Constitutional Limitations on the Power to Tax: Alco Parking Corp. v. Pittsburgh

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Constitutional limitations on the power to tax, especially the use of the taxing power as a means of regulation, have long been a subject of dispute with respect to congressional enactments, but are equally important at the local level. In the case of Alco Parking Corp. v. Pittsburgh, the Supreme Court of Pennsylvania was confronted with the issue of a city's power to impose a relatively high tax on its competitors in the municipal parking business. Despite the deference the courts have traditionally given to the legislature in appraising the fairness of a tax rate and in determining whether a tax legitimately promotes the general welfare, the Pennsylvania court in Alco found the financial burden imposed by the city of Pittsburgh on its direct competitors to be confiscatory in violation of the due process clause. The United States Supreme Court reversed and held that burdensome tax rates and government competition, whether taken separately or together, are insufficient grounds under the due process clause to invalidate a tax.

The parking lot operators on which the city imposed the tax challenged the tax primarily on the basis of the due process clause of the Fourteenth Amendment. The Pennsylvania court found the tax to be unconstitutional although it applied the general rule that the due process clause, as applied to Congress by the Fifth Amendment and the states by the Fourteenth Amendment, is a limitation on the power to tax only "in rare and special instances." In employing this stand-

3. See text accompanying notes 69-72 infra.
4. The United States Constitution limits the power to tax by requiring that the revenue raised be spent for the general welfare. U.S. CONST. art. 1, § 8; United States v. Butler, 297 U.S. 1 (1936). The decision whether a tax will promote the general welfare is to be made by the legislative body, not the courts. Helvering v. Davis, 301 U.S. 619, 640 (1937).
6. Id. at 4875.
8. Id. at 44. See Heiner v. Donnan, 285 U.S. 312, 325-28 (1932); Nicol v.
ard the Pennsylvania Supreme Court undertook the difficult task of clarifying what constitutes a "special instance,” a task that has proven elusive in the past. Unfortunately, the United States Supreme Court's opinion rejecting the Pennsylvania decision failed to define what constitutes a "special instance” and has thereby left the issue of constitutional restrictions on the power to tax largely unresolved.

The “special instance” found by the Pennsylvania court in the Alco case was the combination of an excessive tax rate with competition from the same government authority imposing the tax. In reversing, the United States Supreme Court reaffirmed the established judicial posture of deference to the legislature in the area of taxation and repudiated the innovative effort of the Pennsylvania court. This note will analyze the approach adopted by the Pennsylvania court in Alco, especially in relation to its utility as a general rule, and will suggest guidelines to help the courts in the difficult task of determining the constitutional validity of a tax, regardless of the governmental authority imposing the tax.

**Taxation: Revenue or Regulation?**

The power of taxation is exercised to serve one of two basic goals. First, a tax may be imposed primarily to raise revenue. Secondly, the purpose motivating a government to levy a tax may be regulation of the taxed subject. Every tax which is not uniformly assessed has an incidental regulatory effect, because the extraction of a resource from the tax subject both decreases the resources available for pursuing the taxed activity and provides an incentive to minimize the tax by either engaging in another activity or by pursuing the taxed activity in some other manner. Since the extent of this regulatory effect depends on the rate at which the tax is imposed, the ability to tax provides the legislature with a powerful regulatory tool.

Chief Justice Marshall's frequently quoted phrase that "the power...
to tax involves the power to destroy"\(^{12}\) is indicative of the extent to which the regulatory effect of taxation may be and has been used by the legislature. The first major challenge to Congress' power to suppress an activity through taxation arose in the case of *Veazie Bank v. Fenno*.\(^{13}\) Congress had imposed a ten percent tax on any state bank note in circulation. The purpose of the tax apparently was to destroy the state banking currency,\(^{14}\) not to raise revenue. The Supreme Court upheld this use of the taxing power on the grounds that since Congress could directly suppress the circulation of the bank notes under its power to control the national currency,\(^{15}\) it could use its taxing power as a means to the same end.\(^{16}\) Since the *Veazie Bank* case, the courts have continuously held that the use of the taxing power to suppress an activity which the legislative body has the power to regulate will not meet with judicial interference.\(^{17}\)

