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FEDERAL TAXATION AND ECONOMIC STABILITY

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FEDERAL TAXATION AND ECONOMIC STABILITY

The significance of the federal taxing power may no longer be measured primarily in terms of its revenue function.1 Prior to the last fifteen years per-

1. The principle that taxes may be justified under the federal taxing power only if their primary purpose is the production of revenue has been invoked on several occasions to invalidate legislation. If some other purpose is found primarily responsible for the imposition of a particular federal tax, and if that purpose is beyond the power of Congress to effectuate per se, the tax is unconstitutional. E.g., Child Labor Tax Case, 259 U.S. 20 (1922) (tax upon persons employing children under sixteen years of age in industries outside the purview of interstate commerce); United States v. Constantine, 296 U.S. 287 (1935) (excise tax upon occupation of engaging in liquor business within states in violation of state law); United States v. Butler, 297 U.S. 1 (1936) (tax upon processors of basic agricultural commodities).

If, however, an activity taxed falls under permissible Congressional regulation, tax measures have been sustained even though their revenue function has been unquestionably subordinate to their effectiveness as control devices. See Mulford v. Smith, 309 U.S. 33 (1939) (sustaining the validity of a penalty provision in the Agricultural Adjustment Act of 1938, applicable to the market price of all tobacco sold by a farmer in excess of his
haps, the economic impact of taxes imposed to balance the federal budget could be regarded as incidental. Only a small proportion of the nation's income passed through the federal treasury in the form of tax receipts and ex-

quota); Wickard v. Filburn, 317 U.S. 111 (1942) (extending the penalty upon "farm marketing excess" under the Agricultural Adjustment Act to wheat). In Sunshine Anthracite Coal Co. v. Adkins, 310 U.S. 381, 393 (1940) (approving a tax on the sale price of bituminous coal exempting producer members of the code established by the Bituminous Coal Commission), Mr. Justice Douglas emphasized that "this tax is not designed merely for revenue purposes. In purpose and effect it is primarily a sanction to enforce the regulatory provisions of the [Bituminous Coal] Act [of 1937]. But that does not mean that the statute is invalid and the tax unenforceable. Congress may impose penalties in aid of the exercise of any of its enumerated powers. The power of taxation, granted to Congress by the Constitution, may be utilized as a sanction for the exercise of another power which is granted it."

But cf. Sonzinsky v. United States, 300 U.S. 506 (1937) (upholding an annual license tax on dealers in firearms, the Court refusing to look into possible regulatory motives in the imposition of the tax as long as it produced even the most negligible revenue). For a discussion of the constitutionality of taxation for non-fiscal purposes, see TwENTIETH CENTURY FUND, FACING THE TAX PROBLEM 135 et seq. (1937).

In early theoretical disputes over the purpose of taxes two general viewpoints have prevailed. Exponents who have favored the revenue function alone have looked upon taxes only as devices for supporting the fisc on the ground that administrative difficulties make taxation an unreliable mechanism for accomplishing more ambitious purposes. For the best recognized statement of this doctrine, see BASTABLE, PUBLIC FINANCE (3d ed. 1903). Dissatisfied with such a limited concept, especially since the growth of national economics in the past century, other economists have considered taxes as possible means of accomplishing deliberate economic changes for socially beneficial ends. Under this philosophy, taxes have been extolled principally as instruments for redistributing the wealth or income of a nation to promote social equality. For the formulation of these "socio-political principles" of taxation, see Wagner, Finanzwissenschaft (1877). For more recent consideration of the "revenue vs. economic purpose" dichotomy, see Marsh, Taxation Without Tears? 2 et seq. (1945); NEWCOMER, TAXATION AND FISCAL POLICY 32 (1940); Peck, Taxation and Welfare c. xi (1925); Cushman, Social and Economic Control Through Federal Taxation, 18 MINN. L. REV. 759 (1934); Gray, Income Tax Deductions as a Means of Effectuating Governmental Policies, 2 WASH. & LEE L. REV. 191 (1941); Shultz, Regulatory Taxes, 17 Taxes 515 (1939); and articles cited in Griswold, Cases and Materials on Federal Taxation 50, n.5 (2d ed. 1946).

2. Customs duties, excises and income taxes were the principal taxes levied for this purpose. The first tariff act [1 STAT. 24 (1789)] was designed primarily for revenue, and this policy was continued until 1816. Since 1816, however, the tariff, in addition to producing income, has been used also as a weapon to promote American business by guaranteeing domestic markets free from foreign competition. See FAINSOYD and GORDON, Government and the American Economy 85-93 (1941); TwENTIETH CENTURY FUND, op. cit. supra note 1, at 141 et seq.; Faulkner, The Development of the American System, 141 Annals 11 (1929). See, generally, Bidwell, Tariff Policy of the United States (1933); JAMES, Industrial Concentration and Tariffs (TNEC Monograph 10, 1941); TAUSIG, The Tariff History of the United States (1896). For a summary breakdown of federal revenue receipts disclosing the substantial reliance on customs duties as a source of federal revenue during the nineteenth century, and their diminishing importance more recently, see SECRETARY OF THE TREASURY, ANNUAL REPORT 365, 368 (1946).
penditures. But the burgeoning of a currently estimated national debt of $359,000,000,000 precipitated by depression recovery measures and spurred

Excises were the first internal revenue taxes levied in the United States. 1 STAT. 199 (1791) (tax on distilled spirits and stills to provide revenue for debt charges). Since 1865, excises have been resorted to in large number, principally as revenue measures. See JOINT COMMITTEE ON INTERNAL REVENUE TAXATION, CODIFICATION OF INTERNAL REVENUE LAWS XI (1938); Brauer, Excises in 5 ENCYC. SCI. 669 (1931). For the proportion of revenue receipts furnished by internal revenue taxes during the nineteenth century, see Dewey, FINANCIAL HISTORY OF THE UNITED STATES 110, 142, 299, 399, 426, 475 (1909).

The income tax first appeared as a source of federal revenue in 1861, 12 STAT. 309 (1861) (3% levy on all United States residents with net income above $800), as amended, 12 STAT. 473 (1862), 13 STAT. 281 (1864), 16 STAT. 257 (1870); and during the decade of its existence yielded nearly 25% of the total internal revenue. See Klein, FEDERAL INCOME TAXATION 4 (1929); Patterson and Scholz, Economic Problems of Modern Life 325 (1937). Not until the Revenue Act of 1913, 38 STAT. 166 (1913), passed immediately following ratification of the 16th Amendment, did the income tax again assume importance as a source of federal revenue. Since then it has produced an increasing share of total revenue receipts. For one example of proportions in recent years, see note 47 infra.

3. Compare federal expenditures and tax revenue with figures for national income from 1909, date of the first Department of Commerce income estimates, through 1946:

<table>
<thead>
<tr>
<th>Year</th>
<th>National Income</th>
<th>Federal Expenditures</th>
<th>% of National Income</th>
<th>Federal Tax Revenues</th>
<th>% of National Income</th>
</tr>
</thead>
<tbody>
<tr>
<td>1909</td>
<td>28.7</td>
<td>.7</td>
<td>2.44</td>
<td>0.5</td>
<td>1.74</td>
</tr>
<tr>
<td>1915</td>
<td>37.0</td>
<td>.7</td>
<td>1.89</td>
<td>0.6</td>
<td>1.62</td>
</tr>
<tr>
<td>1921</td>
<td>51.7</td>
<td>5.0</td>
<td>9.67</td>
<td>4.9</td>
<td>9.48</td>
</tr>
<tr>
<td>1927</td>
<td>75.9</td>
<td>2.7</td>
<td>3.56</td>
<td>3.3</td>
<td>4.35</td>
</tr>
<tr>
<td>1933</td>
<td>39.6</td>
<td>4.6</td>
<td>11.62</td>
<td>1.8</td>
<td>4.55</td>
</tr>
<tr>
<td>1937</td>
<td>73.6</td>
<td>7.8</td>
<td>10.60</td>
<td>4.3</td>
<td>6.52</td>
</tr>
<tr>
<td>1941</td>
<td>81.3</td>
<td>13.9</td>
<td>17.10</td>
<td>6.9</td>
<td>8.49</td>
</tr>
<tr>
<td>1943</td>
<td>103.8</td>
<td>80.0</td>
<td>77.05</td>
<td>21.1</td>
<td>20.31</td>
</tr>
<tr>
<td>1945</td>
<td>168.3</td>
<td>98.4</td>
<td>58.47</td>
<td>41.0</td>
<td>24.36</td>
</tr>
<tr>
<td>1946</td>
<td>178.2</td>
<td>60.8</td>
<td>34.12</td>
<td>36.2</td>
<td>20.31</td>
</tr>
</tbody>
</table>


4. For significant points in the accelerated growth of the national debt during the last three decades, see 93 Cong. Rec. 10788 (Nov. 20, 1947). For more detailed chronological data since 1919, compiled from Treasury Department Reports, see 93 Cong. Rec. A4375 (Aug. 15, 1947).

