II. THE RECEPTION INTO THE DUE PROCESS CLAUSE

A. STATE IRRIGATION AND RECLAMATION PROJECTS

We have noted the shaky foundations of the doctrine of public purpose. A more critical age demands a firmer foundation. We are now in a position to observe the transformation of the notion of public purpose from a "general principle of constitutional law" into a constitutional guarantee under the due process clause of the Fourteenth Amendment. This would not have been possible at the time of the Loan Association case in 1872. At that time the depths of due process were unplumbed. But since then its possibilities have begun to be realized, and among other things it has been found to be a denial of due process if the power of eminent domain is exercised for other than a public use.42

In the cases in this section we will see that the judicial mind was beginning to realize that the proposition that to deprive a person of property for other than a public use through the exercise of the power of eminent domain is a denial of due process of law, could be made to sustain the proposition that to deprive a person of property for other than a public purpose through the taxing power is likewise a denial of due process of law.

In Fallbrook Irrigation District v. Bradley,43 the Supreme Court had before it the question of the constitutionality of a California statute permitting landowners in given areas to form an irrigation district. The district when formed was given power to condemn needed property and to levy annual assessments. In effect the legislature authorized the creation of a taxing district, for it is clear that the power to levy an assessment for a local improvement is derived from the power to levy a general tax.44

Mr. Justice Peckham stated the issue to be whether the act as construed by the state court conflicted with the Fourteenth Amendment of the Federal Constitution. The question, he said, is whether "the citizen is deprived of his property without due process of law, if it be

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* This is the second and final installment of this article, the first having appeared in the January issue of the Review. See 18 Calif. L. Rev. 137.


43 (1896) 164 U. S. 112, 17 Sup. Ct. 56.

44 Cooley, Taxation (3d ed. 1903) 1181.
taken by or under state authority for any other than a public use, either under the guise of taxation or by the assumption of the right of eminent domain."

He went on to show that an irrigation project would be seriously prejudiced without the power to condemn needed property. The requirement that the benefit be a public one was satisfied by the consideration that the irrigation would add to the wealth of the state by making available greater productive areas.

When it came to the question of the power to levy assessments Mr. Justice Peckham relied upon an admission of counsel for appellees that either a general tax or a local assessment might be levied to irrigate arid lands. With this as a starting point he had little difficulty in concluding that it made no difference that the Wright Act was not limited to arid lands, but covered all lands "susceptible of one mode of irrigation from a common source."

The opinion of Mr. Justice Peckham betrays a hopeless confusion between the notions of public purpose and public use. A more careful analysis in terms of the effects upon landowners of the exercise of the two powers would have produced a different opinion if not a different result.

The effect upon the landowner of the exercise of the power of eminent domain may be to compel a sale of easements for canals, sites for reservoirs, pumping stations, etc. But when, as in the principal case, an irrigation district is created with power, not only to condemn property but also to levy assessments upon all landowners, whether they be willing or unwilling participants, the effect is more drastic. The money so obtained is used not only to pay for the property taken by condemnation, but also to construct canals, reservoirs, pumping stations, etc., and to maintain and operate them.

The analysis which has been developed above does not point to a different result in the Fallbrook case. It does, however, point to the wisdom of the separate treatment of the two limitations of public use and public purpose. It may be that in many cases what is public for eminent domain will be public for taxation. This gives apparent color to the argument of identity.

On the other hand, in Clark v. Nash the Court upheld the con-

45 164 U. S. at 158, 17 Sup. Ct. at 63.
46 George H. Maxwell, as reported in 164 U. S. at 125.
47 164 U. S. at 164, 17 Sup. Ct. at 65: "... water used for irrigation purposes upon lands which are actually arid is used for a public purpose, and the tax to pay for it is collected for a public use, and the assessment upon lands benefited is also levied for a public purpose ... the irrigation of really arid lands is a public purpose, and the water thus used is put to a public use." (Italics ours.) See also 164 U. S. at 158, 161, 17 Sup. Ct. at 63, 64.
demnation of a right of way in favor of an individual landowner across neighboring land for the enlargement of his irrigation ditch. Under this decision public use in eminent domain may mean use by an individual landowner. In Strickley v. Highland Boy Gold Mining Co., the Court upheld an order of condemnation in favor of a private mining corporation to secure a right of way over adjoining land for an aerial bucket line. It may well be doubted whether the Court, if the question were presented, would allow the use of the taxing power in these last two cases.

