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THE CONSTITUTIONALITY OF THE FEDERAL CORPORATION TAX.

DURING the special session of Congress held the past summer there was enacted as an amendment to the new Tariff Law what is generally known as the Federal Corporation Tax.¹ At the time of its consideration in Congress and since its enactment there has been considerable discussion regarding the constitutionality of the measure, and no little doubt has been expressed as to its validity. The Act, so far as is necessary to its understanding, is as follows:

“Every corporation, joint stock company or association, organized for profit and having a capital stock represented by shares, * * * shall be subject to pay annually a special excise tax with respect to the carrying on or doing business by such corporation, joint stock company or association, * * * equivalent to one per centum upon the entire net income over and above five thousand dollars received by it from all sources during such year, exclusive of amounts received by it as dividends upon stock of other corporations, joint stock companies or associations, * * * subject to the tax hereby imposed,” etc.

The events and circumstances leading up to the enactment of this provision make an interesting bit of legislative and political history. Perhaps no decision of the Supreme Court, unless it be that in the *Dred Scott* case, has evoked so much criticism generally as *Pollock v. Farmers Loan and Trust Co.*,² the income tax case. Ever since the decision of that case it has been the wish of a great many lawyers that the question might be again presented to the court. When, therefore, it became evident that Congress would have to devise some means of increasing the national revenues, it was suggested that an income tax measure be again enacted. The proposition met with considerable opposition on one score or another, and on June 16, 1909, President Taft in a special message³ to Congress suggested that inasmuch as the Supreme Court had held an income tax of the nature proposed invalid without apportionment among the several states, the wiser plan would be for Congress to propose an amendment to the Constitution, and recommended as a substitute, for the present at least, the enactment of a law imposing upon all corpora-

¹ H. R. 1438, §38.

² 157 U. S. 429, 158 U. S. 601.

³ C. R., Vol. 44, pp. 3450, 3451.

ions and joint stock companies organized for profit, with certain exceptions, an excise measured by two per cent on the net income of such corporations and companies. From this it would seem that the purpose of the act was revenue. That, however, was not all.

The ever growing evils of corporate organization and management had given rise to a demand for some sort of federal control or regulation. Such control, however, as to corporations generally, could be exercised only as an incident to or by virtue of some recognized power granted to the National Government, for there is found in the Constitution no express power vested in the United States to regulate or control corporations in general. In this scheme of corporate taxation was found a method of getting at such control. As said by President Taft in his message recommending the measure, "Another merit of this tax is the federal supervision which must be exercised in order to make the law effective over the annual-accounts and business transactions of all corporations. While the faculty of assuming a corporate form has been of the utmost utility in the business world, it is also true that substantially all of the abuses and all of the evils which have aroused the public to the necessity of reform were made possible by the use of this very faculty. If now, by a perfectly legitimate and effective system of taxation, we are incidentally able to possess the Government and the stockholders and the public of the knowledge of the real business transactions and the gains and profits of every corporation in the country, we have made a long step toward that supervisory control of corporations which may prevent a further abuse of power." But however desirable federal control may be deemed to be, the provision must stand or fall upon its validity as a tax or revenue measure.

The main legal objections to the tax may be summed up in general as follows:

(1) The tax is of such a nature that under the Constitution and decisions of the Supreme Court it can be levied by Congress, if at all, only by apportionment among the states.

(2) Congress may not interfere with or hamper a state in its exercise of sovereign powers not delegated to the United States; the creation of corporations is an incident of sovereignty; the tax is therefore invalid because it interferes with the power of the states to create corporations.

(3) The tax is unconstitutional because it is not uniform, the Constitution requiring that "all duties, imposts and excises shall be uniform throughout the United States."

