is limited or restrained by the provisions of the constitutions, national and state, its power of taxation, if exercised for a public

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8 See Kirtland v. Hotchkiss, 100 U.S. 491, 497 (1879), in relation to the nature and extent of the original rights of taxation which remained with the states after the adoption of the federal Constitution.

9 Gibbons v. Ogden, 9 Wheat. 1, 199 (1824).
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purpose, is general, unlimited and absolute, and extending to all persons, property, and business within its jurisdiction.

What is a public purpose, like the terms "public interest" and "reasonableness," is an elusive and elastic term, especially when it conflicts with the so-called fundamental rights of an individual. Thus, the state of New York may regulate her milk supply by price-fixing. But in so doing she may not interfere with interstate commerce, nor may she regulate the hours of bakers. Nor may the State of Louisiana tax the "liberty of the press" by imposing on owners of newspapers, for the privilege of selling or charging for advertising therein, a tax measured by a percentage of the gross receipts from such advertisements, but applicable only to newspapers enjoying a circulation of more than twenty thousand copies a week.

The argument has not been infrequently addressed to the Court "that the power to tax is the power to destroy," with respect to the exercise of the powers of Congress. The Court was quick to note the weakness of this statement and it was soon stated: "This principle is pertinent only when there is no power to tax a particular subject and has no relation where such right exists." In other words, the power to destroy which may be the consequence of taxation is a reason why the right to tax should be confined to subjects which may be lawfully embraced therein, even though it happens in some particular instance

10 See Citizens' Savings and Loan Association v. Topeka, 20 Wall. 655, 662, 664 (1874).
11 Ohio Oil Company v. Conway, 281 U.S. 146 (1930). For an elaborate exposition of the law on taxable situs covering real estate, tangible personal property, taxable only within the territorial jurisdiction of the state, see: Union Refrigerating Transit Company v. Kentucky, 199 U.S. 194, 204, 206 (1905); Frick v. United States, 268 U.S. 473 (1925); Senior v. Braden, 295 U.S. 422 (1935); Wheeling Steel Corporation v. Fox, 298 U.S. 193, 208, 209 (1936). In respect to intangible personal property, it has been held that a state may properly apply the rule mobilia sequuntur personam and treat it as localized at the owner's domicile for purposes of taxation, see: Farmers' L. & Tr. Co. v. Minnesota, 281 U.S. 204, 211 (1930); Baldwin v. Missouri, 281 U.S. 586 (1930); Biedler v. South Carolina Tax Commission, 282 U.S. 1 (1930); First National Bank v. Maine, 284 U.S. 312, 328, 329 (1932); Wheeling Steel Corporation v. Fox, 298 U.S. 193, 209 (1936). But tangible personal property such as choses in action by the conduct of the owner of business in a state different from that of his domicile, or, when intangible personal property, become integral parts of some local business, may be taxable in the state wherein it has acquired such "business situs" irrespective of the owner's domicile, see: Wheeling Steel Corporation v. Fox, 298 U.S. 193 (1936); New Orleans v. Stemple, 175 U.S. 309 (1899); Bristol v. Washington County, 177 U.S. 133 (1900); Board of Assessors v. Comphurst National, 191 U.S. 388 (1908); Metropolitan L. Ins. Co. v. New Orleans, 205 U.S. 395 (1907); Liverpool and L. & G. Ins. Co. v. Board of Assessors, 221 U.S. 346 (1911).
that no great harm may be caused by the exercise of the taxing authority as to a subject which is beyond its scope. But, this reason has no application to a lawful tax, and if it had, there would be an end to all taxation, that is to say, if a lawful tax can be defeated because the power which is manifested by its imposition may when further exercised be destructive, it would follow that every lawful tax would become unlawful and therefore no taxation whatever could be levied.

Today this theory of the destructive power of taxation has been rejected by modern thinkers. This oft-quoted maxim, (the power to tax is the power to destroy) instead of being regarded as a blanket authorization of the unrestrained use of the taxing power for any and all purposes, irrespective of revenue, is more reasonably construed as an epigrammatic statement of the political and economic axiom that since the financial needs of a state or nation may outrun any human calculation, so the power to meet those needs by taxation must not be limited even though the taxes become burdensome or confiscatory. To say that "the power to tax is the power to destroy" is to describe not the purposes for which the taxing power may be used but the degree of vigor with which the power may be employed in order to raise revenue. "The power to tax is more than the power to destroy, it is the power to encourage as well, through light taxation or through expenditure." As early as 1927 Justice Oliver Wendell Holmes in one of the now famous opinions of "Holmes, Brandeis and Stone, J. J., dissenting," stated, "It seems to me that the State Court was right. I should say plainly right, but for the effect of certain dicta of Chief Justice Marshall which culminated in or rather were founded upon his often quoted proposition that the power to tax is the power to destroy. In those days it was not recognized as it is today that most of the distinctions of the law are distinctions of degree. If the States had any power it was assumed that they had all the power, and that the necessary alternative was to deny it altogether. But this Court, which so often has defeated the attempt to tax in certain ways, can defeat an attempt to discriminate or otherwise go too far without wholly abolishing the power to tax. The power to tax is not the power to destroy while this Court sits. The power to fix rates is the power to destroy if unlimited, but this Court while it endeavors to prevent confiscation does not prevent the fixing of rates." A tax is not an unconstitutional regulation in every case where an absolute prohibition of sales would