5. For a breakdown of federal expenditures during the thirties, see SECRETARY OF THE TREASURY, ANNUAL REPORT 454 (1941). On the recovery program of the Roosevelt administration, see Buehler, PUBLIC FINANCE 65-71 (1936); Hansl, YEARS OF PLUN-
by war expenditures,⁶ has been accompanied by an enormous expansion in both the incidence and degree of taxation. A taxing power so extensively exercised, economists agree, exerts in fact far-reaching economic effects upon business conditions.⁷ And with the establishment in 1939 of the Division of Tax Research of the Treasury Department to investigate the economic aspects of federal taxes as a basis for legislative recommendations,⁸ the position of modern economists has received official recognition.

Once a taxation theory of "economic neutrality"⁹ is discarded, it is apparent that taxes must either be consciously directed toward "economic consistency"¹⁰ or be permitted to modify the national economy at haphazard. By the Employment Act of 1946,¹¹ pledging the Federal Government "to promote maximum employment, production, and purchasing power," "in a manner calculated to foster and promote free competitive enterprise,"¹² Congress

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⁷ Shultz, Regulatory Taxes, 17 Taxes 515, 517 (1939), epitomizes the modern economist's point of view: "A pure tax, one that produces revenue without in any way altering the economic order, is a figment of the fiscal theorists' imagination." For discussions of economic aspects in taxation, see Anderson, Taxation, Recovery, and Defense 24–37 (TNEC Monograph 20, 1941); Dalton, Principles of Public Finance, cc. x, xi, xii (1946); Groves, Production, Jobs and Taxes 9–10 (1944); Marsh, op. cit. supra note 1, at 3–4; Stamp, The Fundamental Principles of Taxation c. v (1936); Coln, Tax Policy and Capital Formation in National Industrial Conference Board, Capital Formation and Its Elements 73 et seq. (1939); Goldenweiser, Jobs in Board of Governors of the Federal Reserve System, Jobs, Production, and Living Standards 1 (Postwar Economic Studies No. 1, 1945).
⁸ Upon request, the Division of Tax Research provides information on aspects of taxation and tax policy for the use of the House Ways and Means Committee, the Senate Committee on Finance, the Joint Committee on Internal Revenue Taxation, and federal administrative and executive agencies. See Graske, Revising Tax Laws, 25 Taxes 205 (1947).
⁹ For the coinage of this term, see Coln, supra note 7; Coln, Conflicting Theories of Corporate Income Taxation, 7 Law & Contemp. Prob. 281, 288 (1940).
¹⁰ Ibid.

Compare the White Paper on Employment Policy issued by the Churchill administra-
seems inferentially at least to have committed itself to an economically-directed tax policy. For taxation, with its demonstrated effect upon business conditions, and thus upon any program for achieving maximum employment and production, is already a responsibility of government. And the indirect government control exerted by taxation does not remove from private management the determination of specific employment, production, marketing and price policies. An economically oriented tax system is thus consistent with the free competition and occupational choice contemplated by the Act.

Accordingly, a study of the economic aspects of taxation and corresponding modifications in the present federal tax system would seem to be an essential part of a program effectuating the Congressionally declared national economic policy.


14. Even under conditions of maximum employment, seasonal, transitional and technological unemployment would result in an idle labor force estimated at 2½ to 3 million out of 60 million. *Hansen, Economic Policy and Full Employment* 103 (1947); *Morgan, Income and Employment* 80 (1947).

15. "Maximum production", as urged in the Employment Act of 1946, has been defined as "that volume of production which the people of a country when given opportunity to apply their labor whenever they see fit and under efficient conditions of employment, will want to turn out before they prefer to turn their time to the enjoyment of leisure." Over a long period of years such a volume contemplates development and conservation of natural resources, adequate capital equipment, programs of job placement and labor training, and constantly improved technological processes. 2 Council of Economic Advisers, *Annual Report to the President* 8 (1947).


THE IMPACT OF TAXES UPON THE BUSINESS CYCLE

In the current postwar period of record employment and production, the immediate problem faced by any program designed to implement the national economic policy is to forestall substantial changes in prevailing economic conditions. It follows that the major objective of such a program today is minimization of the "business cycle." The role assigned enlightened tax administration, then, would seem to be a share of responsibility in averting, in one instance, the idle production facilities, inactive labor forces, and low standards of living characteristic of depression periods; and, in another, the social disorders attendant upon unbridled inflation.

Analysis of the impact of taxes upon the business cycle is facilitated by

18. In June, 1947, civilian employment reached a record peak of more than 60 million. Unemployment averaged only 2.1 million for the entire year, thereby reaching "what is probably the practical minimum" for peacetime. The Economic Report of the President 2, 11-12 (Jan. 14, 1948).

19. Total production in 1947 increased over that in 1946 and was greater than that in any other peacetime year. The Economic Report of the President 2, 11 (Jan. 14, 1948). Production during 1946 was 50% above that in 1939 and only 15% below the wartime maximum. The Economic Report of the President 1 (1947).

20. Business cycles are usually defined as recurrences at irregular intervals of broad fluctuations in general economic activities. Angell, Investment and Business Cycles 3 (1941); Estey, Business Cycles 76 (1942); Mitchell, Business Cycles; The Problem and Its Setting 468 (1928); Schumpeter, The Analysis of Economic Change, 17 Rev. of Econ. Statistics 2 (May, 1935).


Popular references have been made to the assignment given to the Council of Economic Advisers by the Employment Act of 1946 as the job of "taming the business cycle". The Council itself has declared that the Act was aimed at moderating the calamities of business depression. 1 Council of Economic Advisers, Annual Report to the President 9 (1946).

21. The threat of inflation may be more immediate today than the danger of recession. See The Economic Report of the President 34-44 (Jan. 14, 1948). Since the end of World War II, prices have exhibited a marked inflationary trend: From August 1945 to July 1947, for example, the national purchasing power index based on changes in consumer prices decreased from 93.8 to 79.1. National Industrial Conference Board, The Economic Almanac for 1948 52 (1947). The most graphic examples of the havoc inflation can wreak upon business and social organization are recorded in the critical conditions prevailing in Europe following World War I. See Dulles, The Dollar, The Franc and Inflation 51 et seq. (1933) (social structure of France); Landis, An Engineer Looks at Inflation (1934) (general business conditions in Germany and France); Rogers, The Process of Inflation in France, 1914-1927 (1929) (financial system of France); Wright, Inflation and After (1934) (personal security institutions in France, Germany and Austria).
separating the aggregate economic process into three components: **national product**, **national income** and **national spending**. **National product** is customarily defined as the market value of the economic goods and services produced in a designated fiscal period. The term includes both consumption goods and services and investment goods; more specifically, it indicates the natural resources developed, the goods manufactured and the many services rendered in carrying on commerce. National income, on the other hand, comprises the total payments for factor costs of current output. This concept measures, for example, the aggregate payments for raw materials, wages and salaries, rents, interest and profits. **National product** and **national income** therefore, represent the obverse sides of the production process—value and cost.

As monetary equivalents of "production" and "purchasing power", **national product** and **national income** constitute useful indices of the nation's progress toward two of the three objectives of the Employment Act of 1946. Barring a change in the value of money itself, the promotion of "maximum production" and "purchasing power" may then be recast as the promotion of max-

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22. Whether activities are "economic" so as to be included within the concept of national product presents many controversial problems. Official appraisals made by the Department of Commerce, for instance, exclude as unproductive government interest, family services and illegal operations, but include services in kind such as the rental value of homes occupied by owners and banking facilities provided without specific charge. United States Dept of Commerce, op. cit. supra note 3, at 2-3. For variations in the categorization of activities embraced within the national product concept, see Kuznets, National Income and Its Composition, 1919-1938 c. 1 (National Bureau of Economic Research, 1941); Morgan, op. cit. supra note 14, at 4-5.

Further difficulties arise from the expression of national product in gross or net terms. Although the gross figure can be determined with greater statistical accuracy, net national product remaining after the elimination of capital exhausted in production indicates more clearly the increase in real product added by current output. Hansen, Economic Policy and Full Employment 32 (1947); Kuznets, National Income—A Summary of Findings 112 (1946); United States Dept of Commerce, op. cit. supra note 3, at 8, 10-11.

23. Hansen, Economic Policy and Full Employment 37 (1947); United States Dept of Commerce, op. cit. supra note 3, at 8. Total disposable income should be distinguished from the concept of national income. The former includes transfer payments which do not arise out of productive services (such as veterans' allowances, pensions, relief and social insurance payments) and excludes certain deductions from income arising out of productive services (such as contributions to social insurance funds, corporate income and excess profits taxes, and corporate net savings). The latter, however, has been descriptively limited to incomes "created" by suppliers of production factors. Morgan, op. cit. supra note 14, at 5-9.