1. Whether the first objection, as to the necessity of apportion-

ment, is tenable depends upon the nature of the tax imposed. The Constitution provides for four sorts of taxation, viz., duties, imposts, excises and taxes, and the latter are either direct or indirect. It is perhaps needless to say that the act provides for neither a duty nor an impost in the generally accepted meaning of those terms. It is, then, either an excise or a tax. In determining whether apportionment is essential it is necessary to consider only whether it provides for a direct tax, for only direct taxes are required to be apportioned. In the early case of *Hylton v. United States*,⁴ it was expressed as the opinion of the Justices that the only taxes included under the head of "direct taxes" as used in the Constitution were taxes levied on land and capitation taxes, but the point was not necessary to the decision of the case. In a number of cases subsequent thereto this view was declared by the Supreme Court. But in the case of *Pollock v. Farmers Loan and Trust Co.*, it was determined that in addition to the sorts of taxation conceded in the *Hylton* case to be direct taxes, burdens in the nature of taxation placed upon income from real estate and invested personalty were within the constitutional inhibition of direct taxes without apportionment. The *Pollock* case has never been overruled, and still stands as the law. The extent to which the Supreme Court has gone in determining what taxes are direct may be summed up, then, as follows: Capitation taxes and taxes imposed upon a person because of his general ownership of real or personal property or imposed on the income derived from such realty or invested personal property are direct and must be apportioned.

Is this corporation tax a direct tax or is it an excise? On this point the phraseology of the act is of great importance. It provides that corporations, etc., "*shall be subject to pay annually a special excise tax with respect to the carrying on or doing business of such corporation, * * * equivalent to one per centum upon the entire net income over and above,*" etc. Manifestly this purports to be a tax upon the *business* and not upon the *income as such*, though it is true that the amount of the tax is to be measured by the amount of income. In 1898 Congress passed an act providing "That every person, firm, corporation, or company carrying on or doing the business of refining petroleum, or refining sugar, or owning or controlling any pipe line for transporting oil or other products, whose gross annual receipts exceed two hundred and fifty thousand dollars, shall be subject to pay annually a special excise tax equivalent to one

⁴ 3 Dall. 171.

quarter of one per centum on the gross amount of all receipts," etc.⁵ The Spreckels Sugar Refining Co. resisted the payment of the tax, and the question was finally determined in the case of *Spreckels Sugar Refining Co. v. McClain*,⁶ the Court holding that the tax imposed was valid and constitutional. It was contended on behalf of the Refining Co. that the act provided for a direct tax. The court, by Mr. Justice HARLAN, on page 411, said:

"* * * Clearly the tax is not imposed upon gross annual receipts as property, but only in respect of the carrying on or doing the business of refining sugar. It cannot be otherwise regarded because of the fact that the amount of the tax is measured by the amount of the gross annual receipts. The tax is defined in the act as 'a special excise tax,' and, therefore, it must be assumed, for what it is worth, that Congress had no purpose to exceed its powers under the Constitution, but only to exercise the authority granted to it of laying and collecting excises." This case is very persuasive upon this point, for the corporation tax act was modeled upon the act of 1898 and the language of Mr. Justice HARLAN, just quoted.⁷

It may be suggested that the Act in question does not impose a tax on *business*, since no particular businesses are named and it applies only to corporations. Had the act applied to persons, firms and corporations and specified in detail every conceivable form of business, it would seem under the decision in the *Spreckels* case that it would be clearly a tax on business as such. Surely the fact that Congress expressed the provision in blanket form instead of specifying the various sorts of businesses ought not to make the measure any the less a tax on business. As will be pointed out hereafter there is no legal objection to Congress classing corporations together as the objects of the tax. But whether it is a tax on business or a tax on the privilege of doing business in a corporate capacity makes no difference, it is believed. If it is a tax on the privilege necessarily it is an excise and not a direct tax.

Businesses and the privilege of existing and operating in a corporate capacity must at this time be conceded proper subjects of taxation. "Everything to which the legislative power extends may be the subject of taxation, whether it be person or property, or possession, franchise or privilege, or occupation or right."⁸ "It has been seen that the sovereignty may, in the discretion of its legisla-

⁵ Revenue Act of 1898, §27.

⁶ 192 U. S. 397.

⁷ See C. R., Vol. 44, p. 4087 et seq.