As well as upholding taxes as a means of regulation in areas that may be constitutionally regulated, some decisions have indicated that the existence of an independent regulatory power is not a necessary prerequisite.\(^{18}\) The United States Supreme Court retained the *Veazie* approach to invalidate congressional taxes until the 1930's when it retreated from that approach in favor of considering New Deal legislation on its face without searching for a forbidden regulatory purpose. In the 1922 case of *Bailey v. Drexel Furniture Co.*,\(^{19}\) for example, the Court held unconstitutional the imposition of a ten percent tax on the net profits of manufacturers who knowingly employed child labor. The Court found that the purpose of the tax was to coerce compliance

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12. McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 431 (1819). A good example of a tax being imposed to discourage an activity was the tax on the transfers of marihuana. The rate of this tax was $100 per ounce unless the transferee had registered and paid a special tax. Act of Aug. 16, 1954, ch. 736, § 1, 68A Stat. 560.

13. 75 U.S. (8 Wall.) 533 (1869).

14. The tax was successful in fulfilling its purpose. It drove the state bank notes out of circulation within a few years. Citizen's Saving & Loan Ass'n v. Topeka City, 87 U.S. (20 Wall.) 655, 663-64 (1875).


16. In these situations the tax is not an exercise of the taxing power per se but is merely the vehicle through which the desired purpose is attained.


with a policy deemed desirable by Congress and not to raise revenue. This use of a tax as a means of implementing social policy was held to be unconstitutional in this instance because the commerce clause, as it was then interpreted,20 did not confer upon Congress the power to regulate manufacturing.

Although the decision in Bailey was entirely consistent with the Veazie Bank holding, the underlying theory that regulatory taxation must be based on a separate regulatory power was particularly inappropriate for dealing with the economic problems facing the nation in the 1930’s. By 1933 the nation was caught in the throes of the Great Depression, and two important segments of the economy, the bituminous coal and agriculture industries, were especially depressed. The Roosevelt administration sought to stimulate these two important industries through legislation which employed taxation as its means of accomplishment. In Carter v. Carter Coal Co.21 the Supreme Court held the legislation aimed at relieving the bituminous coal industry’s plight22 unconstitutional as an attempt to coerce compliance with a governmental scheme of production beyond congressional authority under the commerce clause. Similarly, the legislation which sought to aid agriculture23 was declared unconstitutional in United States v. Butler24 as lacking a concomitant regulatory power.25 These decisions, and the legal theory underlying them, frustrated the attempts of the executive and legislative branches to reverse the course of a worsening economic crisis. It was in this situation that President Roosevelt proposed to “reform” the Supreme Court, thereby precipitating “the most acute constitutional crisis in the life of the nation.”26

This proposed “reform” led to the “Constitutional Revolution of 1937” in which the Supreme Court retreated from its earlier restrictive decisions. In the area of taxation the judicial retreat was accomplished not by repudiating the holding of Veazie Bank, but by refusing to look beyond the face of the tax and into its regulatory effect. In Son-

20. At that time neither activities in manufacturing nor production were held to be in interstate commerce. E.g., Heisler v. Thomas Colliery Co., 260 U.S. 245, 259-60 (1922).
25. These decisions would reach the opposite result under present law because the regulation of production and manufacture are now considered to be within interstate commerce. See, e.g., Wickard v. Filburn, 317 U.S. 111 (1942); NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1, 34-37 (1937).
zinsky v. United States\textsuperscript{27} Justice Stone, speaking for the Court, succinctly expressed this change when he stated that courts

will not undertake, by collateral inquiry as to the measure of the regulatory effect of a tax, to ascribe to Congress an attempt, under the guise of taxation, to exercise another power denied by the Federal Constitution.\textsuperscript{28}

This line of reasoning leaves Veazie Bank intact but assures that the court will rarely question the existence of an underlying power. Because all taxes on their face appear to raise revenue, the requirement that a regulatory tax be supported by an independent regulatory power has, in effect, been suspended.

