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CHIEF JUSTICE JOHN MARSHALL was at his axiomatic best in the Supreme Court opinion set forth in *McCulloch v. Maryland*. He propounded several interesting and profound axioms in that decision. The strange thing about these axioms is that they have been permitted to remain in the limited context in which he found use for them rather than being given general application. This is strange because axioms are, by nature, universal in extent and everywhere applicable, if they are true. Moreover, these axioms have been given added weight in the United

States by being embedded in and used to buttress a unanimous Supreme Court decision which still stands.

The axioms in question are stated and appealed to in several ways in the course of the opinion. The most direct statement of them is contained in the following clauses: "That the power to tax involves the power to destroy; that the power to destroy may defeat and render useless the power to create..." The implications of the axioms had already been laid down a few sentences earlier:

These are, 1. That a power to create implies a power to preserve. 2. That a power to destroy, if wielded by a different hand, is hostile to, and incompatible with, these powers to create and preserve. 3. That where this repugnancy exists, that authority which is supreme must control, not yield to that over which it is supreme...

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Before proceeding to the broader application of these principles, or axioms, it is in order first to explain the context within which they were employed by Chief Justice Marshall. The Court had before it a case arising out of a law passed by a state. In 1818, the Maryland legislature had enacted a statute levying a tax on all bank notes issued in Maryland by banks not chartered by the state. A branch of the Bank of the United States, a bank incorporated under the laws of the United States, was located in Baltimore. A man named McCulloch, cashier at the bank, refused to pay the tax on bank notes (currency) issued. The case came to the Supreme Court in 1819.

Two issues were taken up and decided by the Court. The first need not much concern us here. Suffice it to say that it involved the question of whether the United States government was authorized by the Constitution to create such a corporation and that the Court, following the reasoning which Alexander Hamilton had originally used to justify the chartering of a United States bank, held that it was. The other issue was the one which called forth the above axioms in resolving it. The issue was this: Could a state tax an instrument of the United States government created in pursuance of constitutionally permissible objects? The Court held, in as

absolute terms as could be employed, that no state could tax an instrument of the United States government.

Chief Justice Marshall did not, then, restrict himself in writing the opinion to the simple question of whether or not Maryland could tax bank notes issued by the United States Bank. Instead, he explored the whole question of the taxation of any creation of the United States government by any state. Some of this exploration is both interesting and relevant to the even broader issues to be taken up in this article. Before quoting further from the decision, however, something else needs to be got out of the way.

Universal Application?

It is my contention that the axioms and principles set forth in support of this decision, if correct, *apply to all taxation*. That is, the power to tax any one by any government involves the power to destroy and that this power of government by taxation to destroy can defeat and render useless the power of individuals to create and preserve what they have created. Superficially, the conclusion—that the states could not tax the Federal government at all—appears either to rule out all taxation by governments or not to apply to governments in relation to individuals.

It is tempting, of course, to apply

the conclusion literally and rule out all taxation, but it is a temptation that should be resisted. The case for taxation by governments is almost, if not quite, as good as the case for government itself. In theory, governments might be supported by voluntary contributions. In practice, however, the voluntariness of the contributions would always be suspect. Government relies on coercion to carry out its edicts, and there should be no doubt that if it depended on "voluntary" support it would extend its protection mainly, or only, to its benefactors. Moreover, it is unlikely that the power of government could ever be restrained from such confiscations as would enable it to meet its bills. Justice requires that all who can should pay for government. Taxation is probably the only means of achieving this result, or approximating it. In any case, the necessity for taxation is so universally accepted that it should be presumed to be the correct approach in the absence of conclusive proof to the contrary.

It does not follow, however, that Marshall's strictures about the power to tax do not apply to governments in their relations to individuals. Not only are they applicable, but they apply even more emphatically as between governments and individuals than between states and the Federal gov-

ernment. If the power of a state to tax the Federal government could destroy the instrumentality taxed, how much more readily could government taxation destroy relatively helpless individuals? There is nothing in logic to prevent the application of the axioms to individuals as well.