⁸ Cooley on Taxation, p. 9.

ture, levy a tax on every species of property within its jurisdiction. * * * And what is true of property is true of privileges and occupations also; the state may tax all, or it may select for taxation certain classes and leave the others untaxed. Considerations of general policy determine what the selection shall be in such cases, and there is no restriction on the power of choice unless one is imposed by constitution."⁹ In the *License Tax cases*¹⁰ the Supreme Court upheld taxes imposed upon certain businesses, not because anything in their nature gave Congress authority to levy the taxes, but on the broad power of taxation vested by the Constitution in Congress. In the *Spreckels* case it was a business that was taxed; the tax was upheld, but not because of the nature of the business of refining sugar. In *Pacific Insurance Co. v. Soule*¹¹ the court said: "The taxing power (of the United States) is given in the most comprehensive terms. The only limitations imposed are: That direct taxes, including the capitation tax, shall be apportioned; that duties, imposts and excises shall be uniform, and that no duties shall be imposed upon articles exported from any state. With these exceptions, the exercise of the power is in all respects unfettered." And in *Knowlton v. Moore*¹² the following language was used by the court: "It is not denied that, subject to a compliance with the limitations in the Constitution, the taxing power of Congress extends to all usual objects of taxation. Indeed, as said in the *License Tax cases*, 5 Wall. 462, 471, after referring to the limitations expressed in the Constitution, 'Thus limited, and thus only, it (the taxing power of Congress) reaches every subject, and may be exercised at discretion.'" There is another limitation upon the taxing power of Congress which is not referred to in the above quoted cases, the one suggested by the second objection to the validity of the tax under discussion, and will therefore be more appropriately considered under that head. With these limitations and qualifications, then, the taxing power of Congress is concurrent with that of the states. Indeed in *Lane County v. Oregon*¹³ the court went further than this, saying that "It (the power of taxation) is indeed a concurrent power, and in the case of a tax on the same subject by both governments, the claim of the

⁹ Cooley on Taxation, p. 1094.

¹⁰ 5 Wall. 462.

¹¹ 7 Wall. 433. In this case the Supreme Court upheld a tax levied by Congress upon the "amounts insured, renewed, or continued by insurance companies upon the gross amounts of premiums received, and assessments made by them, and also upon dividends, undistributed sums, and income."

¹² 178 U. S. 41.

¹³ 7 Wall. 71.

United States, as the supreme authority, must be preferred; but with this qualification it (the power of the states) is absolute.”

Another argument which may appropriately be discussed under this first head has been advanced against the validity of the measure. In short it is this: There are or may be corporations whose business is made up entirely of owning, using and deriving profits from real estate, a tax upon which corporations would come squarely within the sort of taxation interdicted by the Supreme Court in the income tax case; and the opinion of Mr. Justice HARLAN in the *Spreckels* case is cited as supporting the argument.¹⁴ On the surface this point is one of the strongest against the act; but its fallacy lies in the failure to distinguish between a tax on income from real estate as such and a tax on business or franchise measured by the amount of income. While it is true that the nature of the business is different, the owning, using and deriving the profits from real estate is as much a business as is the refining of oil or sugar, or the transportation of oil by means of pipe lines. By taking certain isolated extracts from the opinion in the *Spreckels* case material may be found in apparent support of the argument, but when read in connection with the context and with reference to the points under consideration it is at once seen that the opinion lends no support to the view. In that case the act in question provided for a tax on persons, etc., engaged in the business of refining sugar, etc. It appeared from the evidence that part of the receipts of the Spreckels Sugar Refining Co. was made up of money received by the company as wharfage for the use of certain wharves owned by it, and the point involved was whether the receipts from that source could properly be considered as receipts in the company's business as a refiner of sugar. In the light of the facts, then, the following language of Mr. Justice HARLAN lends no support or countenance to the argument:

“It was in proof that the plaintiff owned three wharves on the Delaware river, at which vessels landed, and for the use of which those vessels paid wharfage according to the rates prescribed by a general tariff. * * * The wharves were built by the plaintiff for the purpose of transacting any business that it might have or for which it saw fit to use them. And nearly all the business done at that time at the wharves was the unloading of sugar consigned to the plaintiff. * * * In other words, were the receipts from wharfage properly included in plaintiff's

¹⁴ See C. R., Vol. 44, p. 4092.

gross annual receipts upon which the amount of the prescribed tax was to be computed?

* * * * *

"This question is not wholly free from difficulty. But we think the better reason is with the ruling in the Circuit Court and in the Circuit Court of Appeals, to the effect that the wharves, in every substantial sense, constituted a part of the plaintiff's 'plant,' and, if not absolutely necessary, were of great value, in the prosecution of its business, and that receipts derived by plaintiff from the use of the wharves by vessels—particularly because, with rare exceptions, the vessels using them brought to the plaintiff the raw sugar which it refined—were receipts in its business of refining sugar."