The full extent of the judicial retreat from examining the constitutional basis for regulatory taxation was expressed in United States v. Sanchez:\textsuperscript{29}

It is beyond serious question that a tax does not cease to be valid merely because it regulates, discourages, or even definitely deters the activities taxed. The principle applies even though the revenue obtained is obviously negligible, or the revenue purpose of the tax may be secondary. Nor does a tax statute necessarily fall because it touches on activities which Congress might not otherwise regulate.\textsuperscript{30}

Hence the courts looked only to the face of a tax in making the important threshold determination of whether the tax was a valid exercise of the taxing power for purposes of raising revenue or was an attempt to employ the power of taxation for purposes of regulation. “The test of [a tax’s] validity is whether on its face the tax operates as a revenue generating measure and the attendant regulations are in aid of a revenue purpose.”\textsuperscript{31}

The above discussion indicates that the judicial policy of looking only to the face, and not to the effect, of a tax amounts to considerable judicial deference to the legislature. This judicial deference is not based solely on the rather unpleasant experience of 1937 but is also founded on the recognition that taxation is, as the Supreme Court has noted,\textsuperscript{32} an eminently practical matter, one that involves evaluations of economics and the business practices employed in this country. These evaluations can only be properly made with the aid of resources and procedural means available to the legislature, not the courts. Added to the institutional inability of the courts to deal with taxation specifically is the general judicial policy of leaving decisions in the eco-

\textsuperscript{27} 300 U.S. 506 (1937).
\textsuperscript{28} Id. at 514.
\textsuperscript{29} 340 U.S. 42 (1950).
\textsuperscript{30} Id. at 44 (citations omitted) (emphasis in original).
\textsuperscript{31} United States v. Ross, 458 F.2d 1144, 1145 (5th Cir. 1972).
\textsuperscript{32} Nicol v. Ames, 173 U.S. 509, 516 (1899).
onomic sphere primarily to the legislative bodies.\textsuperscript{33}

Regardless of the wisdom of this position, too much judicial aloofness from the area of taxation is potentially very dangerous to the functioning of a constitutional scheme of government. Discussing the erosion of federalism by means of taxation, Justice Frankfurter observed:

To allow what otherwise is excluded from congressional authority to be brought within it by casting legislation in the form of a revenue measure could . . . offer an easy way for the legislative imagination to control "any one of the great number of subjects of public interest . . . ."\textsuperscript{34}

His admonition is equally applicable to the judicial refusal to question the existence of an underlying regulatory purpose. Given the fundamental nature\textsuperscript{35} and the pervasive power of taxation, failure to look beyond the face of a tax to recognize infringements on other substantive rights would give legislative bodies the power to pursue forbidden regulation of constitutionally protected areas.

\textbf{Taxation and Substantive Constitutional Rights}

The Constitution of the United States grants certain basic rights which may not be interfered with or encroached upon by governmental activity.\textsuperscript{36} When the government imposes a tax which may impinge upon a substantive constitutional right, the courts have exhibited a greater willingness to look beyond the face of the tax to its actual effect. Illustrative of the scope of judicial review in these cases is the treatment the courts have given the taxation of the rights to freedom of religion, speech, and press embodied in the First Amendment.\textsuperscript{37} As to these rights, the courts have held that the imposition of a tax which serves to discourage their exercise directly is invalid.\textsuperscript{38}


\textsuperscript{35} The Supreme Court has described the power to tax as "the one great power upon which the whole national fabric is based." Nicol v. Ames, 173 U.S. 509, 515 (1899). Chief Justice Marshall described the taxing power as "of vital importance; that it is essential to the existence of government; are truths which it cannot be necessary to re-affirm," Providence Bank v. Billings, 29 U.S. (4 Pet.) 514, 561 (1830).

\textsuperscript{36} The term substantive constitutional rights is here used to refer to those rights founded in the United States Constitution.

\textsuperscript{37} "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press . . . ." U.S. CONST. amend. I.