On close examination, it comes out that Chief Justice Marshall did not base the *absolute prohibition* of state taxation of instruments of the Federal government on the axioms he adduced in *McCulloch v. Maryland*. Instead, he based the prohibition on the relationship between state governments and the Federal government, a relationship which lacks the *proper limits* on the power to be exercised. It had apparently been argued that the Court should have confidence that the state would not abuse the power of taxation. Marshall rejected this line of reasoning:

... But all inconsistencies are to be reconciled by the magic of the word CONFIDENCE. Taxation, it is said, does not necessarily and unavoidably destroy. To carry it to the excess of destruction would be an abuse, to presume which would banish that confidence which is essential to all government.

But is this a case of confidence? Would the people of any one State trust those of another with a power to control the most insignificant operations of their State government? We know they would not. Why, then, should we suppose that the

people of any one State should be willing to trust those of another with a power to control the operations of a government to which they have confided their most important and most valuable interests? In the legislature of the Union alone, are all represented. The legislature of the Union alone, therefore, can be trusted by the people with the power of controlling measures which concern all, in the confidence that it will not be abused. This, then, is not a case of confidence, and we must consider it as it really is.

Marshall proceeds to point out that if a state can tax one operation of the Federal government, it may tax any of them.

If the States may tax one instrument employed by the government in the execution of its powers, they may tax any and every other instrument. They may tax the mail; they may tax the mint; they may tax patent rights; they may tax the papers of the custom-house; they may tax judicial process; they may tax all the means employed by the government, to an excess which would defeat the ends of government. . . .

Granted that if states could tax one instrument they could tax others. Perhaps, too, such taxation could be used to defeat the ends of government. Strangely, however, Marshall goes on to argue that the Federal government could tax instruments of the states, and that power, so far as his argument had advanced, could be used to destroy the states or their instrumentalities. The difference, he said, is this:

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. . . .

The crux of Marshall's argument for prohibiting state taxation of the Federal government, then, was that state taxation lacked the proper base and limits. A part of the people could, at least in theory, be taxing the whole people. If states could levy taxes on the Federal government, there would be no requirement of uniformity. One state might, for example, levy a 5 per cent tax on notes of the United States Bank, another 10 per cent, another 50 per cent, and so on.

An Outgrowth of the System

The reason for the *absolute prohibition* of such taxation was accidental, not essential. That is, it did not arise from the nature of government or of taxation but from peculiar, hence, accidental, features of the federal system of government. The Court's decision in this case, of course, was concerned with

ruling upon acts occurring within this system, and constitutional historians have usually held that Marshall was concerned with asserting the supremacy of the United States government. Be that as it may, it is not my purpose here to enter upon the question of the merits of the decision or of the particular arguments advanced in support of it. These have been brought up only to show that the absolute prohibitions against the taxation involved arose from peculiar arrangements and not from the axioms which were earlier cited. In short, they were brought up in order to get them out of the way so as to give the axioms the examination they warrant and suggest their implications.

The only reason for not applying the axioms—"That the power to tax involves the power to destroy; that the power to destroy may defeat and render useless the power to create"—to government taxation of individuals, then, would be that they are not valid. It is not difficult to test their validity as axioms. It involves only determining whether in the nature of things they are necessarily true. Clearly enough, the power to tax does involve the power to destroy. The power to tax entails the power to take up to 100 per cent of the income from any undertaking. No undertaking, no matter how well it is financed, can

survive indefinitely if all its income is drained away in taxes. Hence, any and every human undertaking, short of breathing, can be destroyed by taxation.

Counterproductive Taxation

If any human undertaking can be wiped out by taxation, it follows that taxation may "defeat and render useless the power to create." There would be no purpose in beginning undertakings if they were certain to be destroyed by taxation. The chances are good that man's ingenuity would not be completely stifled by such government action, but it would surely be rendered largely useless.

The axioms are shown to be valid by this line of reasoning, but, unhappily, they are thereby made very nearly irrelevant. One hundred per cent taxation would dry up all sources of revenue; hence, such a level of taxation would be counterproductive, as the contemporary phrase has it. Or, the government would have to proceed by the enslavement of some portion or all of the population. The evil would then be slavery, though slavery is essentially nothing more nor less than 100 per cent taxation. While the enslavement implications are not entirely irrelevant, they do tend to place anything less than 100 per cent outside the frame of the axioms.