It is thus apparent that the only point under consideration and the only thing determined by the above quoted language was that receipts from such sources were receipts in the company's business of refining sugar, receipts from the business being the only measure of the tax provided by the act. So instead of being an authority against the validity of the corporation tax it is in its favor; for if the tax is considered as imposed on business, the case is squarely in point on the proposition that receipts from real estate are properly included in determining the net income of the corporation.

Professor Goodnow has taken the position that the act is unconstitutional in so far as it includes income derived from property, on the ground that under the income tax decision such tax would have to be apportioned.¹⁵ Just how he arrives at that conclusion does not appear. In another part of his article he takes the view that the tax is really upon the franchise or privilege. If he is correct in that, necessarily the tax must be an excise, no matter how its amount is measured. And if the tax be considered as imposed on business, it is equally an excise. In neither case need it be apportioned.

2. Is the tax such an interference with the sovereignty of the states that it is invalid on that ground? Section 8 of Article I of the Constitution provides that Congress shall have "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."

Except as to the federal government each state is sovereign. In the founding of our scheme of government the people saw

¹⁵ Article on "The Constitutionality of the Federal Corporation Tax." *Columbia Law Review*, December, 1909.

fit to deprive the several states of certain portions and attributes of their sovereignty, and conferred them upon the nation. As to the powers, then, granted to the United States it is supreme, and Section 2 of Article VI of the Constitution so provides. Such powers are unlimited except as qualified by the Constitution or the amendments thereto or in certain cases by implications growing out of the nature of our system of dual government. Those powers and rights which are conferred upon the federal government and which in their nature admit of control by but the one branch of the government, the sovereignty of the states does not and cannot limit. Examples of this are found in the power to regulate interstate commerce and the right to coin money. Though these matters are incidents of sovereignty, the states are deprived of their exercise because the people have delegated control over them to Congress. But upon the taxing power of the United States there is a limitation inherent in the nature of the dual system. The power to tax, as to the general subjects of taxation, is not exclusive. The power, therefore, as to the Federal Government, is impliedly limited to the extent that the United States cannot so exercise its taxing power as to prevent a state from discharging the ordinary functions of government. In *Gibbons v. Ogden*¹⁶ Chief Justice MARSHALL said:

"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. * * * When, then, each government exercises the power of taxation, neither is exercising the power of the other. But, when a state proceeds to regulate commerce with foreign nations or among the several States, it is exercising the very power that is granted to Congress, and is doing the very thing which Congress is authorized to do. There is no analogy, then, between the power of taxation and the power of regulating commerce. * * * It has been contended by the counsel for appellant, that as the word to 'regulate' implies in its nature full power over the thing to be regulated, it excludes, necessarily, the action of all others that would perform the same operation on the same thing."

And in *South Carolina v. United States*¹⁷ Mr. Justice BREWER in delivering the opinion of the court said:

¹⁶ 9 Wheat. 1.

¹⁷ 199 U. S. 437.

"It will be seen that the only qualifications of the absolute, untrammelled power to lay and collect excises are that they shall be for public purposes, and that they shall be uniform throughout the United States. All other limitations named in the Constitution relate to taxes, duties and imposts. * * *

"But it is undoubtedly true that that which is implied is as much a part of the Constitution as that which is expressed. * * *

"Among those matters which are implied, though not expressed, is that the nation may not, in the exercise of its powers, prevent a State from discharging the ordinary functions of government, just as it follows from the second clause of Article VI. of the Constitution, that no State can interfere with the free and unembarrassed exercise by the National Government of all the powers conferred upon it."