\textsuperscript{38} \textit{E.g.}, Thomas v. Collins, 323 U.S. 516 (1944) (speech); Murdock v. Pennsylvania, 319 U.S. 105 (1943) (religion); Hull v. Petrillo, 439 F.2d 1184 (2d Cir. 1971)
When a tax adversely affects a substantive constitutional right, the courts will invalidate it to the extent of the adverse effect. In *Marchetti v. United States*, for example, the constitutionality of the tax on gambling was challenged as violative of the Fifth Amendment's prohibition against self-incrimination. This tax scheme required each person engaged in wagering to register with the district collector of revenue and to pay a tax. The revenue officers were then required to submit a registration list to any state or local prosecuting officer who requested it. The Supreme Court held that to the extent the accused was forced to incriminate himself, the tax was unconstitutional.

A major source of substantive constitutional rights which imposes limitations on taxation is the due process clause of the Fifth Amendment applicable to the federal government, and the due process and equal protection clauses of the Fourteenth Amendment applicable to the states. The fact that the vast majority of taxes are not imposed with absolute uniformity means that taxation is usually based on some form of classification differentiating one group of people from another. For this reason, many taxes are subject to challenge on equal protection grounds. The restrictions imposed on taxation by the equal protection clause are dependent upon the criteria by which the classification is defined and the nature of the right affected.

The equal protection clause requires at a minimum that the classification be rational. The classification must meet this constitutional standard with respect to both the basis for distinguishing between

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40. "No person . . . shall be compelled in any criminal case to be a witness against himself . . . ." U.S. CONST. amend. V.

Registering and paying the tax were treated as inseparable so that the failure to do either necessarily subjected the party to the penalty for failure to pay the tax. *Marchetti v. United States*, 390 U.S. 39, 42-43 & n.3 (1968).

those people included and those people excluded from the class and the relationship between the classification and the purpose of the legislation.

The recent case of Lehnhausen v. Lake Shore Auto Parts Co. exemplifies the ease with which the rationality requirement of equal protection can be met and demonstrates the reluctance of the Court to look beyond the face of a tax. In Lehnhausen the Supreme Court upheld a classification that distinguished between corporations and individuals for purposes of taxation by valuation. The respondent, a corporation, assailed the classification as lacking any rational basis and contended that it was therefore violative of equal protection. The Court noted that the authority imposing the tax has "large leeway in making classifications and drawing lines which in their judgment produce reasonable systems of taxation." The Court then made clear that the judicial inquiry would not extend beyond the face of the tax:

We could strike down this tax as discriminatory only if we substituted our judgment on facts of which we can be only dimly aware for a legislative judgment that reflects a vivid reaction to pressing fiscal problems.

Since the rationality requirement is the only restriction imposed by the equal protection clause when the legislature is dealing with matters of economic policy, the refusal of the Court to inquire into the basis of a tax means that the equal protection limitations imposed on most forms of taxation are minimal.

48. Id. at 359.
49. Id. at 365.
51. It should be noted that under "new equal protection" the much more stringent test of compelling state interest is applied if the classification is either suspect or adversely affects a fundamental right. A suspect classification is one that is based on a trait or element of a class that is an inherently unreasonable basis for distinguishing one group of people from another. The number of judicially recognized suspect classifications is small. Frontiero v. Richardson, 411 U.S. 677, 682 (1973) (sex); Graham v. Richardson, 403 U.S. 365, 372 (1971) (alienage); Loving v. Virginia, 388 U.S. 11 (1967) (race); Oyama v. California, 332 U.S. 633, 644-46 (1948) (national origin).

It is difficult to determine what rights are or are not fundamental other than on a case by case basis. The United States Supreme Court has attempted to provide a general guideline by defining those rights which are basic to the "American scheme of justice" as fundamental. Duncan v. Louisiana, 391 U.S. 145, 149 (1968). See, e.g., Reynolds v. Sims, 377 U.S. 533, 554-55, 561-62 (1964) (suffrage); Skinner v. Okla-
In *A. Magnano Co. v. Hamilton* in 1974, the Supreme Court restated the general rule that the due process clauses of the Fifth and Fourteenth Amendments become a limitation on the taxing power only in "rare and special instances." These special instances exist only if the act be so arbitrary as to compel the conclusion that it does not involve an exertion of the taxing power, but constitutes, in substance and effect, the direct exertion of a different and forbidden power, as, for example, the confiscation of property.