But does the validity of the axioms depend on carrying the argument to its logical conclusion? John Marshall did not hinge his use of them on some potential extremity. He did not even explore much the question of the degree of the taxation. He was very careful to exclude the whole question of abuse, for if he had admitted its relevance he would have been drawn in a quite different direction. In point of fact, he put in his axioms to serve as a foundation and then proceeded to cover them with his edifice of Federal supremacy. Even so, if the axioms have the validity he ascribed to them, they should be valid in the absence of abuses.

All Taxes Affect Creativity

It is my contention that the axioms are valid regardless of the degree of the taxation. The power to tax involves the power to destroy whether the degree is some fraction of one per cent or 100 per cent. It is possible to demonstrate this by marginal theory. The marginal theory as it applies to degree of taxation can be stated this way: *Any level of taxation will make some undertakings unprofitable or sub-marginal.* In practice, any increase in taxes will drive some people out of business, prevent them from going into business, or make it difficult or impossible for them to sustain themselves by whatever

they are doing. The point is of such crucial importance that it should be fleshed out with some details.

This principle of marginality applies to anyone who attempts to produce, provide, purvey, sell, or transport any good or service; it applies to farmers, manufacturers, storekeepers, teachers, artists, industrial workers, or whoever, but the effects may be most clearly seen in business enterprise. The power to preserve what has been created is essential to all constructive human undertakings. Taxation impinges on that power and at the margins always is threatening and destroying undertakings. What happens to business enterprises dramatizes the general principle.

In the first place, taxation affects when and whether a business enterprise is begun. To go into business requires a greater or lesser amount of capital, depending on its size and requirements. To gather the capital, savings must be accumulated. Probably the form of taxation with the most devastating effects on saving is inflation. Government, by increasing money supply, reduces the value of money being accumulated as savings. Indeed, the propensity to save is discouraged by inflation, and the propensity to spend is encouraged.

The progressive income tax is another deterrent to capital accumulation. The tax is often

talked about as if it were devised to take from the "haves." It should be better understood, however, as taking from those who are "getting," or trying to accumulate savings. A graduated income tax does not, *per se*, tax wealth that has been accumulated in earlier times; rather, it taxes current income. It bears particularly hard on potential new enterprisers.

Capital Formation Inhibited

Social Security payments greatly inhibit capital accumulation. Individuals are forced to pay into the "fund," yet all that is paid into it is, in effect, forfeit. It cannot be drawn out for investment. It cannot be used as security for loans. No creative use may be made of all the money that goes into Social Security. Whether it will be available in old age may be questionable, but that it is generally unavailable at any other age is beyond doubt.

Even so, anyone who has managed to accumulate or borrow or persuade others to invest enough to go into business has just begun his difficulties with taxation. The man who enters business discovers all too soon, if he did not know it already, that he has a Senior Partner—government. More precisely, he has a committee of Senior Partners, composed of Federal, state, county, and, depending upon the locale, township and municipal

authorities. Once he opens his doors, these Partners join the firm, so to speak, expecting him to perform special services for which they do not pay, having the first go at any profits that he makes, and besetting him with various costly requirements.

In the first place, the Senior Partners require the businessman to be a tax collector. Though he has not been a candidate for the position, though it may be alien to his nature to do such things, though the citizenry have not elected him to the post, a tax collector he is most apt to be. If he is a storekeeper or otherwise sells to consumers, there are a variety of taxes he is supposed to collect. Both the state and local governments may impose sales taxes which he has to collect. The Federal government imposes excise taxes which he has to collect on certain items. If he employs other people, he has to deduct income taxes from their paycheck. Under most conditions, he must collect the Social Security tax by way of payroll deductions. Some areas have employment taxes which he may have to collect.

In addition to the taxes which he collects from others, the businessman has taxes to pay on his own account. He must pay the fees connected with whatever licenses are required. He has to pay income taxes, if he has sufficient income, to

the Federal government, and, perhaps, to other governmental divisions. Merchandise of all sorts carries with it an array of hidden taxes. If the governmentally prescribed minimum wage is in fact above what the market wage would be, the difference between the two is a tax.