24. Since net national product is expressed in market value and net national income in factor costs (which include interest and profits but not taxes), statistical measurements of these components differ approximately by the indirect taxes paid by business. Hansen, Economic Policy and Full Employment 37 (1947). For statistically-documented discussions of the relationship between national product (gross and net) and national income, see ibid.; Morgan, op. cit. supra note 14, at 15; United States Dept of Commerce op. cit. supra note 3, at 10, 20.
imum product and income. And realization of these objectives presupposes maximum employment and optimum use of labor, resources and technological skill. At the same time, a gradual increase in product and income, resulting from the gradual perfection in production techniques and the more efficient allocation of resources, can be expected even at a maximum level of employment. Hence the composite goal of the Employment Act may be resolved as the attainment of expanding product and income without a rise in prices and corresponding decline in monetary values.

National income is either consumed, saved or paid to the government in taxes. Consumption expenditures represent private spending for consumer goods and services, leaving savings as the residuum of income neither spent on consumption nor transferred in the form of taxes. The amount of consumption expenditures in any income period depends upon the propensity to consume which can be translated effectively into purchases. Savings provides the primary source of investment expenditures, or private spending for goods to be utilized in further production. But since the amount of investment expenditures in any income period depends upon the over-all attractiveness of risk-taking rather than merely the supply of savings, these expendi-
tures in one period may be either greater or less than savings in the previous period if, in one instance, they are made from borrowed funds in excess of savings or if, in another instance, savings are not fully utilized. Government expenditures may be likened to either consumption expenditures or investment expenditures according to the kind of goods or services purchased with public funds. Consumption and investment, as distinguished from consumption expenditures and investment expenditures, constitute the value of national product consumed and not consumed immediately.

Since income today originates in yesterday's spending, the business cycle is predominantly a phenomenon of the spending process. Modern economists associate recessional and inflationary trends with changes in the flow of income into consumption, savings and tax channels and in the disposition of this income within each channel by consumers, investors and government. Though the emphasis of such explanations may differ, all seem to proceed from the same pattern of reasoning. Given a national income and product in year one, this income and product may either rise or fall in year two depending upon the total amount of consumption expenditures, investment expenditures and government expenditures in the second period. National income and product, therefore, vary with changes in consumption expenditures from one period to another, with changes in the relation of investment expenditures to savings of the preceding period, and with changes in the relation of government expenditures to tax revenues of the preceding period. Deflation, a fall in income, is the result of spending less than the national income for combined consumption, investment and government projects. Inflation, a rise in income, con-

business. See Keynes, General Theory of Employment Interest and Money 150 (1936). The level of total investment, on the other hand, is affected by such societal factors as growth of new industries, growth and shifting of populations, changes in productivity and price levels, unbalanced cost-price relationships and many special causes. Altmann, Saving Investment, and National Income 92 et seq. (TNEC Monograph 37, 1941).


32. Other explanations of the causes of business cycles have included the weather, crop changes, wars, inventions, spontaneous changes in taste, banking policy, and psychological periods of optimism and pessimism. For classifications of the diverse theories of cyclical sources, see Haberler, Prosperity and Depression 5-12, 133-60 (1938); Mitchell, Business Cycles: The Problem and Its Setting 50-3 (1928).

33. Economic views on the causes of cyclical "crises" in business fall into three groups: (1) the undersaving-overinvestment theory; (2) the oversaving-underinvestment theory; (3) the oversaving-underconsumption theory. See Estey, Business Cycles 261 (1942); Haberler, op. cit. supra note 32, at 2 et seq., 111 et seq.; Hayes, Spending, Saving and Employment 196 (1945); Klein, The Keynesian Revolution 134 et seq. (1947); Mitchell, Business Cycles: The Problem and Its Setting 25 (1928); Villard, op. cit. supra note 20, at 57 et seq. For statistical studies of the functional relations among national income, savings and investment see Altmann, op. cit. supra note 30; Ezekiel, Statistical Investigations of Saving, Consumption, and Investment: I, 32 Am. Econ. Rev. 22 (1942); Abramovitz, Savings and Investment: Profits vs. Prosperity?, 32 Am. Econ. Rev. 53 (TNEC Supp. 1942).

34. See Altmann, op. cit. supra note 30, at 4; Wernette, The Control of Business Cycles 64 (1940).
versely, is the result of spending in excess of current national income. This excess of spending may itself result from the creation of new money or credit, the release or purchasing power accumulated from prior periods, or an unusually rapid turnover of funds. To the extent that current production can be sufficiently expanded to absorb the demand, prices of the prior period need not rise; beyond that point inflation must be reflected in an increasing cost of living. A variation in incentives to private consumption and investment expenditures, then, would seem to be the office of any economic device seeking reduction of cyclical fluctuations.

The choice between promoting consumption or investment involves basically the problem of how best to promote the economic progress of the nation. Since a rising standard of living requires the improvement of means of production and allocation of resources, rather than total consumption of current production, incentives to either investment expenditures or consumption expenditures must be addressed to maintaining the rate of capital growth which the society as a whole can accept as an optimum—a rate which does not, on the one hand, impose unduly burdensome restrictions on consumption, nor, on the other, materially slow down the rate of increase in real incomes.

But a long range solution to the problem of raising the standard of living is not inconsistent with, and may depend upon, an answer to the problem of cyclical control. Compensatory government fiscal policy has been the device most frequently suggested for the latter role. More specifically, variation in government expenditures alone, tax revenue remaining constant or varying less than expenditures, has been prescribed to offset underspending and overspending by private consumers and investors. Because of the predominance of depression problems in American commercial history, this remedy has been in-

35. One of the primary factors responsible for the present inflationary trend in business has been the tendency to "dishoard" some $10 billion of money issued during the war in excess of the national needs for actual circulating media. See Kuthe, PRICES AND BUSINESS IN 1947 11 et seq. (1946). In March, 1947, the volume of money in circulation was estimated to be 75% of the total income, as compared with a usual ratio of less than 50%. Burgess, NATIONAL DEBT, INTEREST RATES AND THE SAVER, Commercial and Financial Chronicle, March 13, 1947, § 1, p. 1374, col. 2-4.

36. The doctrine of government compensatory fiscal policy to combat cyclical unemployment takes its origin from the writings of Keynes. Keynes pointed out that control of an economy predicated on the laissez-faire theory that aberrational economic forces are automatically brought into line by the operation of the interest rate and the price mechanism has proved to be historically inadequate to forestall periods of extremes in business—either depressions or boom eras. To achieve an equilibrium among economic forces at a level of maximum employment, he proposed to supplement laissez-faire by government intervention in the economy in the form of 1) government spending; 2) control of the rate of interest; 3) and reduction in the inequality of incomes. Keynes, THE END OF LAISSEZ-FAIRE (1926); Keynes, THE GENERAL THEORY OF EMPLOYMENT INTEREST AND MONEY (1936); Hayes, op. cit. supra note 33, at 133 et seq.

For general discussions of the use of compensatory fiscal policy, see Anderson, op. cit. supra note 7, at 27; Hansen, Economic Policy and Full Employment 11, 110 (1947); Marsh, op. cit. supra note 1, at 18; Blakey, Tax Problems of the National Government, 25 TAXES 320, 323 et seq. (1947); Colm, Fiscal Policy, 2 TAX L. REV. 1 (1946).
voked only to compensate for deficiencies in private spending, as in the "pump priming" era of deficit financing during the 1930's. Although dissent has been voiced, there is considerable evidence that these measures, by increasing both consumption expenditures and investment expenditures, have been at least in part responsible for recovery from recession. And returning less to the na-


38. It is generally recognized that public spending from 1932–1937 was directly successful in reducing unemployment and in increasing consumption expenditures. Gilbert, An Economic Program for American Democracy 24–5 (1938). By increasing consumption expenditures, moreover, public spending secondarily furnished the impetus for substantial expansion of private investment expenditures to finance the production of consumer goods. Ibid.; Hansen, Full Recovery or Stagnation? 277 (1938); Villard, op. cit. supra note 20, at 359–60. As a result, national income rose rapidly from a low mark of $41.7 billion in 1932 to $73.6 billion in 1937, considerably outstripping federal net income-increasing expenditures for those years. United States Dept. of Commerce, op. cit. supra note 3, at 14; Gayer, Fiscal Policies, 28 Am. Econ. Rev. 90, 97 et seq. (Supp. 1933); Haley, The Federal Budget: Economic Consequences of Deficit Financing, 31 Am. Econ. Rev. 67, 69 (Pt. 2 1941).