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38 Kendrick, Taxation Issues 131.
be one.\textsuperscript{20} In a leading case\textsuperscript{21} on the federal income tax, Chief Justice White, after setting forth the doctrine that the Fifth Amendment does not limit the true taxing power of Congress, said: 

\ldots That doctrine would have no application in a case where, although there was seeming exercise of the taxing power, the act complained of was so arbitrary as to constrain to the conclusion that it was not the exertion of taxation but a confiscation of property.”

In like manner, on January 6, 1936, the United States Supreme Court, feeling that the plan of the Agricultural Adjustment Act to increase the price of certain agricultural products for the farmers by decreasing the quantities of products and making payments of money to farmers, who under agreements with the Secretary of Agriculture reduced their acreage in crops, was unconstitutional in exacting a tax from those who first processed the commodities, stated therein, through Justice Roberts speaking for the majority of the Court: “The power to confer or withhold unlimited benefits is the power to coerce or to destroy. If the cotton grower elects not to accept the benefits he will receive less for his crops; those who receive payments will be able to undersell him. The result may well be financial ruin. The coercive purpose and intent of the statute is not obscured by the fact that it has not been perfectly successful. It is pointed out that, because there still remained a minority whom the rental and benefit payments were insufficient to induce to surrender their independence of action, the Congress has gone further and, in the Bankhead Cotton Act, used the taxing power in a more directly minatory fashion to compel submission. This progression only serves more fully to expose the coercive purpose of the so-called tax imposed by the present act. It is clear that the Department of Agriculture has properly described the plan as one to keep a non-cooperating minority in line. This is coercion by economic pressure. The asserted power of choice is illusory . . . The power of taxation, which is expressly granted, may, of course, be adopted as a means to carry into operation another power also expressly granted. But resort to the taxing power to effectuate an end which is not legitimate, not within the scope of the Constitution, is obviously inadmissible.”\textsuperscript{22}

The Act, it was said, invaded the reserved powers of the states, and the regulations and control of agricultural production were beyond the powers delegated to the federal government. Was the end legitimate? Was it within the expressly granted or necessarily implied pow-

\textsuperscript{20} Hatch v. Reardon, 204 U.S. 152, 162 (1907).
\textsuperscript{21} Brushaber v. Union Pacific R. Co., 240 U.S. 1 (1916); see also Nichols v. Coolidge, 274 U.S. 531 (1921); Tyler v. United States, 281 U.S. 497 (1930); Ketner v. Donnan, 285 U.S. 312 (1932).
\textsuperscript{22} United States v. Butler, 297 U.S. 1, 69-71 (1936).
ers of Congress? This seems to be the crux of the entire controversy. The cogency of the reasoning employed by the majority of the Court in the last-mentioned case, deciding that the tax was illegal and not within the powers of Congress, was bitterly assailed and scathingly repudiated by a vigorous dissenting opinion rendered by Justice Stone with whom Justice Brandeis and Justice Cardozo agreed. The adaptability and flexibility of the United States Constitution in safeguarding the individual rights of the citizen and at the same time permitting a reasonable expansion of the Constitution to adequately cope with the modern, economic, and social problems are matters worthy of the deepest reflection. A tortured construction of the Constitution must blind the eyes of the people seeking economic justice through law and order. Mechanical jurisprudence must eventually succumb to sociological movements for the adjustment of principles and doctrines to the human conditions they are to govern.23

Now considering the historical basis for federal taxation we find only too clearly the impotency of a government without the power of taxation. On July 4, 1776, by virtue of the Declaration of Independence, the American Colonies became states independent of the Crown of England and politically independent of each other. Shortly thereafter, on November 15, 1777, for the purpose of carrying on the Revolutionary War they entered into a League of Amity and adopted the Articles of Confederation and Perpetual Union. However, the freedom and sovereignty of the several states remained inviolate. The inability of Congress under the Articles to finance the central government was due directly to the absence of all taxing power. Consequently, the government could not meet its obligations; its credit declined and eventually disappeared; under the weight of excessive issues of paper or fiat money the currency systems of both the states and the central governments declined. The central government was without power to stabilize the system. The commercial relations of the Union were thrown into chaos by the states setting up tariff barriers against each other while Congress, lacking the power to regulate commerce among the several states, sat by idly and hopelessly. To make confusion worse confounded there was an increasing tendency on the part of the states to disregard their obligations and to assume an indifferent or irreconcilable attitude toward the problems of Congress. Thus, the lack of the power to tax almost brought destruction to the government.