Having thus considered the nature of the taxing power of Congress and marked out in a general way the limitations thereon, we are brought to the supposedly most perplexing question in the entire matter, namely, whether the imposition of the tax is such an interference with the sovereignty of the states as to render the provision invalid. It may be admitted, at the start, that the power to grant articles of incorporation is an incident of general sovereignty; and, further, it may probably be conceded that it would not be competent for Congress, under the taxing power, to place a burden directly upon the action of the states in creating corporations. There is a clear distinction, however, between a tax on the creation of corporations and an excise imposed on corporations for the privilege of existing and operating as such or on the businesses in which corporations may engage. There is also a clear distinction between a tax on the business and a tax on the privilege. As pointed out, manifestly Congress intended the measure to be a tax on business, and if it is so considered, the authorities herein referred to are practically conclusive to the effect that the tax is valid. Moreover, should the view of the court be that the act provides for an excise on the privilege, it is believed that the authorities are equally conclusive to the same effect.

The case of *Veazie Bank v. Fenno*¹⁸ is frequently cited on this point of interference with state sovereignty as authority for the validity of the act under consideration. That case, however, when closely analyzed does not stand as authority for the proposition to which it is cited. The court was very careful to state that the object of the tax was "not the franchise of the bank, *but property created*, or

¹⁸ 8 Wall. 533.

contracts made and issued under the franchise, or power to issue bank bills." The decision might well have been based entirely upon other grounds. On page 549 the Chief Justice said:

"Having thus, in the exercise of undisputed constitutional powers, undertaken to provide a currency for the whole country, it cannot be questioned that Congress may, constitutionally, secure the benefit of it to the people by appropriate legislation. To this end, Congress has denied the quality of legal tender to foreign coins, and has provided by law against the imposition of counterfeit and base coin on the community. To the same end, Congress may restrain, by suitable enactments, the circulation as money of any notes not issued under its own authority. Without this power, indeed, its attempts to secure a sound and uniform currency for the country must be futile.

"Viewed in this light, as well as in the other light of a duty on contracts or property, we cannot doubt the constitutionality of the tax under consideration."

In the *Spreckels* case, before referred to, it will be remembered Congress imposed an excise tax upon all persons, firms, corporations and companies engaged in certain occupations, the tax to be measured by the amount of the gross annual receipts. There was nothing in the nature of the businesses taxed which gave the federal authorities jurisdiction over them; it seemed to be assumed without question, once it was determined that the imposition was a tax upon the business as distinguished from a direct tax, that Congress had power to compel not only persons and firms to pay the excise, but corporations and companies as well. Now the Spreckels Sugar Refining Co. was a corporation organized under and by virtue of the laws of Pennsylvania, and if a tax on the business of corporations is an interference with the sovereignty of the states creating them, it is indeed strange that the point was not made in that case. Of course it is not meant that the failure to notice the point is at all conclusive, but it is at least highly significant.

Perhaps the strongest case that may be cited on this point is *South Carolina v. United States*,¹⁹ decided by the Supreme Court as recently as 1905. The importance of the case is such that a somewhat detailed examination of it may be warranted. By several statutes, the State of South Carolina established dispensaries for the wholesale and retail sale of liquor, and prohibited sale by other than the dispensers. These dispensers received no profit from the sales and

¹⁹ 199 U. S. 437.

acted solely in the capacity of agents of the state. The action was commenced by starting suit in the Court of Claims for the recovery of the amounts paid by the state for licenses. From a judgment entered for the United States the state appealed. It was contended on the part of the appellant that the tax was imposed upon the state or its agents and thus interfered directly with its governmental functions; that there being no constitutional limitation as to the amount of the license tax, and the power to tax being the power to destroy, if Congress can enforce such a tax against a state, it may destroy this effort of the state in the exercise of its police power to control the sale of liquor. And further that the regulation of the sale of liquor comes within the scope of the police power which is in its fullest extent reserved to the states, and is not subject to national supervision; but if Congress may tax the agents of the state charged with the duty of selling intoxicating liquors, it in effect assumes a certain control over the police power, and thus may embarrass and even thwart the attempt of the state to carry out this mode of regulation. In spite of the force of this argument the court held that the tax was properly leviable upon the dispensers. Here is a case in which it was held that Congress may impose a tax upon the privilege of a sovereign state of engaging in the sale of intoxicating liquors, a measure held to have been a proper exercise of the state's police power, and a business competent for the state to engage in.²⁰ If this was not an interference with the sovereignty of the state of South Carolina, how can it be reasonably argued that a tax upon either the business or franchise of a private corporation engaged in no way in carrying out the state's governmental functions is an imposition inconsistent with the sovereignty of the state creating it? As is apparent from the following language quoted from the opinion of the court in *South Carolina v. United States*, the line between proper and improper federal taxation must be drawn with reference to whether or not the tax interferes with governmental functions. On page 459 Mr. Justice BREWER said:

"It is also worthy of remark that the cases in which the invalidity of a Federal tax has been affirmed were those in which the tax was attempted to be levied upon property belonging to the State, or one of its municipalities, or was a charge upon the means and instrumentalities employed by the state, in the discharge of its ordinary functions as a government.