Difference of opinion regarding the efficacy of deficit spending as a permanent recovery measure, however, arose out of the acute business recession in 1937. Some critics claim that the success of deficit spending as an interim economic measure is to be determined by the extent to which private business can maintain higher levels of production, income and employment when the "artificial" government stimulus is removed. Gilbert, op. cit. supra, at 27; Newcomer, op. cit. supra note 1, at 75; Villard, op. cit. supra note 20, at 365. To these observers, the crucial test of the federal spending program of the early 1930's came in late 1935 and 1937, when public expenditures were tapered in an effort to balance the budget. League of Nations, World Economic Survey 1937–33, 21, 22 (1938); 131 The Economist 233 (1938). Accordingly, the sharp curtailment of economic activities in 1937 indicated to them the failure of the compensatory fiscal policy previously pursued. Private investment, they said, had not sufficiently rallied because of the impeding effect of large public expenditures, and therefore whatever recovery had been accomplished was a "consumption recovery," which collapsed when the government ceased to provide consumer funds. Gilbert, op. cit. supra, at 28; Hansen, Full Recovery or Stagnation? 274, 281 (1938). Factually-supported dissents have been raised to this characterization of the recovery on the theory that the deficiency in private investment development was confined to long-term investment, such as permanent building and construction, for short-term investment, such as inventories, rose rapidly immediately before 1937. Feldner, Monetary Policies and Full Employment 35 (1946); Samuelson, supra note 37. But, regardless of the nature of the recovery, the contraction in investment which occurred in 1937 and the consequent drop in national production, income and employment have been attributed not as much to the shortcomings of deficit financing as to other forces, such as the initial impact of several concurrent administration policies which temporarily counteracted the incentive to investment expenditure—e.g., enactment of the undistributed profits tax and regulatory laws for security markets. Buehler, The Undistributed Profits Tax 33–6 (1937); Newcomer, op. cit. supra note 1, at 75; Hough, The 1937 Bond Market, 136 Bankers' Magazine 60 (1938). If this explanation be true, deficit spending
tional income stream through government expenditures than is drawn from the stream in taxes would seem correlatively effective to restrain inflationary movements. 39

Since government spending affects national spending merely to the extent that it differs from revenue receipts, however, it is the accompanying tax policy which resolves the net economic impact of government expenditures. 40 A variation in federal tax receipts, and therefore in government borrowing, may thus be utilized independently of federal expenditures to perform similar countercyclical functions. 41 Except in periods of severe financial distress when tax relief per se may be insufficient to compensate for the diminished expectations of future profits from investment, tax changes may well be preferred to a revision in expenditures. Urging business itself to dispel incipient reces-

should not be condemned as a poor counter-cyclical weapon because of the unfavorable reaction of an investment market depressed by factors foreign to the spending program itself. For an exhaustive study of the causes and manifestations of the 1937 recession, see the unpublished doctoral dissertation of Kenneth Roose, The Recession and Revival of 1937-1938, on file in the Yale University Library. For general discussions of the economic utility of deficit financing, see Groves, Postwar Taxation and Economic Progress 365 (1946); Nichols and Roskam, Pump-priming Theory of Government Spending (1939); Villard, op. cit. supra note 20, at 365 et seq.; Williams, Deficit Spending, 31 Am. Econ. Rev. 52 (Pt. 2 1941).

39. See The Economic Report of the President 47-8 (Jan. 14, 1948). An excess of revenue, if obtainable, would be applied against the national debt. A decrease in an internally-held national debt is purely a transfer transaction between taxpayers and bondholders. Hansen, Economic Problems of the Post War World 38 (1942); Hansen, Fiscal Policy and Business Cycles 140-4 (1941). Since the debt is held principally by banks, other corporations and wealthier individuals, however, debt reduction can be deflationary. See Secretary of the Treasury, Annual Report 60 (1946) (ownership of federal securities by investor classes). For the quantity of money or credit issued by banks decreases and the holders of retired bonds have a greater tendency and ability to save than do the general group of taxpayers from whom taxes are collected. See Groves, Postwar Taxation and Economic Progress 358 (1946); Marsh, op. cit. supra note 1, at 78-80. Cf. Lutz, Public Finance 632 (4th ed. 1947).


41. Tax adjustments intended to vary total private spending, as for example, to increase either private investment or consumption expenditures without a corresponding decrease in the other, can be accomplished only by varying total tax receipts. Unless the adjustment is confined solely to changing the ratio between investment and consumption expenditures, therefore, a variation in government borrowing is necessary. See Groves, Postwar Taxation and Economic Progress 364 (1946); Paul, Taxation for Prosperity 345 et seq. (1947).
sions by freeing potential consumption and investment forces from tax burdens would seem more "calculated to foster and promote free competitive enterprise" than government subsidies and public works. In like manner, withdrawing inflationary sources of spending from consumers and investors would seem preferable to government price ceilings as a means of checking a rise in the cost of living.

There are limits, nevertheless, to a compensatory expenditure or tax program. Since the "compensatory" feature of such a program lies in supplementing or counteracting national spending, rather than in balancing annual deficits and surpluses, and since anti-depressional revenue deficits have in fact considerably outweighed anti-inflationary or prosperity surpluses, the long run usefulness of government fiscal policy seems to be circumscribed by a practical limit of the public debt. Unless the interest payments on government obligations can be met from current taxation, default or reduction of the gold value of the currency may be necessary. A countercyclical tax

42. A balanced annual budget is in itself a meaningless goal and clearly inconsistent with a compensatory fiscal policy, since business cycles do not coincide with fiscal periods. See Goldenweiser, supra note 7, at 16. But compare the dissent of Henry Hazlitt in The Full Employment Bill—An Analysis 26 (American Enterprise Ass'n Problem No. 415, 1945) : "The only 'substitute' for the [Murray Full Employment] bill [based on the premise of compensatory fiscal policy] ... would be an announcement by Congress of its determination to bring the Federal budget into balance at the earliest practicable moment."

The first endorsement by Congressional leaders of unbalanced budgeting is contained in an amendment to the Murray Full Employment Bill proposed by Senators Taft and Radcliffe and unanimously passed by the Senate. By its terms, a federal spending program to counteract depression was to be accompanied by taxation merely sufficient to foreclose net increase in the debt over a "reasonable number of years." 91 Cong. Rec. 9144 (1945). The amendment, however, was not included in the Act as finally passed. See Hansen, Economic Policy and Full Employment 113-4 (1947). For a good discussion of the problems in a cyclical budget-balancing program, see Groves, Postwar Taxation and Economic Progress 356 et seq. (1946).

43. For the prominence of deficits among annual Treasury balances, see Secretary of the Treasury, Annual Report 365-71 (1946) (summary of annual operations, 1789-1946). Since 1900, for example, 27 of the 46 years have disclosed deficits consistently larger than the surplus figures for remaining years.

44. The statutory limit of the national debt now stands at $275 billion. 60 Stat. 316 (1946), 31 U.S.C.A. § 757(b) (Supp. 1947); see Secretary of the Treasury, Annual Report 65-7 (1946). The actual debt is currently estimated at $239 billion, note 4 supra.

45. That such are the alternatives to retirement of the public debt may be seen in the experience of many European countries and the Confederate States following the Civil War. Groves, Financing Government 555-6 (1945); Lutz, Public Finance 630 (4th ed. 1947); Newcomer, op. cit. supra note 1, at 76-8.

Short of the outside limit at which current taxation cannot meet interest payments, there is little agreement among economists as to the permissible size of the public debt, although the great majority seem to agree that this figure must be determined relative to the size and distribution of the national income. Groves, Financing Government 544 (1945); Hansen, Fiscal Policy and Business Cycles 168 et seq. (1941); Newcomer, op. cit. supra note 1, at 77. The basis of disagreement, where substantial, seems to be the stand taken toward an increased direct participation by government in enterprise. Newcomer, op. cit. supra note 1, at 76, 78-9. Experience in foreign countries has indicated that
program of indefinite duration, therefore, must take into account not only the
net government contribution to national spending but also the net government
receipt of revenue so that the debt will always remain easily serviceable by
current taxation. 46

CYCLICAL ADAPTABILITY OF THE INCOME TAX

Assuming that some revision of the federal tax system to facilitate cyclical
control is desirable in the light of a declared national economic policy, it does
not seem necessary to utilize all federal taxes in such a program. Several
features qualify the income tax as best adapted for stimulating or curbing dis-
cordant consumption and investment tendencies. 47

Of primary importance is the automatic adjustability to cyclical needs which
income tax yields have displayed in the past—diminishing more perceptibly in
depression and increasing more heavily in prosperous years than other tax
yields. 48 This elasticity of return accompanying fairly stable government ex-
a debt equal to twice the national income can be easily serviced by current taxation.
GROVES, POSTWAR TAXATION AND ECONOMIC PROGRESS 359 (1946); HANSEN, ECONOMIC
PROBLEMS OF THE POST-WAR WORLD 36-7 (1942). Accordingly, if recent annual national
incomes of approximately $180 billion can be maintained, or increased, the debt might be
built up to at least $360 billion without alarm. NATIONAL INDUSTRIAL CONFERENCE BOARD,
THE ECONOMIC ALMANAC FOR 1948, 335 (1947).
46. Interest upon the outstanding federal debt is approximately 2% or $5 billion per
year. ABBOTT, MANAGEMENT OF THE FEDERAL DEBT 83 et seq. (1946); SECRETARY OF THE
TREASURY, ANNUAL REPORT 64 (1946). The burden of such charges is best seen, however,
by a comparison of interest with national income. MORGAN, op. cit. supra note 14, at 236-7.
47. Federal estate and gift and social security taxes, tariffs, and excises are not con-
sidered essential to a countercyclical tax structure primarily because of the minimal impor-
tance of their yield relative to the income tax. In 1946, for example, the distribution of
revenue receipts by major sources was as follows:

<table>
<thead>
<tr>
<th>Source</th>
<th>Revenue Receipts</th>
<th>Income and Profits</th>
<th>% of Total Receipts</th>
</tr>
</thead>
<tbody>
<tr>
<td>Income taxes</td>
<td>6995</td>
<td>3945</td>
<td>58.9</td>
</tr>
<tr>
<td>Miscellaneous internal revenue taxes (including estate and gift and excise taxes)</td>
<td>3780</td>
<td>1761</td>
<td>46.6</td>
</tr>
<tr>
<td>Employment taxes</td>
<td>4033</td>
<td>2331</td>
<td>57.8</td>
</tr>
<tr>
<td>Customs</td>
<td>2006</td>
<td>1057</td>
<td>52.7</td>
</tr>
<tr>
<td>Miscellaneous receipts</td>
<td>3800</td>
<td>1099</td>
<td>28.9</td>
</tr>
<tr>
<td>Total receipts</td>
<td>7607</td>
<td>3470</td>
<td>45.6</td>
</tr>
</tbody>
</table>

SECRETARY OF THE TREASURY, ANNUAL REPORT 368-70 (1946). During the depression
of the 1930's, income tax rates were raised to the level of World War I. Yet the per-
penditures approximates, in fact, deliberate compensatory action by the government. Furthermore, since the federal income tax applies to net income, and thus does not add to costs of production, it exerts a less complex effect on national spending than other taxes. The impact of these other taxes can be determined only by tracing increased costs through the pricing process to consumers and investors, whereas the impact of the income tax falls directly on the consumption and investment expenditures of the corporation or individual on whom it is levied.

What revision is necessary then to conform the federal income tax system to a countercyclical program? Exactly what amendments can be devised in combination with other countercyclical measures to maintain national spending at a point consonant with maximum employment, production and purchasing power? The answer, of course, must depend upon the effect of particular elements in the personal and corporate income taxes on consumption and investment expenditures.

The influence of the personal income tax upon total national spending is primarily determined by the breadth of base, on the one hand, and the progression of surtax rate, on the other. The former, for instance, has been shown statistically to coincide closely with national consumption expenditures because of the concentration of potential purchasing power among consumers in the lower income brackets. Increasing the supply of funds available to these consumers by raising the normal tax exemption tends to increase consumption and subsequent national income; conversely, decreasing the exemption would tend to reduce excessive inflationary consumption expenditures.

A variation percentage of total federal tax receipts coming from income and profits taxes in each of the years 1933-1936 was lower than in any year since 1917. Twenty-First Century Fund, op. cit. supra note 41-2.


50. In 1938-1939, for example, less than 10% of income was saved by income classes up to $3000. The consumer income represented by these classes amounted to more than $47 billion out of a total consumer income for all income classes of approximately $70 billion. Colx and Tarasov, Who Pays the Taxes? 6, 33 (TNEC Monograph 3, 1941); Marsh, op. cit. supra note 1, at 53.


in consumption may, through the medium of profits, also affect the propensity to invest in a later period. But, in the light of changing economic conditions, any permanent alteration in the normal tax exemption would seem as ineffective to accomplish cyclical control as none at all.

Just as breadth of the tax base corresponds to national consumption expenditures, it would seem that precipitousness of the surtax rate should bear directly upon total investment expenditures. Indeed, this would be true if the profits of investment were distributed to individuals upon whom the surtax is levied. In recent years, however, individual stockholders have received less than half of corporate profits after taxes, the undistributed portion being reinvested by corporations and subjected, not to the high personal surtax, but to the lower capital gains tax upon the profits realized when corporate stock changes hands. Although section 102 of the Internal Revenue Code is designed to close this loophole in the personal surtax by penalizing an “unreasonable” accumulation of surplus, it does not reach profits retained for the needs of a business. Yet, to the extent the personal surtax is not avoided, the progressive absorption of individual savings which it accomplishes affects both the supply of investment capital and, perhaps more sig-

<table>
<thead>
<tr>
<th>Year</th>
<th>Corporate Profits</th>
<th>Dividends</th>
</tr>
</thead>
<tbody>
<tr>
<td>1941</td>
<td>9386</td>
<td>4465</td>
</tr>
<tr>
<td>1942</td>
<td>9433</td>
<td>4297</td>
</tr>
<tr>
<td>1943</td>
<td>10363</td>
<td>4477</td>
</tr>
<tr>
<td>1944</td>
<td>9972</td>
<td>4689</td>
</tr>
<tr>
<td>1945</td>
<td>8939</td>
<td>4765</td>
</tr>
<tr>
<td>1946</td>
<td>12539</td>
<td>5614</td>
</tr>
</tbody>
</table>

United States Dep't of Commerce, op. cit. supra note 3, at 19 (Table 1). Although this “conservative” dividend policy during the World War II years was caused partially by the establishment of reserves in preparation for postwar reconversion costs, in the main the undistributed profits constituted an accumulation of unearmarked surplus. See Derrickson, Trend of Corporate Profits 1929-45 in United States Dep't of Commerce, Survey of Current Business 9, 15-6 (April, 1946).

54. 25% is the maximum tax rate on capital gains. Int. Rev. Code § 117(a)-(c); U.S. Treas. Reg. 111, § 29.117-3 (1943).


57. For discussions of the problems of enforcement in § 102 of the Code, see Cary, Accumulations Beyond the Reasonable Needs of the Business: The Dilemma of Section 102(c), 60 Harv. L. Rev. 1282 (1947); Note, 57 Yale L.J. 474 (1948). A collateral effect of § 102, combined with high personal surtax rates, may be to encourage corporations to make investment expenditures classifiable in the eyes of the Commissioner of Internal Revenue as legitimate business expansion.

58. Since savings form a residuum in the higher income classes after consumption
significantly, the propensity to invest. For the willingness of private investors to put their own savings into risk ventures and of entrepreneurs to "invest" their personal endeavors and the savings of others in the productive process depends at least in part upon the retainable profits accruing therefrom. Hence mitigation of tax rates upon middle and upper income groups, insofar as they would apply to profits passed on to individual stockholders, would encourage individual investment expenditures and effort and tend to increase the national product and income. Or inflationary overspending by individuals for capital goods could be discouraged by an increased surtax rate. In either case subsequent consumption would also be ultimately affected. Again, however, the precise determination of a desirable and effective surtax rate must depend upon the economic "state of the nation."

In addition to variations in base and rate, exemptions, deductions and special rate provisions determining computation of the personal income tax may affect the balance between consumption and investment expenditures. For example, exclusion from gross income of federal pension allowances to veterans and social security benefits, deduction from adjusted gross income of state and local sales taxes, and perhaps deduction of a limited amount of medical and dental expenses, principally affect consumption expenditures. In like manner, the exemption of interest on state, municipal and certain out-

expenditures and taxes have been subtracted from income, changes in tax rates applying to these incomes affect savings, and thus investment expenditures, more than consumption expenditures. COLE AND TARASOV, op. cit. supra note 50, at 33.

59. Although a substantial amount of individual savings is directly invested, a larger proportion is deposited in banks or paid to insurance companies and then finally invested by entrepreneurial interests through these financial institutions. ALTMAN, op. cit. supra note 30, at 4.

60. Heavy taxation of investment yields will cause many people to hold on to cash balances in preference to sinking them in risky ventures. See Musgrave, Federal Tax Reform in Board of Governors of the Federal Reserve System, Public Finance and Full Employment 22, 31 (Postwar Economic Studies No. 3, 1945). An investment which is especially risky, but which may return gain sufficient to raise an individual's taxable income several brackets, will be seriously discouraged by a high income tax. Bronfenbrenner, Diminishing Returns in Federal Taxation, 50 J. Pol. Econ. 699 (1942). The "limit of taxation" is said to be reached when any further rise will deter the capitalist from making extra efforts to produce in larger quantities or in a more efficient manner. See MORGAN, op. cit. supra note 14, at 197; TWENTIETH CENTURY FUND, op. cit. supra note 1, at 61; Editorial, 141 THE ECONOMIST 411 (1941).


63. INT. REV. CODE § 23(c) (3).

64. INT. REV. CODE § 23(c), as amended by Pub. L. No. 471, 80th Cong., 2d Sess., § 304 (April 2, 1948).
standing federal obligations, capital loss carry-over privileges, the family income-splitting provisions of the Revenue Act of 1948 and probably most important of all, the separate rates on capital gains are closely associable with investment spending.

The thrust of "investor taxes" may be upon the composition as well as the quantum of national investment. Thus, through favorable tax treatment of interest earned from state and municipal bonds, savings may be channeled from investment in private business to investment in government projects.