The recordkeeping that must be done in order to account for all taxes which he collects and provides the basis for his own payment of taxes amounts to a tax also. Records must be kept of all taxes collected, of the gross and net income of the firm, of all expenses of operation, of goods in stock and of equipment purchased, sold, and discarded.

Occasionally newspapers carry stories of the failure of some company. Usually, it is some large corporation, such as the Penn Central Railroad. Most business failures, however, are noted only in local papers, if at all, and many of them go unremarked. A study a few years ago found that approximately one-third of all new businesses do not last a year, and about half of those that do are unable to make it through the second year.

There is no way of knowing how many of these failures are directly attributable to taxation. Some of them would no doubt have failed had there been no taxes to pay, none to collect, and no records to keep. But it is safe to say that taxes were

a contributing factor in every failure and a determinative one in many, for taxation adds to the cost of doing business.

Businesses Abandoned

That the power to tax is the power to destroy can actually be viewed, then. All that is necessary to do so is to drive down almost any road. The empty stores, the abandoned filling stations, the factory no longer in operation, the rusting rails on the spur from the main track, the fading signs on the premises, are mute evidence of the destructiveness of taxation. They are the relics of someone's dream and hope. But these visible remains do not tell the whole story of the destruction wrought by taxation. That would have to include all those undertakings that might have been, but were not, were not because inflation and progressive taxation prevented the necessary amount of saving, were not because the cost of the undertaking was made prohibitive at the outset by the necessary recordkeeping, were not because failure in one undertaking forestalled expansion into other fields.

The power to tax, then, is the power to destroy. It is not just the power to destroy if states may tax the Federal government. It is not just the power to destroy if the Federal government may tax the states. It is not just the power to

destroy if the degree is great and abusive. It is destructive wherever it falls and in whatever degree the levy may be.

The courts have never seen fit to extend to the rest of us the protection from this destruction that they have given to the Federal government. It is unlikely that they ever will. Nor is it in the least probable that any other means will ever be used to give us absolute protection from the destructiveness of taxation. As already indicated, the case for taxation is strong and probably conclusive. And, if there is taxation, it will have the effect of destroying some marginal undertakings. There is no way around it, if the reasoning and evidence adduced thus far are correct. What application, then, can be made of the principle that the power to tax is the power to destroy?

We can no more deduce the proper course of action from the axiom that the power to tax is the power to destroy than could Chief Justice Marshall in the case before him. The axiom is valid, but it provides no specific guidelines as to what course to follow. To find this, it is necessary to turn to the purpose of taxation. In turn, the purpose of taxation depends upon the purpose of government. The purpose of government is to keep the peace. The mode by which government properly does this is to use whatever force may be required to restrain and

inhibit disturbers of the peace and effect just settlements among disputants who cannot otherwise reconcile their differences. The purpose of taxation is to raise the money necessary to achieve the ends of government.

The Need for Government

The maintaining of the peace by government is necessary to constructive creative efforts and preserving what is thereby produced. In short, government provides a necessary service by its efforts at maintaining the peace. The cost of that service is a proper charge against those producing and providing goods and services. They are the prime beneficiaries of it and may be expected to bear most or all of the cost. If a business cannot survive its proportionate share of the cost of this protection, it might be better thought of as a victim of its own ineffectiveness rather than of taxation. The power to tax is not only the power to destroy, then, but also a corollary of the power of government to preserve by protecting life, liberty, and property.

Nonetheless, the power to tax is an awesome power to destroy. Like fire and water, when it is tamed, confined, and limited, it serves a useful and beneficent purpose. But uncontrolled and unlimited taxation is like a wildfire or rampaging river out of its banks, destroying

whatever is in its path. Chief Justice Marshall noted in his decision in *McCulloch v. Maryland* that taxation by the Federal government was limited by the uniformity requirement. So it was, until the 16th Amendment was adopted in 1913. This Amendment removed the most important of the restraints imposed by the Constitution, or so it has been interpreted by the courts. Almost simultaneously, Congress set up the Federal Reserve System and has given it increasing power over the money supply. The destructive power of taxation was let loose, and when it is combined with the taxing power of all other government units it makes it increasingly difficult to create or to preserve a worthwhile portion of what has been created.