Men of vision like Hamilton, Madison, Washington, and Jay, saw the necessity of strengthening the Confederation. A general convention of delegates from all the states was called to meet in Philadelphia in May 1787. Accordingly, fifty-five members representing twelve states

23 Pound, Mechanical Jurisprudence (1908) 8 Col. L. Rev. 605, 624.
(Rhode Island not represented) assembled in May 1787, drafted a Constitution and on September 17, 1787, in the historic State House at Philadelphia, where eleven years previously the Declaration of Independence was born, signed a precious document that from its ratification in 1788 to this day is the supreme law of the land. The history of the ten-year struggle of an infant nation crying for peace and liberty, internally and externally, is found in the very first sentence, "We, the people of the United States, in order to form a more perfect Union, insure domestic tranquility, provide for the common defense, promote the general welfare, and secure the blessings of liberty to us and our posterity, do ordain and establish this Constitution for the United States of America."

So with great thought and sad experience, the framers of the Constitution wisely provided\textsuperscript{24} "that Congress shall have the power to lay and collect taxes, duties, imposts, and excises, to pay the debts, and provide for the common defense and general welfare of the United States; but all duties, imposts, and excises shall be uniform throughout the United States." This is the constitutional basis for all the federal powers of taxation.

The people are represented expressly and most intimately in Congress by the House of Representatives. Therefore, it is only fitting and proper that the Constitution provide\textsuperscript{25} that "all bills for raising revenue shall originate in the House of Representatives; but the Senate may propose or concur with amendments as on other bills." The failure of a bill for raising revenue to originate in the House of Representatives renders it fatal from a constitutional point of view.\textsuperscript{26} However, it should be said in this connection, bills for other than revenue purposes, although they incidentally create revenue, need not originate in the House.\textsuperscript{27} The fact that the Senate substituted a corporation tax for a plan of inheritance tax, as contained in the bill originally introduced in the House, was held not fatal for the reason that the bill properly originated in the House and the Amendment was pertinent and germane to the subject matter.\textsuperscript{28} In practice revenue bills are likely to be introduced in the House and the Senate at about the same time.

In examining the constitutional taxing powers granted to Congress, Judge Cooley states:\textsuperscript{29} "The first thing is to note that the power extends to taxes, duties, imposts, and excises. This is very broad language. The term 'taxes' is generical. It includes direct taxes on property,\textsuperscript{30} duties, imposts, and excises,\textsuperscript{31} and other imposts, if any, of an

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  \item \textsuperscript{24}U. S. Const. Art I, § 8 (1).
  \item \textsuperscript{25}U. S. Const. Art I, § 7 (1).
  \item \textsuperscript{26}Hubbard v. Lowe, 226 Fed. 135 (S.D. N.Y. 1915), appeal dismissed 242 U.S. 654 (1916).
  \item \textsuperscript{27}United States v. Norton, 91 U.S. 566 (1875); Twin City National Bank v. Nebeker, 167 U.S. 196 (1897).
  \item \textsuperscript{28}Flint v. Stone Tracy Company, 220 U.S. 107 (1911).
  \item \textsuperscript{29}1 Cooley, Taxation (4th ed.) 239-241.
\end{itemize}
indirect kind and not within the classification of duties, imposts, and excises. Secondly, the power to impose taxes, etc., is to pay the debts and provide for the common defense and promote the general welfare of the United States. In other words, federal taxation must be for a public purpose." The Supreme Court has held that moral obligations are included within the term "debts," also, that Congress has no power to lay taxes to pay the debts of a state nor to provide by taxation for a state's general welfare, nor regulate and control the agricultural production of a state or the states under the Agricultural Act. The revenues of the United States must be obtained from the same territory and same people and its excises collected from the same activities as are reached by the state to support the local governments. But this is not technically double taxation; nor should it create a conflict in the tax powers of the several states and the United States.

However, "the question is not what power the federal government 'ought to have' but what powers in fact have been given by the people. It hardly seems necessary to reiterate that ours is a dual form of government; and in every state there are two governments—the State and the United Stats. Each state has all the governmental powers save such as the people, by their Constitution, have conferred upon the United States, denied to the States, or reserved to themselves. The federal Union is a government of delegated powers. It has only such as are expressly conferred and such as are to be reasonably implied from those granted." 

Thus it appears that taxation is an indispensable, inherent, and sovereign power of every independent government; it is a mode of raising revenue for a public purpose; the power to tax is no longer literally the power to destroy; even the states of the United States are limited inherently and restrained by constitutions, national and state, in the exercise of the power of taxation; the federal union is a government of delegated powers; the basis of the federal power of taxation is the United States Constitution.

31 Passenger Cases, 7 How. 283 (1849).
34 Gibbons v. Ogden, 9 Wheat. 1, 199-200 (1819).
35 United States v. Butler, 297 U.S. 1, 63 (1936). But in respect to international relations it has been held that, as a nation with all the attributes of sovereignty, the United States is vested with all the powers of government necessary to maintain an effective control of international relations. The remedy for multiple taxation resulting from several nations having jurisdiction to tax the same interest on distinct grounds—citizenship, domicile, source of income, situs—is by international negotiation and convention. Burnet v. Brooks, 288 U.S. 378 (1933); Fong Yue Ting v. United States, 149 U.S. 698, 711 (1893); Knox v. Lee, 12 Wall. 457, 555, 556 (1871).