The corporate income tax represents another device, with perhaps more limited possibilities, for controlling national spending. Since the present tax cannot be shifted to the corporation's employees or consumers as a production cost, despite occasional statements to the contrary, its major impact in both base and rate seems to fall more on the side of savings than consumption expenditures. For the profits of a corporation may be followed finally either to the stockholder-saver who receives dividends reduced by the amount of the corporate tax, or to the corporation itself which may retain part of its earned surplus for capital expansion or reinvestment for its stockholders.

Through the various provisions governing its computation, the corporate income tax may affect the quality as well as the quantity of investment expenditures. Such provisions as loss carry-over privileges and depreciation sched-

65. Inter. Rev. Code § 22(b) (4) (interest on obligations of the United States issued before March 1, 1941, if tax exempt by act authorizing issuance; and interest on not over $5000 of United States Savings bonds, at cost, and Treasury bonds, at face value, issued prior to March 1, 1941). This exemption applies to corporate as well as individual taxpayers.


67. Pub. L. No. 471, 80th Cong., 2d Sess., § 301 (April 2, 1948). Computations prepared by the Treasury Department prove, for example, that the decrease in tax liability accomplished by dividing taxable income between husband and wife substantially benefits only income classes above $5000 annually. Division of Tax Research, Treasury Department, The Tax Treatment of Family Income Table 2 (June, 1947); Comment, 57 Yale L.J. 788, 805 (1948).

68. See notes 54 and 55 supra.

69. For comments and references upon the distribution of investment expenditures resulting from tax exemption of public securities, see Lutz, The Fiscal and Economic Aspects of the Taxation of Public Securities 119, 148-57 (1939); Powell, National Taxation of State Instrumentalities 59, 62 (1936); Schultz, Tax Exemption of Governmental Securities, 17 Taxes 331, 332 (1939).


71. The proportion of annual national income represented by corporate profits before tax since 1940, for example, has amounted to only 10-15 percent of personal income (the sum of wage and salary receipts, proprietary and rental income, interest, dividends and transfer payments). See United States Dep't of Commerce, Survey of Current Business 19 (Tables 1, 3) (National Income Supp. July, 1947).

72. See note 49 supra.


74. Id. at 629.

75. Present law permits carry-back and -over of business net operating losses for two years each and carry-forward of net capital losses for five years. Int. Rev. Code § 117(e) (1), 122 (b) (3). For recommendations of longer periods contributing to the attractiveness of risk-taking and to cyclical business stability, see Groves, Production,
ules exert a general effect on total investment much the same as cognate provisions in computing the personal income tax. And the mere existence of a corporate income tax in theory operates to some degree to direct investment into non-corporate forms. In addition, permitting interest, but not dividends, as a business deduction, for instance, tends to induce heavy corporate bond issues. The accrual of fixed interest charges on these bonds during recessional periods, according to many observers, contributes to the bankruptcies and reorganization which may well exert an adverse influence on production.

Advocates of recent tax proposals usually frame amendments to the Internal Revenue Code in terms of the effect of such amendments on either consumption or investment. Those favoring the encouragement of consumption expenditures generally seek to modify the rate or exemption on lower income groups. And pro-investment suggestions follow a similar, but rather more elaborate, pattern for the higher income groups—offering numerous special provisions designed to reduce the “confiscatory” or “prohibitive” tax burden on selected classes of savers who provide the funds for investment expend-

76. Depreciation, including obsolescence, is now allowed only to the extent of a “reasonable” amount for “exhaustion, wear, and tear” of an asset. Int. Rev. Code §23(1). Liberalized permission to businesses to shorten the depreciable life of assets, thus decreasing the accounting profits and the size of income tax payments and encouraging rapid replacements of fixed equipment fully depreciated for tax purposes, has been advanced as a stimulus to investment expenditures. See Groves, Production, Jobs and Taxes 62 (1946); Musgrave, Federal Tax Reform in Board of Governors of the Federal Reserve System, Public Finance and Full Employment 22, 40 (Postwar Economic Studies No. 3, 1945); Seghers, Accelerated Depreciation, 25 Taxes 645 (1947).

77. Because of its own progressive rates plus the added burden of a personal income tax on dividends distributed by a corporation, the federal tax on corporate income is clearly higher than the tax on income of unincorporated enterprise of analogous size. However, it is unlikely today, except perhaps in the cases of small enterprises, that the corporate tax per se is a significant incentive for transforming corporations into partnerships or other forms of unincorporated business organization. For use of the corporate form of business permits accumulation of earnings and avoidance of high surtax rates applicable to the earnings of unincorporated business. See notes 54, 55 and 57 supra. And other non-tax considerations, such as limited liability and absentee ownership, outweigh the tax disadvantage of the corporation. See Shultz, Economic Effects of a Corporate Income Tax, 21 Taxes 598, 600-01 (1943); cf. Bock, Taxation Trends from the Management Standpoint, 23 Taxes 1054 (1945) (noting some dissolutions of corporations in favor of partnerships in the past, but a reversal of trend in more recent years). Compare the similar effect upon the relative incentive to invest in corporate and government enterprise, note 69 supra.

78. Int. Rev. Code, § 23(b).

79. See Groves, Production, Jobs and Taxes 25, 26 (1944); Hansen, Economic Problems of the Post-War World 41 (1942); Goldenweiser, supra note 7, at 9; Levinson, The Integration of Taxes on Income, 25 Taxes 404, 405-6 (1947); Rumil, Fiscal Policy and the Taxation of Business, 1 Tax L. Rev. 75, 81 (1945); Simons, Federal Tax Reform, 14 U. of Chi. L. Rev. 20, 63-5 (1946).
Thus, a proposal to revise the basis of income tax computation by averaging erratic individual incomes over a series of fiscal years may be rationalized as a device to shift investment to less conservative capital outlets. Similarly, exemptions or lower rates for small and youthful corporations have been urged as stimulants of new risk enterprise.

Administration of a Counter-cyclical Tax Program

Even though many proponents of federal tax revision have recognized the economic utility of taxation, specific plans have been too short in range to provide counter-cyclical control. For in the main these proposals have been directed toward the mere attainment of maximum peacetime production, employment and purchasing power. It is clear, however, in view of the constantly changing economic forces other than taxation, that any permanent revision of the income tax or rate cannot maintain equilibrium among consumption, investment and savings once a desirable ratio is struck. Deliberate use


For excellent objective compilations of possible tax changes influencing both components of national spending, see Musgrave, Federal Tax Reform, in Board of Governors of the Federal Reserve System, Public Finance and Full Employment 25 et seq. (Postwar Economic Studies No. 3, 1945); Studenski, Tax Program for Post-War, 80 Trusts & Estates 15 (1945).

81. An unavoidable objection to the averaging device seems to be administrative difficulty involved in refunding overpayments. Also, since the base for an average must be fixed in the first year of payment, the taxpayer is often required to pay on a basis that later becomes unrepresentative of his income. See Groves, Production, Jobs and Taxes 84, 85 (1944); Musgrave, Federal Tax Reform in Board of Governors of the Federal Reserve System, Public Finance and Full Employment 22, 34 (Postwar Economic Studies No. 3, 1945).

82. See Hansen, Economic Policy and Full Employment 144 (1947); Kimmel, op. cit. supra note 80, at 17; Goldenweiser, supra note 7, at 9; Musgrave, Federal Tax Reform in Board of Governors of the Federal Reserve System, Public Finance and Full Employment 22, 36-7 (Postwar Economic Studies No. 3, 1945); National Lawyers Guild, Committee on Taxation, supra note 80. Safeguards would have to be provided under this proposal against splitting up of corporations to make use of multiple exemptions.
of this levy to implement the Employment Act of 1946 must presume flexibility at least in its rate and base— the elements which influence current national spending and subsequent national income most ascertainably. Moreover, the wide divergence of consumption and investment philosophies espoused in postwar tax programs points up the necessity for administration of a flexible tax system by an authority divorced from private interests and currently informed on national production, income and spending.

Congress is the constitutionally appointed tax authority. Two features in the existing legislative process, however, militate strongly against direct Congressional supervision of a countercyclical tax program. First, before revenue legislation reaches statutory form today, it must undergo seriatim the advice of the Treasury Department, the President, the Ways and Means Committee of the House of Representatives, the Joint Committee on Internal Revenue Taxation of both houses, the Committee of the Whole House, the House, the Committee on Finance of the Senate, the Senate and the President again. The prolonged time interval involved in such parliamentary procedure may well defeat a program in which speed is fundamental. Second, even with the facilities of committee hearings and debates over pending tax bills, Congressmen with manifold duties of office cannot be expected to qualify as well as economic technicians in recognizing the symptoms of maladjustments in the flow of national income through the various institutions which may effectively narrow or enlarge it and in ordering appropriate compensatory relief.