Irrigation and drainage cases were distinguished in a recent decision involving the constitutional validity of a district organized for the purpose of clearing or stumping land and fitting it for agriculture. It was pointed out that in irrigation and drainage projects cooperative effort was required and that success lay in treating the given area as an area, regardless of boundary lines of private property. Stumping, on the other hand, might well be carried on with reference to lines of private ownership. The justification for exerting pressure upon the minority landowners no longer existed, and the court held the purpose to be a private one.

B. STATE AND MUNICIPAL ENTERPRISES

The development of the modern industrial order had as its concomitant the rush to the city. This inevitably gave rise to increasingly complex problems of sanitation, policing, fire protection, lighting, etc. It was not until about 1850 that any appreciable effort was made to grapple with them. This inertia has been ascribed to a blind faith in the notion of laissez-faire. Whatever the causes, the deliverance was slow and halting. It was not until about 1880 that private gain began to give way to public interest. The presumption in favor of private enterprise still remains. But the readiness of government both state and local, to enter into new fields, and into fields heretofore regarded as the exclusive preserves of private enterprise, is unmistakable evidence that a dominant public interest will gain ready recognition.

It was not long before municipal waterworks, electric light plants,
gas works, street railways, ferries and wharves became common activities, but this was not accomplished without a struggle. When the constitutional validity of these activities was challenged in court the municipal authorities had to meet the doctrine of public purpose as enunciated in *Sharpless v. The Mayor*. It was then a "general principle of constitutional law." It had not as yet occurred to the judges in the state courts to ground it in the due process clauses of the state constitutions. It remained for the Supreme Court of the United States to set the example with respect to the Federal Constitution. We cannot say that the Supreme Court did so in the *Fallbrook* case. The matter of eminent domain clouded the issue. But the example was set in 1917 in the case next to be considered.

1. The Municipal Fuel Yard Case

The power of the state to authorize a municipality to operate a fuel yard and supply fuel at cost to the inhabitants was upheld by the Supreme Court in *Jones v. City of Portland*. The Court took jurisdiction under the due process clause of the Fourteenth Amendment. The sole question dealt with by Mr. Justice Day was whether the

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57 Many cases are collected and discussed in POND, Public Utilities (3d ed. 1925) c. 4; POND, Municipal Control of Public Utilities (1906) c. 5; DILLON, Municipal Corporations (5th ed. 1911) c. XXVI-VII; Cooley, Taxation (3d ed. 1903) 217.

58 (1853) 21 Pa. 147.

59 (1890) 1917 245 U. S. 217, 38 Sup. Ct. 112, noted in (1917) 245 U. S. 217, 38 Sup. Ct. 112, noted in (1918) 24 Harvey L. Rev. 584; (1918) 52 Am. L. Rev. 215. The state court had upheld the state statute. *Jones v. City of Portland* (1915) 113 Me. 123, 93 Atl. 41; following the earlier case of *Laughlin v. City of Portland* (1914) 111 Me. 486, 90 Atl. 318, noted in (1915) 15 Col. L. Rev. 179. This was a departure from the view taken in Massachusetts. In Opinion of the Justices (1890) 150 Mass. 592, 24 N. E. 1084, the court had advised the legislature that it might authorize municipalities to manufacture and distribute gas and electricity for lighting purposes. But in Opinion of the Justices (1892) 155 Mass. 598, 30 N. E. 1142, it declared that the legislature could not constitutionally authorize municipal fuel yards. Justice Holmes dissented. This view was reaffirmed in *In re Municipal Fuel Plants* (1903) 182 Mass. 605, 66 N. E. 25, though it was said that towns might supply fuel in time of extraordinary emergency, such as a famine, when private enterprise broke down. *Cf.* Baker v. City of Grand Rapids (1906) 142 Mich. 687, 106 N. W. 208; Central Lumber Co. v. City of Wascoa (1922) 152 Minn. 201, 188 N. W. 275; Consumers Coal Co. v. City of Lincoln (1922) 109 Neb. 51, 189 N. W. 643.
taxes levied to operate the fuel yard were levied for a public purpose. He emphasized the local conditions in Maine which gave rise to the fuel yard and placed great reliance upon the judgment of the Maine court in *Laughlin v. Portland*. Assuming the power to supply water, light and heat, it was there argued, it can make no practical difference that in the assumed cases fuel is burned in a central plant and heat is distributed through wires or pipes whereas in the case at bar the fuel is hauled direct to the consumer. In the one case it goes under the streets in pipes or wires. In the other case it goes over them in wagons. From the standpoint of the consumer there is no practical difference.