The *Magnano* rule combines the *Veazie Bank* approach, requiring a regulatory tax to be supported by an independent regulatory power, with the more modern rule that in the economic sphere a court will defer to the legislature's judgment. Thus, although a tax may not amount to the exercise of a forbidden power, the judiciary will not inquire into the nature of the legislative power being exercised unless the arbitrariness of the act is patent.

### Alco Parking Corp. v. Pittsburgh

In the recent case of *Alco Parking Corp. v. Pittsburgh* 1974, the Supreme Court of Pennsylvania was faced with the difficult task of applying the special instances rule to a municipally imposed tax. The city of Pittsburgh had imposed a twenty percent gross receipts tax on all nonresidential parking garages. At the time the ordinance became effective all nonresidential garages in Pittsburgh were operated either by private companies or by the city through its Public Parking Authority. Approximately one-quarter of the 24,300 parking spaces in downtown Pittsburgh were operated by the Parking Authority, the remainder being operated by private interests. The court held this
tax to be confiscatory and thus violative of due process under the Fourteenth Amendment.\(^5\)

The court found that several aspects combined to bring the tax within the Magnano special instances rule. First among these factors, as demonstrated by the destructive effect the tax had on the industry,\(^6\) was the excessive tax rate. The effects of the tax rate were aggravated by the Parking Authority’s exemption from real estate taxes and its ability to obtain financing at much lower interest rates.\(^6\) The second important factor was that the private parking lot operators were in direct competition with the Parking Authority. The combined result of the excessive tax and the competition was to give the Parking Authority a tremendous competitive advantage. If the private operators attempted to preserve their profits by passing the tax on to their customers the existing disparity between their rates and the Parking Authority’s would grow.\(^6\) Yet if the tax was not passed on, most of the private operators either would be unable to remain in business or would show only a minimal return.\(^6\) In this situation the competition from the government prevented the tax from being passed on, so that the tax served to prevent the use of the property as parking garages.

The court found that this combination of factors constituted a taking of property without just compensation, and thus qualified as a

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\(^5\) The court also indicated that the tax may be confiscatory under Pennsylvania law. Two conditions must be met before a tax becomes confiscatory in Pennsylvania. First, under the rule of Philadelphia v. Elgin’s Garages Inc., 342 Pa. 142, 19 A.2d 845 (1941) the tax must create a situation in which only a few businesses, out of the entire industry, are able to remain in operation.

The second requirement, established by the court in Philadelphia v. Samuels, 338 Pa. 321, 12 A.2d 79 (1940), is that the tax subject is incapable of passing the tax on to its customers. The Alco court, however, distinguished Elgin’s and Samuels and based its decision on the due process clause of the Fourteenth Amendment. Alco Parking Corp. v. Pittsburgh, 453 Pa. at 262, 307 A.2d at 860 (1973).

\(^6\) The appellants’ statistics demonstrated that with the imposition of the tax 9 of the 14 appellants would suffer operating losses. Brief for Appellants at 18, Alco Parking Corp. v. Pittsburgh, 453 Pa. at 259, 307 A.2d at 859 (1973).


\(^6\) The parking authority bonds, with the exception that for one year the interest may be greater as determined by the Parking Authority.

\(^6\) An attempt to pass the tax on would raise the appellants’ rates from $3.00 to $3.60. While the Parking Authority would have to raise its rates only forty cents, from $2.00 to $2.40. 453 Pa. at 262, 307 A.2d at 860 (1973).