Two substitutes may be suggested for avoiding the inexpediencies of present Congressional procedure. By the first, Congress could delegate a part of its tax power, the power to amend the income tax rate or base within fixed limits, to an administrative authority equipped with economic analysts and statistical fact-finding personnel. Or, alternatively, Congress could retain the

83. Senator Morse recently presaged the need for flexibility in the tax structure in amendments to H.R. 3950, which were rejected by the Senate. See 93 Cong. Rec. 8579, 8762, 8770 (1947). For other recommendations of a flexible tax policy, see Hansen, Economic Policy and Full Employment 140-2 (1947); Hansen and Perloff, State and Local Finance in the National Economy 255-6 (1944); Goldenweiser, supra note 7, at 14.

Flexibility should be confined within the limits of a basic tax structure of relatively stable rates and base in order to create confidence in businessmen for planning without the risk of sharp reversals in government tax policy. See Groves, Postwar Taxation and Economic Progress 12, 361 (1946); Hansen, Economic Problems of the Post-war World 43 (1942).

84. Fassett, Summary of Procedure in Preparation, Consideration, and Adoption of the Federal Budget, and the Method and Sequence in the Enactment of Revenue Legislation 12-3 (1940). In major tax legislation enacted between 1926-1946, as many as 3 months elapsed before many bills became law after being passed by the House of Representatives. See 93 Cong. Rec. 5599-5600 (1947).

85. See Groves, Postwar Taxation and Economic Progress 360 (1946).

86. "Immense power, of course, resides in the employment of taxation avowedly for social ends. Normally, however, it suffers from an inability to provide flexibility of treatment and continuity of concern with given segments of our industrial civilization—at-
taxing power but modify the income tax rate or base by some abbreviated procedure upon the recommendation of an advisory group of economists. Both methods possess the advantages of circumventing time lags fatal to the purpose of remedial tax measures and of affording economically sounder tax action. Although a degree of error in prediction of consequences would certainly obtain even in the recommendations of economists, mistakes would be readily correctible because of the "trial and error" permitted by flexible tax administration.

A delegated tax authority finds analogy in the Federal Reserve Act and the Trade Agreements Act of 1934. Since 1913, the Board of Governors of the Federal Reserve System has occupied a kindred supervisory position in the field of banking. Through its power to influence the extension of credit by the banking system, the Board of Governors controls to a considerable extent the national spending process and thus seeks to minimize inflationary or recessional business trends. And, similarly, Congress has empowered the President, assisted by the fact-finding and recommendations of the Tariff Commissions that characterize the administrative process." Landis, The Administrative Process 119-20 (1938).

Various forms for an administrative tax authority have been suggested: Groves, Postwar Taxation and Economic Progress 360 (1946) (undefined "administrative agency"); Hansen, Economic Policy and Full Employment 141 (1947) (the President); Paul, Taxation for Prosperity 397-8 (1947) (Treasury Dep't); Coln, Tax Policy and Capital Formation in National Industrial Conference Board, Capital Formation and Its Elements 73, 83 (1939) ("executive arm of the Government"); Graske, supra note 8, at 206 (board of advisory tax experts); Lutz, Tax Simplification, 22 Taxes 251 (1944) (Joint Congressional Committee assisted by advisory council of experts); Muesecke, Federal Tax Reform, in Board of Governors of the Federal Reserve System, Public Finance and Full Employment 22, 43 (Postwar Economic Studies No. 3, 1945) (representatives of both legislative and executive branches).

87. See p. 1258 infra.
91. The Board of Governors has declared that the objective of Federal Reserve policy is "to maintain monetary conditions favorable for an active and sound use of the country's productive facilities, full employment, and a rate of consumption reflecting widely diffused well-being." Board of Governors of the Federal Reserve System, op. cit. supra note 90, at 115.
sion, to modify import-export duties for the purpose of expanding foreign markets for American products. In language resembling the policy declaration of the Employment Act of 1946, this delegation of tariff regulation was intended, inter alia, to help "in overcoming domestic unemployment and the present economic depression, [and] in increasing the purchasing power of the American public."  

Despite these analogies, however, delegation of the power to tax raises an important question of constitutionality and an even more serious problem of practicability.

Although the present judiciary is accustomed to administrative delegation, definitive standards must still be established governing the area of administrative action. It would seem advisable in order to avoid constitutional hazards,

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92. The Tariff Commission is charged by statute with the investigation of the "fiscal and industrial effects of the customs laws of this country" for the information of the President, the House Ways and Means Committee, and the Senate Committee on Finance. 46 STAT. 698 (1930), 19 U.S.C. § 1332 (1940). Its power is solely that of a fact-finding advisory body. See 34 Ops. ATT'y GEN. 77, 79 (1924). Yet, investigation by the Commission is a condition precedent to the issuance of a valid Presidential proclamation altering the tariff. See Norwegian Nitrogen Products Co. v. United States, 20 C.C.P.A. (Cust.) 27, 34 (1932), aff'd, 288 U.S. 294 (1933); United States v. Fox River Butter Co., 20 C.C.P.A. (Cust.) 38, 45 (1932), cert. denied, 287 U.S. 628 (1932).

93. The Trade Agreements Act of 1934 today permits the President by proclamation to decrease or increase up to 50% any duty rate in effect on January 1, 1945. 48 STAT. 943 (1934), 19 U.S.C. § 1351 (1940), as amended, 59 STAT. 410 (1945), 19 U.S.C.A. § 1351 (Supp. 1946). See also the Tariff Act of 1930, conferring similar power upon the President to change the duty rate to equalize costs of production of foreign articles with the American selling price. 46 STAT. 701 (1930), 19 U.S.C. § 1336(c) (1940).


95. It has long been recognized that limited legislative functions may be delegated to an administrative body despite objections based upon the related constitutional doctrines of separation of powers and due process of law. The argument against delegation rests upon the assumption that the Constitution requires a rigid division of power among the legislative, executive and judicial branches of the government. Because an executive agency is without power to perform legislative functions, the taking of liberty or property through the exercise of powers constitutionally reserved to the legislature is said to be a deprivation of due process of law. See Hampton, Jr. & Co. v. United States, 276 U.S. 394, 405-6 (1928); Buttfield v. Stranaham, 192 U.S. 470, 491-2 (1904); Blachly and Oatman, Administrative Legislation and Adjudication 72-3 (1934). Where the courts have found it necessary to answer this argument in sustaining delegations, they have either declared the duties of the agency "quasi-legislative" in character or abandoned the doctrine of separation of powers and substituted instead a theory of checks and balances. See, e.g., Ex parte Grossman, 267 U.S. 87, 119-20 (1925); Blachly and Oatman, op. cit., supra, at 73-4; Comer, Legislative Functions of National Administrative Authorities 114-7 (1927); Landis, The Administrative Process 1-2 (1933); Pennick, Administration and the Rule of Law 19 (1941); Cheadle, The Delegation of Legislative Functions, 27 YALE L.J. 892 (1918); Green, Separation of Governmental Powers; 29 YALE L.J. 369 (1920).

96. Some standard for guiding the delegated body must, of course, be provided to indicate the bounds of administrative discretion. Underlying the Constitutional basis for the need of such administrative standards seems to be the theory that Congress may not delegate its functions without qualification because of the provision in Art. I, § 1, that "a]]
therefore, not only that Congress enunciate the economic policy behind a partial delegation of tax direction, but also that such delegation be confined to specified variations in the income tax rate or base. And the issuance of these changes perhaps would need to be based upon specific conditions, such as, for example, the departure of national production and employment from some fixed high norm. On the basis of repeated decisions upholding other Congressional delegations,97 with few exceptions no longer controlling,98 the Supreme legislative powers herein granted shall be vested in a Congress..." See Panama Refining Co. v. Ryan, 293 U.S. 388, 421 et seq. (1935). Although the question of how definite a standard the Constitution requires has been before the courts in numerous cases and contexts, no general criterion has ever been agreed upon. For examples of formulas laid down in decisions upholding delegations, see Hampton, Jr. & Co. v. United States, supra note 95, at 409 ("intelligible principle to which the person or body authorized to fix... rates is directed to conform"); Yakus v. United States, 321 U.S. 414, 426 (1944) ("standards... sufficiently definite and precise to enable Congress, the courts and the public to ascertain whether the Administrator... has conformed"); American Power & Light Co. v. S.E.C., 329 U.S. 90, 105 (1946) (delineation of "the general policy, the public agency which is to apply it, and the boundaries of this delegated authority").

97. See, e.g., Fahey v. Mallonee, 332 U.S. 245 (1947) (authority of Federal Home Loan Bank Board to prescribe terms and condition for appointment of conservators of federal savings and loan associations, no statutory standard being given); Yakus v. United States, supra note 96 (authority of Price Administrator to control wartime prices); Federal Radio Commission v. Nelson Bros. Bond & Mtg. Co., 289 U.S. 266 (1933) (authority of Radio Commission to make "fair and equitable allocation" of broadcasting privileges on the basis of "public convenience, interest or necessity"); Mahler v. Eby, 264 U.S. 32 (1924) (authority of Secretary of Labor to deport "undesirable residents of the United States"); United States v. Grimaud, 220 U.S. 506 (1911) (authority of Secretary of the Interior to make rules "to insure the objects" of public forest reservations); Buttfield v. Stranahan, supra note 95 (authority of Secretary of Treasury to "establish uniform standards of purity, quality and fitness for consumption of all kinds of tea imported into the United States").