Mr. Justice Day must have known that from the standpoint of the relation between the city and private enterprise there are differences. In the one case the exercise of public authority is required to enable the use of public streets for mains, poles, wires, etc., whereas the coal dealer who distributes in wagons needs no such permission. This, however, is not the important difference. The important difference is that in the one case the manner of distribution results in a virtual monopoly. The first enterprise in the field binds the consumers to it by securing exclusive rights in the streets and establishing physical connections with their dwellings. On the other hand, the tenure of the coal dealer is not thus secured. He must meet competition. The consumer can bestow his patronage where he will.

The decision represents a departure from the earlier notion that unless a natural monopoly existed, whether in the form of a limited source of supply or strategic location, the state could not encroach upon the field of private enterprise. Under the old notion the existence of competition was supposed to prevent all possible ills. It was only a monopoly or a tendency toward it that might not serve the public.

The fuel yard was admittedly a new departure in municipal activity. It did not fall squarely within the category of a natural monopoly. But it did have another element in common with the earlier cases. In the words of Mr. Justice Day, "When we speak of fuel, we are dealing not with ordinary articles of merchandise for which there may be many substitutes, but with an indispensable necessity of life." The yard supplied the citizen with "something which is a necessity in its absolute sense to the enjoyment of life and health which could otherwise be obtained with great difficulty and at times perhaps not at all, and whose absence would endanger the community as a whole." The earlier category was discarded, at least for this case. The new one serves to explain the earlier cases, yet supplies a principle of growth. This is a

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60 See supra n. 59.
61 245 U. S. at 223, 224, 38 Sup. Ct. at 114.
happy discovery. A narrow generalization is replaced by a more amorphous one. This is a mode of growth in the law. But it did not just grow. Mr. Justice Day did it. The Court thought a fuel yard was a proper activity for a municipality in Maine. At least it was not going to say that it was not. To sustain it required some revamping of the existing categories. This Mr. Justice Dáy proceeded to do.

There has been a similar change in judicial attitude where the issue is whether a private enterprise may be subjected to regulation as a public utility. At first the element of monopoly was deemed essential. It is not now regarded as decisive. The further consideration that the community is virtually dependent upon the service rendered may be enough.

When Mr. Justice Day removed the lid of monopoly as a check upon municipal encroachment into the realm of private enterprise he substituted for it the lid of "necessities of life." But he indicated that he would not always do so. He expressed a solicitude for private enterprise and made it clear that the fuel yard in the present case was to be justified only by the breakdown of private enterprise.

To summarize, the courts have stressed three considerations: (1) the existence of a natural monopoly, (2) the breakdown of free competition, (3) the service rendered must be a "necessity" to the community. All three need not be present. But as to which one, or which combinations, will suffice must surely depend upon the particular legislation before the court.

2. The North Dakota Industrial Program

The recent North Dakota Industrial Program brought before the Supreme Court an issue in statecraft of the first magnitude. The legislature of North Dakota, under authority given by constitutional amendment passed acts creating the Industrial Commission of North Dakota, and three distinct state enterprises which were placed under its control. One of these, the North Dakota Mill and Elevator Association, had for its purpose the manufacture and marketing of farm products. To accomplish this it was required to establish a system of

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64 245 U. S. at 224, 38 Sup. Ct. at 114.
65 N. D. CONST. (1919) art. 32.
66 N. D. LAWS 1919, c. 151.
67 N. D. LAWS 1919, c. 152, 153.
warehouses, elevators, flour mills, factories, plants, bureaus, markets, etc. Another, the Home Building Association of North Dakota, was created to provide homes for residents at a fixed price. Finally, the Bank of North Dakota was created with a capitalization of $2,000,000, and further provision for $10,000,000 to provide a fund to replace money out on certain loans. This extensive program was to be financed by the issue of bonds.