"In *Veazie Bank v. Fenno*, 8 Wall. 533, in which a national tax of ten per cent on the amount of notes of any person, state

²⁰ *Vance v. W. A. Vandercook Co.* No. 1, 170 U. S. 438.

bank, or banking association, used for circulation, was sustained, the court thus stated the limits of the power of national taxation over state agencies (p. 547):

‘It may be admitted that the reserved rights of the states, such as the right to pass laws, to give effect to laws through executive action, to administer justice through the courts, and to employ all necessary agencies for legitimate purposes of state government, are not proper subjects of the taxing power of Congress.’”

Again on page 461:

“These decisions, while not controlling the question before us, indicate that the thought has been that the exemption of state agencies and instrumentalities from national taxation is limited to those which are of a strictly governmental character, and does not extend to those which are used by the state in the carrying on of an ordinary private business.”

That the right to control the devolution of property upon death is an incident of sovereignty has long been recognized. In no respect has control over this matter been delegated to the Federal Government, and the right, therefore, remains in the states. Nevertheless it can no longer be seriously disputed that Congress, under the taxing power, has the right to lay an excise upon inheritances. This has been settled by a number of well considered cases. Now since Congress has such power it may levy a tax of such an amount as to totally destroy the right to inherit property, thus diverting the estates of all decedents from the channels designated by the state into the coffers of the nation. What, then, has become of the power of the states? In the inheritance tax cases it was argued with great force and persistency that such taxes were imposed upon the exclusive power of the state to regulate the devolution of property upon death, and constituted a direct interference with the sovereign power of the states in reference thereto. In *Knowlton v. Moore* the Supreme Court disposed of this contention as follows (page 59):

“But the fallacy which underlies the proposition contended for is the assumption that the tax on the transmission or receipt of property occasioned by death is imposed on the exclusive power of the state to regulate the devolution of property upon death. *The thing forming the universal subject of taxation upon which inheritance and legacy taxes rest is the transmission or receipt, and not the right existing to regulate.* * * * Certainly a tax placed upon an inheritance or legacy diminishes, to the extent of the tax, the value of the right to inherit or re-

ceive, but this is a burden cast upon the recipient and not upon the power of the state to regulate. This distinction shows the inapplicability to the case in hand of the statement made by Mr. Chief Justice MARSHALL in *McCulloch v. Maryland*, 4 Wheat. 316, 431, 'that the power to tax involves the power to destroy.' This principle is pertinent only when there is no power to tax a particular subject, and has no relation to a case where such right exists."

In many respects the analogy between these inheritance tax cases and the matter under discussion is indeed striking. The point made by Mr. Justice WHITE in the above quoted extract from the opinion in *Knowlton v. Moore* would seem to be an almost complete answer to the argument that the corporation tax is invalid because it taxes a matter under the exclusive control of the state. This tax is no more a burden upon or an interference with the state's power of control than was the inheritance tax. It is true, if this tax is valid, that Congress may impose upon corporations such burdens that the advantages derived from corporate existence would not warrant the payment of the tax, thus effectually destroying corporations and making the power of the state in that respect an empty one; but that is practically the same situation met by the Supreme Court in the *Knowlton* case with the reply that the tax was not imposed upon the sovereign right of the state to regulate or control.

It is also well settled that the police power is reserved in its fullest extent to the several states. The control of the liquor traffic is conceded to be within the police power. The states may prohibit the sale of intoxicating liquors entirely or permit it under such restrictions as the legislatures may see fit to prescribe, and when there is no restriction placed upon the traffic there is an implied permission that it may be conducted free from all hindrance. Yet Congress may exact a license fee from all persons engaged in the business, and carrying the power to its logical extent, may prohibit the business entirely.²¹ Has not the Federal Government, then, directly interfered with a matter conceded to be within the state's police power?²²

²¹ See also on this general question, *McCray v. United States*, 195 U. S. 27, the *Oleomargarine Case*.