For discussions of these and other statutory delegations which have been held constitutional, see Cushman, The Independent Regulatory Commissions 423 et seq. (1941); Dickinson, Delegation of Legislative Power in American Constitutional Law (Address) (1935); Aikin, The Nature and Exercise of Legislative Power: A Phase of the American Doctrine of the Separation of Powers, 26 Geo. L. J. 606 (1938); Feller, Prospectus for the Further Study of Federal Administrative Law, 47 Yale L. J. 647 (1938); Jaffe, An Essay on Delegation of Legislative Power: I, II, 47 Col. L. Rev. 359, 561 (1947); Smith, Administrative Law: A Threat to Constitutional Government?, 31 Va. L. Rev. 1 (1944); Note, 18 Notre Dame Law. 338 (1943).

98. Attempted delegation to the President under the National Industrial Recovery Act of power to impose "codes of fair competition" upon business and to prohibit interstate shipments of oil in excess of the amounts permitted by state authority was held unconstitutional because of Congressional failure to prescribe adequate standards for the guidance of the Executive. A.L.A. Schechter Poultry Corp. v. United States, 295 U.S. 495 (1935); Panama Refining Co. v. Ryan, supra note 96.

However, when the Supreme Court upheld the power of the Price Administrator to "stabilize prices and to prevent speculative, unwarranted, and abnormal increases in prices and rents," with no more definite standard for its discretion than consideration "so far as practicable" for prices prevailing between October 1-15, 1941, it seems permanently to have shed whatever non-delegable inhibitions were once in vogue. See Roberts, J., dissenting in Yakus v. United States, supra note 96, at 452: "Comparison of [the standards pro-
Court could find in a delegation so qualified a sufficient standardization of administrative discretion.99

But, even though delegation of other Congressional powers may be sustainable upon this basis, the power to tax may not be delegable at all. Several state courts, at least, for one reason or another, have declared invalid attempted delegations of the taxing power.100 While there are exceptions—for example, the power may usually be given to municipal corporations101—this proposition must be accepted as prevailing judicial opinion and may be expected to obtain among legislators as well.

Perhaps this reluctance to permit the determination of tax rates by administrative bodies may be explained as the result of an identification of attitudes towards administrative tax direction with the historical fear of "taxation without representation."102 And it seems doubtful that the Fathers would have sanctioned this practice in drafting the Federal Constitution, which has, in turn, provided the model for many state constitutions. Yet it is not clear in just what respect a partial delegation of the taxing power would result in unrepresented taxation as long as Congress exercised continuing control over the administrative taxing authority.103

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99. Procedural due process would not be an obstacle to administrative tax direction. For, under a rule developed in cases involving state and local taxing bodies, taxpayers are not constitutionally entitled to notice and hearing before a tax becomes effective. Bi-Metallic Investment Co. v. State Board of Equalization of Colorado, 239 U.S. 441 (1915); Kentucky Railroad Tax Cases, 115 U.S. 321, 331 (1885). See also 1 Cooley, THE LAW OF TAXATION § 145 (4th ed. 1924). And judicial review before the exercise of the taxing power has consistently been held unnecessary to due process as long as there is opportunity for subsequent judicial determination of taxpayers' rights which may be infringed by illegal administrative action. Phillips v. Commissioner of Internal Revenue, 283 U.S. 589, 595–7 (1931).

For discussion of the practical wisdom in these constitutional principles as applied to the tax function of the government, see Dickinson, ADMINISTRATIVE JUSTICE AND THE SUPREMACY OF LAW IN THE UNITED STATES 270–2 (1927); McDermott, To What Extent Should the Decisions of Administrative Bodies Be Reviewable by the Courts?, 25 A.B.A.J. 453, 456, 458 (1939).


101. Henderson Bridge Co. v. Henderson City, 173 U.S. 592 (1899). See also 1 Cooley, op. cit. supra note 99, at § 75; Gellhorn, op. cit. supra note 100, at 100–2; 6 McQuillin, THE LAW OF MUNICIPAL CORPORATIONS § 2520 (2d ed. 1928).

102. See, e.g., Harvard v. St. Clair and Munroe Levee and Drainage Co., 51 Ill. 130, 135 (1869), in which an attempted delegation of the power to levy a property tax to a drainage district corporation was denied as violative of that "which our forefathers thought just cause of revolution."

103. To insure control by providing a general safeguard against possible arbitrary ac-
A more tangible explanation of the non-delegability view can be found in the specific constitutional provision that all federal revenue measures shall originate in the House of Representatives. This limitation would suggest that, even though other Congressional duties may be assumed by appointed officials, the power to tax may have been intentionally reserved to members of the only elective legislative group existing when the Constitution was written. To this explanation also, however, the judicially-approved power of the President to alter tariff rates—another form of revenue measure—furnishes recent countervailing precedent.

By tradition, nevertheless, politics seems to be considered as an essential safeguard against arbitrary taxation. And any administrative taxing authority is at least one step removed from political restraints. Taking taxation directly out of the hands of legislators, moreover, would put an end to the favorite platform of tax reduction employed for generations by campaigning politicians. Accordingly, it is unlikely that any attempt to remove taxation from Congress, though only to the minimal extent desirable in executing the national economic policy, could be successful.

It would seem more soundly considered, therefore, to adapt the existing process of Congressional tax legislation to economic needs. A basis for adaptation has already been provided in the very Employment Act of 1946. From the President's Council of Economic Advisers or a similar group of experts appointed solely to advise the Congress, current information of national economic conditions and explicit recommendations for tax action could be secured. Instead of relaying these recommendations through normal Congressional channels the finality of an administrative tax order might be deferred until a lapse of some reasonably short time period, such as 30 days, after issuance without Congressional disapproval. For the use of this procedural device in other administrative contexts, see Section 4(c) of the Administrative Procedure Act, 60 Stat. 239 (1946), 5 U.S.C.A. § 1003(c) (Supp. 1947); Final Report of the Attorney General's Committee on Administrative Procedure 114–5 (1941).

105. The Senate did not become a popularly elected body until 1913. U.S. Const. Amend. XVII.
107. See the answer of Chief Justice Taft to the argument that enforcement of Congressional policy by executive regulation has never been permitted in the levying of taxes and customs duties: "The authorities make no such distinction. The same principle that permits Congress to exercise its rate making power in interstate commerce, by declaring the rule which shall prevail in the legislative fixing of rates, and enables it to remit to a rate-making body created in accordance with its provisions the fixing of such rates, justifies a similar provision for the fixing of customs duties. . . ." Hampton, Jr. & Co. v. United States, supra note 95, at 409.
nels, this advisory council could submit them to the Congressional Joint Committee of the Economic Report, also established under the Act. Finally, the Committee could initiate in both houses simultaneously a joint resolution embracing the acceptable recommendations of the council. Frequently used for a mere expression of Congressional opinion, the joint resolution, capable of relatively quick enactment, would be a more appropriate vehicle for effectuating economic tax changes than the ordinary statute, even though it would still have to be approved by the President.

If a joint tax resolution were utilized only to change the rate or base of the income tax within defined limits, virtually the same result as independent administrative tax direction could be accomplished. Changes in the tax system principally qualitative in their effect upon national spending would be left to regular Congressional procedure. Time-consuming debate and the resolution of conflicting political issues would be reserved for consideration of the more basic and permanent changes in the tax structure. The more expeditious and less protracted procedure characteristic of the joint resolution would be protected to this extent from gradual disintegration under the pressure of diversely interested taxpayers. And the goal of a flexible countercyclical tax administration could be more nearly realized.

**CONCLUSION**

Flexible tax administration provides one ready means of furthering the objectives of the Employment Act of 1946. Through variations in taxes, private consumption expenditures can be influenced toward the level requisite to maximum national product, income and employment without depriving consumers of freedom of choice in their expenditures. In like manner, taxes can be used to promote the desirable level of private investment expenditures in relation to savings without direct government intervention in private business management. If government fails to stabilize national income through fiscal policy—the use of taxes, banking policy and its arsenal of weapons for controlling the size and flow of national income—drastic public regulation of another type may well become a reality. The alternative, under the pressure of either deflation or inflation in the extreme, would be direct control of wages, prices and allocations, in a pattern of planning which would have totally different social and political consequence.

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110. See 6 Ops. Att'y Gen. 650 (1854).

111. Recently, a well-informed critique of the steadily cumulative inflationary movements on all fronts of the 1948 domestic economy has been made by Leon Keyserling, vice-chairman of the Council of Economic Advisers. Mr. Keyserling emphasizes the urgent need for harmonizing fiscal policy and all other devices of government economic regulation with a "national prosperity budget" in order to avoid the "boom-bust" cycle of the past. *The Economic Test: Will We Act in Time?*, N.Y. Times, June 13, 1948, § 6, p. 7.