The question that reached the Supreme Court was whether the taxpayer's money was being taken for a public purpose and therefore with due process of law. The Court answered this in the affirmative in Green v. Frazier. Mr. Justice Day based jurisdiction upon the due process clause. He said: "The due process of law clause contains no specific limitation upon the right of taxation in the States, but it has come to be settled that the authority of the States to tax does not include the right to impose taxes for merely private purposes," and cited the Fallbrook case. He pointed out that in this case the people, the legislature and the highest court of North Dakota had declared these acts to be of a public nature. He reviewed the economic conditions and agreed with the state court that the Mill and Elevator Act was to be justified "by the peculiar situation in the state . . . and particularly by the great agricultural industry of the state." The bank was deemed essential to the other acts. The Home Building Act was sustained because "the opportunity to secure and maintain homes would promote the general welfare and . . . redound to the general benefit."

To say that the legislation is justified by "the peculiar situation in the state" is to serve notice that the Court is prepared, if it is so minded, to confine the decision closely within its particular facts. It is a warning that what has been done is not a reliable barometer of what may be done in the future. But it goes further. It is a mode of decision and as such warrants analysis. It means that the court is not disposed to say that the legislation is unreasonable in view of the situation. That still enables the court to say that a given enactment is unreasonably related to the situation. Given the "peculiar situation," the particular legislation may go too far in dealing with it. This still enables the court to say that there is no "peculiar situation." This

68 N. D. Laws 1919, c. 150; N. D. Laws 1919 (Sp. Sess.) c. 24, as amended c. 39.
69 N. D. Laws 1919, c. 147, 148, 154, as amended N. D. Laws 1921, 154.
70 (1920) 253 U. S. 233, 40 Sup. Ct. 499, noted in (1920) 29 Yale L. J. 933.
71 253 U. S. at 238, 40 Sup. Ct. at 501.
72 See supra n. 43.
73 Green v. Frazier (1920) 44 N. D. 395, 176 N. W. 11.
74 Ibid.
raises the question as to what is a "peculiar situation." A categorical answer is ex hypothesi impossible. There are, then, two questions: (1) is there a "peculiar situation"? (2) is the legislation reasonably related to it? These questions cannot be answered in advance of the particular facts.

Compare this mode of decision with that in the fuel yard case. In both cases the court paid deference to the state courts. But in the fuel yard case this was coupled with an evaluation of the necessity of the service. In the North Dakota case this deference went to the extent of regarding as controlling the "peculiar situation." We are left to speculate as to what entered into this. The elements of necessity of life and monopoly were sidetracked. The failure of private enterprise, the need for action and the anticipated benefits are the elements which we may guess entered into the "peculiar situation."

The latest pronouncement by the Supreme Court is a per curiam decision affirming the Supreme Court of Nebraska which had sustained the validity of a municipal filling-station for the sale of gasoline and oil to the general public at cost. The Nebraska court had held that the widespread use of gasoline and oil made the purpose a public one. The Supreme Court affirmed the decision on the authority of Jones v. City of Portland and Green v. Frazier. It is apparent that in cases involving municipal enterprises the Supreme Court will rely heavily upon the determination of the state court. As far as the Supreme Court is concerned there is no real limit to state and municipal activity in the field of business enterprise.

3. Miscellaneous Cases

Three more cases remain in which the Supreme Court reviewed state tax measures on an allegation that the taxpayers were deprived of property without due process of law because the tax was for a private purpose. In all of these cases, however, the Court upheld the state legislation.

In City of Boston v. Jackson the Court upheld the expenditure of public money to supply the deficit of a publicly operated subway sys-

75 Jones v. City of Portland, supra n. 59.
77 Supra n. 59.
78 Supra n. 70.
tem. The deficit resulted from a low fare. Cheap transportation is, then, a public purpose. The burden is distributed over the public.