²² In *South Carolina v. United States*, 199 U. S. 437, 456, the court observed: "There is something of a conflict between the full power of the nation in respect to taxation and the exemption of the State from Federal taxation in respect to its property and a discharge of all its functions. Where and how shall the line between them be drawn? We have seen that the full power of collecting license taxes is in terms granted to the National Government with only the limitations of uniformity and the public benefit. The exemption of the State's property and its functions from Federal taxation is implied from the dual character of our Federal system and the necessity of preserving the State in all its efficiency," etc.

As pointed out in *South Carolina v. United States* the justification of such taxation lies in the fact that no burden is placed upon the state's governmental agencies or instrumentalities. According to that case the test should be,—does the tax hamper or affect, or, we may say, tend to hamper or affect the state in its governmental capacity? In a number of cases federal taxation has been declared invalid on that ground. *The Collector v. Day*,²³ *United States v. Railroad Company*,²⁴ *Pollock v. Farmers Loan & Trust Co.*,²⁵ *Ambrosini v. United States*.²⁶ If we can imagine a corporation, organized for profit, and having a capital stock represented by shares, the net income of which corporation exceeds five thousand dollars, engaged in any sense in carrying on or assisting the state in the exercise of its governmental functions, we may have such a corporation as to which the tax provided for would be invalid.

The instances herein cited go to show that a tax imposed by Congress is not necessarily invalid because it affects indirectly powers recognized as being in a sense exclusively within the jurisdiction of the state. The same arguments sustain the act irrespective of whether the measure is considered as a tax on business or an excise levied upon the privilege of doing business as a corporation, for the tax in either view is not a tax upon the state or its agents, but upon the corporation as such.

It appears then that the proper test in determining the validity of federal taxation on subjects within the state or on subjects in which the state has some sort of interest or power of control, is whether the tax interferes with the governmental power of the state or hampers any of its governmental agencies in the exercise of their functions. It seems self evident that private corporations organized solely for the profit of their members are not endowed with any portion of the state's governmental power, and are not concerned in any form with the governmental powers of their parent state. They are not even agents of the state, as were the South Carolina dispensers. Tried by this test the conclusion is well nigh irresistible as far as we have gone, that no matter which view of the nature of the tax is taken the act is valid.

In this connection it may be interesting to note the cases of *Owensboro National Bank v. Owensboro*,²⁷ in which the Supreme Court held a state tax on the franchises of a national bank invalid, and

²³ 11 Wall. 113.

²⁴ 17 Wall. 322.

²⁵ 157 U. S. 429, 584.

²⁶ 187 U. S. 1.

²⁷ 173 U. S. 664.

California v. Pacific Railroad Co.,²⁸ in which the court declared invalid certain state taxes imposed upon the railroad company's franchises. In the latter case the court observed that the franchises had been granted by the Federal Government for national purposes and to subserve national ends, and that the corporation had been created by virtue of the power in Congress to regulate interstate commerce. These cases, however, may be explained by the nature of the business or function for which they were created.

3. We are then brought to a consideration of the final point, namely, whether the act as drawn violates the constitutional provision requiring all excises to be uniform throughout the United States. This argument may be disposed of very shortly, for the comparatively recent case of *Knowlton v. Moore*, before referred to, effectually forecloses all question on that score. The following extract from the opinion in that case needs no further comment. On page 105 the court said:

"Thus it came to pass that although the provisions as to preference between ports and that regarding uniformity of duties, imposts and excises were one in purpose, one in their adoption, they became separated only in arranging the Constitution for the purpose of style. The first now stands in the Constitution as a part of the sixth clause of Section 7 of Article I, and the other is a part of the first clause of Section 8 of Article I. By the result then of an analysis of the history of the adoption of the Constitution it becomes plain that the words 'uniform throughout the United States' do not signify an intrinsic but simply a geographical uniformity."

There is no doubt of the geographical uniformity of the corporation tax. There can, therefore, be no question as to its validity on that point.

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²⁸ 127 U. S. 1.