\(^6\) Of the five appellants operating at a gain after the imposition of the tax Fourth Avenue Parking, Inc. would have the greatest percentage return income of 2.9 percent. Brief for Appellants at 18, Alco Parking Corp. v. Pittsburgh, 453 Pa. at 259, 307 A.2d at 859 (1973).
"special instance" within the Magnano rule. In making this finding, the important element taken in conjunction with the burdensome tax rate\textsuperscript{64} was the competition from the city which the court held to have added "not only a new and most significant dimension to the traditional constitutional problem of what constitutes a taking without due process but also an impermissible one."\textsuperscript{65} In focusing primarily on the government competition and the excessive tax rate, the court in Alco made its first departure from the current judicial treatment afforded taxes by other courts. By so doing the Pennsylvania court broke with settled legal precedent regarding burdensome rates of taxation and government competition, but failed to establish a rule that might be applied by courts in the future as a standard to test the constitutionality of taxes in general.

**Government Competition**

There are many situations in which government competition causes a loss to a private competitor. The judicial treatment given to complaints that such loss has been suffered may best be illustrated by examining the several cases which have dealt with the issue.

In Tennessee Electric Power Co. v. Tennessee Valley Authority\textsuperscript{66} privately owned utility companies argued that the selling of electricity by the TVA, a government agency, constituted a taking of their property without just compensation. The court noted that the companies were not protected from competition by either contract or statute, and denied the companies standing on the grounds that lawful competition, whether arising from the public or private sector, does not give rise to a justiciable legal injury.\textsuperscript{67}

In South Suburban Safeway Lines, Inc. v. Chicago\textsuperscript{68} the appellant, a public utility which operated bus lines, challenged a grant of federal funds to the Chicago Transit Authority. The appellant argued that it had standing to challenge the grant on the grounds that the increase in funds would enable the Transit Authority to expand its bus lines and thereby to come into competition with the appellant to the detriment of the appellant's business. The court, specifically noting that the appellant had no right under state law to be free from

65. Id. at 269, 307 A.2d at 864.
67. "[T]he damage consequent on competition, otherwise lawful, is ... damnum absque injuria, and will not support a cause of action or a right to sue." Id. at 140; see Hardin v. Kentucky Utilities Co., 390 U.S. 1, 5-6 (1967); cf. Public Service Co. v. Hamil, 416 F.2d 648, 651 (7th Cir. 1969), cert. denied, 396 U.S. 1010 (1970).
68. 416 F.2d 535 (7th Cir. 1969).}
competition, denied the appellant's assertion on the grounds that loss incident to competition is not legally cognizable.

As illustrated by these two cases, it is clear that competition, whether it arises from the government or a private party, is of little, if any, legal significance. The only time competition will be sufficient to support a legal action is when the party complaining of the injury has a statutory, common law, or contractual right to be free from competition.

**Taxation at Excessive Rates**

As the Pennsylvania court in *Alco* noted, "few, if any courts have been willing to void a tax solely on the basis of an unreasonably high rate." In cases where the rate of taxation has been brought into question the judicial deference to the legislature is especially apparent. In *Magnano* the Supreme Court noted that the rate of taxation alone, even though destructive of the tax subject, was an insufficient reason to hold a tax unconstitutional. Subsequent cases have continued to adhere to this position.

The reluctance of a court to invalidate a tax on the basis of an unreasonably high rate is a result of the institutional inability of the judiciary to review the legislature's judgments on which the tax is based. When the legislature is considering the rate at which a tax will be imposed judgments must be made concerning the tax subject, *i.e.*, the ability of the subject to absorb the tax, the effects on related interests, etc. These decisions necessitate the use of factual studies and statistical analyses to ascertain relevant proper factual information on which to decide whether a tax should be imposed and at what rate. Collecting and analyzing data of this nature is a function to which legislative bodies, with their investigative capacities, are much better suited than is the judiciary. Added to this institutional inability is the judicial recognition that it may be the intent of the legislative body, and entirely within its authority, to destroy the tax subject. When this is the case, judicial interference would only serve to frustrate a valid legislative purpose.