In Milheim v. Moffat Tunnel Improvement District⁸⁰ the Court upheld the constitutionality of the Moffat Tunnel project in Colorado. The purpose of this is to construct a tunnel through the Continental Divide and thereby facilitate intercourse between the eastern and northwestern portions of the state. The tunnel is to be used for a standard gauge railroad, telegraph, telephone and power lines, the transportation of water, automobiles and other vehicles.

The constitutionality of a state workmen's compensation fund was before the court in Mountain Timber Co. v. Washington.⁸¹ Under the provisions of the act a state fund was established for the compensation of workmen injured in hazardous employment. The act was obligatory upon both employers and employees in hazardous employments. The fund is maintained by compulsory contributions from employers in these industries. The act went far in that it required a contribution whether injuries had occurred or not.

The law involved a tax in that the employer was compelled to contribute. It involved an exercise of the police power in that it was a provision for the welfare of the workmen. From the point of view of the public object Mr. Justice Pitney treated them as one. He felt that industrial accidents were not wholly a matter of private concern. Mr. Chief Justice White, Mr. Justice McKenna, Mr. Justice Van Devanter and Mr. Justice McReynolds recorded dissents but no reasons.

This decision defies the orthodox categories. Whether this compulsory contribution be called a tax or an imposition the most we can say is that it is unobjectionable under the Fourteenth Amendment.

III. THE FEDERAL GOVERNMENT AND PUBLIC PURPOSE

It would seem to be an easy jump from the Fourteenth Amendment to the Fifth Amendment. The Supreme Court has always said that the two due process clauses have the same meaning.⁸² From the premise of identity and the decision in Green v. Frazier⁸³ it ought to follow that a taxpayer of the United States could bring a bill in equity to enjoin a proposed federal expenditure on the ground that it is for a

⁸⁰ (1923) 262 U. S. 710, 43 Sup. Ct. 694, affirming (1922) 72 Colo. 268, 211 Pac. 649.
⁸³ See supra n. 70.
private purpose. But such is not the case. The premise of identity will not hold.

In Frothingham v. Mellon decided with Massachusetts v. Mellon, a taxpayer of the United States brought a bill in equity to enjoin a proposed appropriation, alleging that it was for a non-federal purpose and therefore beyond the power of Congress and further alleging that the expenditure would increase the burden of future taxation and thereby take her property without due process of law in violation of the Fifth Amendment. The Supreme Court denied relief on the ground that the plaintiff had no standing in court to contest the appropriation. The Court did not reach the merits of the case. Mr. Justice Sutherland, speaking for a unanimous court, said that the interest of a taxpayer of the United States "in the moneys of the Treasury — partly realized from taxation and partly from other sources — is shared with millions of others; is comparatively minute and indeterminable." Further, "If one taxpayer may champion and litigate such a cause, then every other taxpayer may do the same . . . in respect of every other appropriation act."

In this case the appropriation was challenged as being for a non-federal purpose and not within the power of Congress under the "general welfare" clause of the Federal Constitution. The reasoning of the

84 (1923) 262 U. S. 447, 43 Sup. Ct. 597. This case involved the constitutionality of the Maternity Act of 1921, 42 Stat. 224. This act provided federal aid to the states for the reduction of maternal and infant mortality. The federal appropriations were limited to those states which accepted the provisions of the act requiring the establishment of specified state health bureaus and the appropriation by the state of a sum equivalent to the federal allotment.

85 262 U. S. at 487, 43 Sup. Ct. at 601.