Two kinds of taxation are so potentially destructive and unjust that they should be absolutely prohibited. One of these is taxation by way of inflation, i.e., by increasing the money supply. The power to tax by inflating is the power to destroy the value of the money. Nor is it a potential power only; every increase of the money supply by monetizing the debt—the prevailing mode of inflation—destroys the value of money in existence to some degree. Inflation is an unjust tax. It penalizes savers and creditors, for the value of the new money is subtracted from the value of money

in hand or loaned out. Moreover, taxation by inflation is unreasonable, for both saving and lending are legal, honorable, and sanctioned as good by the highest authorities. No sound reason can be adduced for penalizing them.

The second kind of taxation that should be prohibited is the graduated or progressive income tax. The graduated income tax destroys incentive to produce and provide goods and services. It attacks saving and investment in just those places where they could be most readily accomplished. It is unjust because it penalizes higher earnings, earnings which in the absence of proof to the contrary are evidence of greater service by individuals and corporations.

Both taxation by inflation and by the graduated income tax lead to a vast amount of wasted energy by citizens in order to preserve what they have created. Not wasted in that they may not be successful in doing so. Not wasted, either, in that they may not be able to use effectively what they have preserved. But wasted because it is energy that could have been spent on constructive undertakings. By imposing these taxes, government shifts from primarily aiding the citizen in keeping what is his to confiscating it from him. Much of the citizen's effort, and that of numerous lawyers, tax experts, and investment

counselors, is devoted to finding ways to avoid paying the taxes or losing what they have by inflation. How much better off Americans would be today if this vast amount of energy could be devoted to productive and creative efforts! Such taxation, too, tends to destroy the rapport between the governors and the governed. Confiscatory government becomes an adversary to be outwitted, not a benefactor to be aided and cherished.

At any rate, taxation must be circumscribed and limited else it will "defeat and render useless the power to create." By what principle should it be limited? There is a principle embedded in our system which provides inherent limits to all taxation. It is so basic to our political institutions that it should govern every legislator, every executive, and every judge. It precedes all our constitutions, all our laws, and all our political institutions. It brought them into existence; it sustains them; without it they are a nullity. It is nothing more nor less than this: All governments in the United States derive their just powers from the consent of the governed. This means, if it has its full meaning, that the people are superior to the government. That which creates is necessarily superior to what it creates. The government of the United States was created by the people. They are

the superior; the governments are the inferior. Taxation by governments, then, is levied by inferiors upon superiors.

The Superior Authority

What rule governs the relation of the inferior power to the superior power? To answer this question, we can turn again to Chief Justice Marshall. In a section already quoted, he declared that "a power to destroy, if wielded by a different hand, is hostile to, and incompatible with, these powers to create and preserve," and that when this situation exists the "authority which is supreme must control." It would be easy to obscure this point, in fact it is regularly done by many political theorists, by having it refer to the mechanisms by which the people control the governments in the United States. It needs to be clear, however, that what we are talking about here is not government at all. The mechanisms by which people control the governments, when and if they do, are really mechanisms of the government—the inferior power here. What is at issue here is the power of creating, producing and providing goods and services and the supreme authority which must control the disposal of them.

Who is the rightful supreme authority over what has been created, produced, or provided? It is he who created, produced, or provided

it. The people brought into being the governments; hence, the people are the supreme authority over them. But "the people" did not bring into being the economic goods and services which are at issue in taxation. These are brought into being by individuals, either by themselves or in co-operation with others. The supreme authority over these creations belongs to those who brought them into being, neither the people collectively, nor their political arm, the government. And, the "authority which is supreme must control."

The principle which inherently limits taxes in the United States is now before us, needing only to be stated. It is this: Taxes must be limited to a degree that will not divest the owner of control over his creations, productions, or provisions. They are his by right, and only so much of them may be taken as is necessary to protect him in his ownership of them. If the government, either by taxation or any other device, comes into control it is the control of the superior by the inferior.

There are certain corollary principles which should control taxation and help to keep it within proper limits.

●1. All taxes should be uniform. Whether levied upon income, wealth, or spending—e.g., sales taxes—a uniform rate should apply

in each particular case. This is not only the just approach to taxation but also it removes the lure of redistribution by which many people approve graduated taxes.