86 Art. I, § 8, cl. 1: "The Congress shall have power to lay and collect taxes, duties, import duties and excises, to pay the debts and provide for the common defence and general welfare of the United States." (Italics ours.) Under this clause the power of Congress to spend money is not deemed to be precisely coterminous with the enumerated powers; see Corwin, The Spending Power of Congress — Apropos The Maternity Act (1923) 36 Harv. L. Rev. 548. This clause provides the means for the accomplishment of a variety of ends. As a mere indication of the practice of Congress the following activities will suffice: relief to sufferers from calamities in foreign countries, 2 Stat. 730 (1812); 3 Stat. 561 (1820); 9 Stat. 207 (1847); 16 Stat. 596 (1871); 21 Stat. 303 (1880); 38 Stat. 238 (1913); 38 Stat. 776 (1914); 42 Stat. 351 (1921) and in the United States. As instances see 3 Stat 211 (1815); 5 Stat. 6 (1836); 6 Stat. 13 (1794); 6 Stat. 46 (1799); 6 Stat. 53 (1804); 6 Stat. 356 (1827); 25 Stat. 630 (1888); 25 Stat. 631 (1888); 40 Stat. 917 (1918); expeditions to explore the Polar seas, Act of June 27, 1882, 22 Stat. 384; expedition to observe an eclipse of the sun, Act of June 15, 1860, 12 Stat. 117 (1860); to expositions in London, Philadelphia, Paris, Chicago, etc., 17 Stat. 203 (1872); 19 Stat. 3 (1876); 25 Stat. 620 (1888); 27 Stat. 389 (1872); appropriations for agricultural experiment stations, 24 Stat. 440 (1887); 26 Stat. 417 (1890); 34 Stat. 63 (1906); 34 Stat. 1256, 1281 (1907); appropriations for agricultural colleges, 38 Stat. 372 (1914); appropriation for promotion of vocational education,
Court, however, was all-inclusive and would apply equally to dispose of a taxpayer who challenged a federal appropriation on the ground that it was for a private purpose.

In result, then, a taxpayer of a state will be heard to allege that a state expenditure works a deprivation of property without due process of law under the Fourteenth Amendment because it is for a private purpose. The taxpayer's interest in the public moneys is assumed to be direct. On the other hand, the interest of a taxpayer of the United States in moneys in the federal treasury is said to be remote. A taxpayer of the United States must find relief in the ballot box. This difference is, of course, one of degree. That the difference should make a difference is a question of judgment.

IV. CONCLUSION

The doctrine of public purpose is stated as a limitation of the taxing power. In fact, it is more often a limitation of the spending power, for it is only in the case of a special assessment or a special tax that the court has before it the question of the validity of a proposed tax. In the great majority of cases the issue is presented in the form of a bill in equity to enjoin a proposed expenditure, or to enjoin the issue of public securities, or a suit to recover interest on public securities, or to compel a transfer of funds. These are efforts to bring in issue the validity of a proposed expenditure. It would be impossible to raise the issue of public purpose by a bill to enjoin the levy of a general tax, for the revenue obtained from a general tax is thrown into a common fund.

and for vocational rehabilitation of persons disabled in industry, 39 Stat. 929 (1917); 41 Stat. 735 (1920); appropriations for the eradication of plant and tree diseases and pests, 33 Stat. 861, 883 (1905); 34 Stat. 669, 695 (1906); 37 Stat. 315 (1915); 39 Stat. 24 (1916); 39 Stat. 1134, 1141 (1917).

The Supreme Court has never taken upon itself the task of marking out the limits of "general welfare." In Field v. Clark (1891) 143 U.S. 649, 695, 12 Sup. Ct. 495, 505, the Court avoided discussion of the "general welfare" clause. In United States v. Realty Company (1896) 163 U.S. 427, 440, 16 Sup. Ct. 1120, 1126, the Court had to pass upon the validity of the Act of 1895 granting bounties to sugar manufacturers. The earlier sugar bounties of 1890 had been repealed in 1894 and this Act of 1895 was to compensate those manufacturers who suffered loss by the repeal in 1894. In dealing with the question the Court considered the power of Congress "to pay the debts" of the United States, Art. I, § 8, and concluded that the obligation to these manufacturers constituted a moral obligation which Congress might well deem to be a "debt" of the United States. The decision of Congress "can rarely, if ever, be the subject of review by the judicial branch of the government," 163 U.S. at 444, 16 Sup. Ct. at 1127.

In Green v. Frazier, supra n. 73, the court assumed, without discussion, that a taxpayer of a state had a sufficient interest in the public moneys of a state to be heard to allege that a given expenditure worked a deprivation of property in violation of the Fourteenth Amendment.
It is drawn out as occasion requires without reference to the source from whence it is derived. Rarely is revenue from a particular source tagged and set aside for a particular purpose.

This analysis is made to point out that the statement that the doctrine of public purpose is a limitation on the taxing power is doctrinaire and does not represent what the courts do in fact. We might restate the doctrine in this fashion: When a general tax is involved the doctrine is a limitation on what we may call the spending power of government; when a special assessment or special tax is involved it is a limitation on the taxing power. The usual statement which lumps these two statements together involves the assumption that taxation has to do with the spending of revenue as well as with the raising of it. The restatement confines the taxing power to the raising of revenue.

If this restatement had only dialectical value there would be little reason for pressing it. But it is submitted that it does shed light on another aspect of the notion of public purpose. The courts have always professed to be protecting the taxpayer from unconstitutional exactions. In doing this the courts have never inquired into the amount of the tax involved in any particular case. In fact, in most cases it would be well nigh impossible to measure the effect in terms of dollars and cents on a given taxpayer. The courts assume that taxpayers in general will be relieved if a given expenditure or tax is found to be unconstitutional.

The restatement which we have attempted serves to provoke a more realistic treatment of this question. It becomes clearer that where a special assessment or a special tax is involved it is possible to forecast the effect on a given taxpayer. It also becomes clearer that where a general tax is involved the effect on a given taxpayer is highly problematical and may be negligible. With this in mind it might be possible to differentiate between cases involving large and immediate outlays and cases involving small though immediate outlays. It might be possible to recognize that the issue of public securities, and their payment over a long period of time, is not attended with as great a burden on taxpayers as is an immediate and large outlay. This is particularly true when the state goes into a business which, it is expected, will in time pay for itself.

But the courts have brought to the question of constitutionality the category of public and private purpose. When we see that as a general proposition the application of this category does not involve the validity of a particular tax, nor a consideration of the effect of a tax or expenditure upon a given taxpayer, it becomes clear that this category amounts to a standard for the judicial testing of new functions of government. Its connection with taxation is at best remote and backhanded.
The notion of public purpose as a limitation on governmental activity is not a new one. When Judge Cooley said that "all governmental powers exist for public purposes" he was expressing a notion as old as political theory.

The courts have broken up Judge Cooley's dictum into four distinct limitations in the public weal. When private property is taken under the power of eminent domain there must be a justification in the public use to which the property is to be applied. When the state enacts regulatory legislation under the police power there must be a showing that it will conduce to the public health, safety, morals or general welfare. Private enterprises may not be subjected to regulation as a public utility unless the state establishes that it is within the acknowledged class of public utilities or is "affected with a public interest." Finally, there is the doctrine of public purpose in taxation.

In all of these cases the court stands between the individual and the state. But it stands between them in connection with powers which differ widely not only in the individual interests which they affect but also in the extent to which they affect them. To say that a handbrake is adequate for a handcar is not to say that it is adequate for an express train. And having settled on the proper brake we will not have to apply it as hard when the train is going ten miles per hour as when it is going sixty miles per hour.

Reverting to Judge Cooley: "All governmental powers exist for public purposes, but they are not necessarily to be exercised under the same conditions of public interest." And further: "each of these powers has its own peculiar and appropriate sphere, and the object which is public for the demands of one is not necessarily of a character to permit the exercise of another." This is the key to the problem. Granting that in many cases, as for example a railroad, the public interest may be so strong that it may be granted the power of eminent domain, aided by taxation and regulated as a common carrier, there are still many cases entailing a closer analysis. For example, it is now settled that a municipality may operate a fuel yard. But does that make the business of distributing fuel such a public one that private yards may be regulated as public utilities or even may be granted the power of eminent domain? An affirmative answer does not necessarily follow.

We have pointed out that there is one question which the court asks. This is not to imply that it can be answered by the simple application of any formula readily deducible from earlier decisions. The only test which has been urged is that of the settled usages of govern-

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89 Ibid. at 478.
ment. Obviously this will not do, and the courts have generally discarded it. To some people this leaves an unsatisfactory condition. But it is nothing new in constitutional law that cases are decided "by the gradual process of judicial inclusion and exclusion." And we have it from Mr. Justice Holmes that in this process "the decision will depend on a judgment or intuition more subtle than any articulate major premise."

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