●2. Taxes should be tied as closely as possible to the object for which the money is to be spent. The payment of a toll for the use of a road will illustrate the principle, though it is not always possible to link the taxation as closely as that to its purpose.

●3. Taxes should never be levied for any purpose other than raising revenue. If they are imposed for controlling, regulating or prohibiting something, taxes become not only destructive in character but also in intent, and are an abuse of governmental power.

●4. Government spending should be limited to that necessary to maintaining the peace and providing those services to which the use of force is necessary and proper.

All limitation of government action is a limit on spending, hence upon taxation, and those who seek precise limits would do well to concentrate their efforts on placing these on government action.

Principles only serve as limitations, of course, if they are believed and adhered to by people. There are helpful guidelines, however, to those who have in mind the limiting of government. Government, if it is to be limited, must be limited by


prohibitions on it and by the weight of public opinion and the ballot.

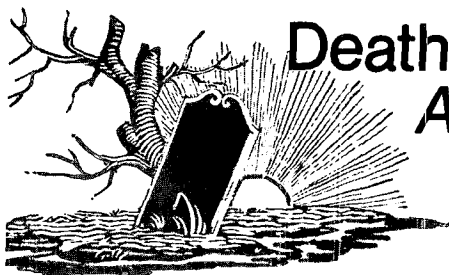
A Congressman once gained a considerable reputation by asking this question after each spending proposal came before the House: "But where is the money to come from to pay for it?" It was, and is, a good question. The axiom that the power to tax is the power to destroy suggests an additional question. Namely, "Who and what is to be destroyed by the taxes to pay for it?" What businesses will fail because of the increased taxation? What services can no longer be offered because of the increased taxation? Whose property is to be confiscated to pay for it? How much of savings are to be subtly seized by the inflation? How many jobs will not be provided because there was no investment to pay for the tools to put men to work productively? What creative energies will be diverted or unreleased because of the taxes to pay for it?

There is no end of laudable objects for which money might be spent. Even children, especially children, are fertile sources of all sorts of spending proposals. In our day, every interest group in the country probably has on its agenda a goodly number of proposals for government spending. Certainly, politicians and bureaucrats bring forth an endless array of notions for

spending taxpayers' money. There are so many goodies to be had if only government would unloose the purse strings and spend, and spend.

Children are so prolific with their spending proposals because their eyes are only on the goodies to be attained, not on the labor, hardship, and even deprivation on which their unwise spending would depend. Many politicians today treat the American people as if they were children, pointing them continually to the goodies to be provided and remaining silent about the price to be paid. They spend and spend to elect and elect, as a New Deal politician was reported to have said. They do something else at the same time: They tax and tax to destroy and destroy. Do they intend the destruction? It hardly matters, for the power to tax is the power to destroy, and there can be no government spending without the taxes to pay for it.

Thomas Jefferson once said that what was wanted was "a wise and frugal Government, which... shall not take from the mouth of labor the bread it has earned." Apropos the axioms announced in Chief Justice Marshall's decision, it is in order to add: "a wise and frugal government which will destroy as little as possible by the taxes it imposes." 



Death and Taxes— A Review

THE IDEA that economic well-being can be created by eliminating means of production is an economic absurdity. The destruction of factories, shops, warehouses, equipment, tools—in short, capital goods—benefits no one. To practice such policies would send man back to struggling for bare subsistence. In view of such obvious consequences, no one could logically advocate policies of capital consumption but rather would encourage capital accumulation. Unfortunately, logic does not always prevail; every day *taxation* destroys existing capital and reduces economic well-being. Dr. Hans Sennholz, in *Death and*

Taxes, demonstrates this impact of taxation and examines especially the results of death duties.

The original role of the federal government was limited to protecting life and property from violence and aggression. Tax laws aimed simply at raising revenue for that purpose. But, as Dr. Sennholz says, "The new America that took shape in our century is a reformatory for man and society. Government has become a powerful agency of reform and redistribution. . . . Our present tax structure openly aims at greater equalization of income and wealth through tax rate progression." His discussion of estate tax history clearly illustrates this transformation.

The first Federal death duty began with a maximum rate of one-

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