69. 453 Pa. at 262, 307 A.2d at 860 (emphasis in original).
70. 292 U.S. 40, 47 (1934).
72. In such a case the proper focus of judicial inquiry should be the extent of the legislature's regulatory authority and not the rate of taxation.
Government Competition and Excessive Rates of Taxation Combined

In *Puget Sound Power & Light Co. v. Seattle* the United States Supreme Court held the combination of government competition and taxation not to be constitutionally barred. In this case the city of Seattle had imposed a three percent gross receipts tax on the business of selling and furnishing electric light or power. At the time the tax was imposed the city was actively and directly competing with the appellant, a privately owned power and light company. Moreover, the city, because of the means used to finance its light and power business, was exempt from the tax. The appellant argued that since the combined power of the city to tax and to compete could be used to destroy its business the appellant's property had been taken without due process. The Court expressly found that a government may actively compete with a private interest at the same time it is imposing a tax upon it and that the risk of loss due to competition was a risk which the appellant assumed when it entered into business.

The Supreme Court of Pennsylvania, in reaching a conclusion opposite from that of *Puget Sound*, raised the question of what constitutes a "rare and special instance" as contemplated by the *Magnano* rule. Unfortunately, in so doing, the court failed to establish a general constitutional limitation on the legislature's power to tax and left its decision vulnerable to subsequent reversal.

The combination of high rates and government competition is primarily prevented from becoming a general limitation on the power of taxation by the difficulties encountered in determining whether there is competition. Competition may generally be defined as the "act of seeking or endeavoring to gain what another is endeavoring to gain at the same time." This definition is useful when the object being sought is readily identifiable, as it was in *Alco*, where both parties were contending for customers of the parking business. However, as the dissimilarities between the objects being sought or the manner of seeking them increases, for example, when one party seeks profit while another seeks to provide a public service, the definition becomes increasingly inapplicable. Thus, when a situation fits into the commonly accepted meaning of competition few problems are presented; when the facts of a situation are only partially within the commonly accepted meaning of the term, the definition begins to fail.

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73. 291 U.S. 619 (1934).
74. *Id.* at 621-22.
This problem becomes especially acute when applied to the activities of the government. The definition of competition would be hard to apply to the government, because many governmental activities both compete with private interests and provide useful services to the community. For example, city owned and operated bus lines provide a valuable service to the citizens, yet they compete against privately owned taxi companies. Thus, even assuming the facts were such that a court could confidently find the government to be in competition with a private interest, there remains the issue of whether the competition also results in a service to the public and, if so, how a court should deal with this combination.

When the problems of defining competition, especially government competition, are considered along with the institutional inability of the courts to inquire into the reasonableness of tax rates, it is apparent that the application of the rule developed in the Pennsylvania decision requires the court to make difficult policy decisions. A court applying this rule must decide whether the government activity is competitive, whether the tax rate is excessive, and whether these two taken together impose such a burden on the tax subject as to be violative of due process. While a court is capable of making most of these decisions, the nature of the process involved and the rule's requirement that the court balance the results thus obtained against each other makes it necessary for the court to consider the facts of each case in such detail that the result could only be predicted in the clearest cases.

The United States Supreme Court, in reversing the Alco decision, found that the due process clause neither demanded nor permitted the judiciary to oversee either the burden imposed by a tax or the existence of government competition. The Court also reaffirmed the judicial policy of not looking beyond the face of a tax to infer a legislative attempt to exercise a forbidden power. Unfortunately, the Court, in holding that the combination of a high rate of taxation with government competition was not a "special instance" within Magnano, did not choose to elaborate further on what does constitute a "rare and special instance." Thus the result of the Supreme Court's decision in Alco was only to establish that one situation did

A case which nicely illustrates the difficulties a court may encounter in trying to define competition is Bretherton v. United Kingdom Totalisator Co., [1945] 1 K.B. 555, 559-60.

77. This example was suggested by New York Rapid Transit Corp. v. City of New York, 303 U.S. 573 (1938); cf. Tilton v. Model Taxi Corp., 112 F.2d 86 (2d Cir. 1940).


79. Id.
not constitute a special instance, rather than to further clarify in what circumstances the power of taxation is constitutionally limited. Had the parking lot operators alleged, or had the Supreme Court of Pennsylvania based its opinion on, the use of the taxing power as an indirect means of exercising eminent domain the result in the Supreme Court may have been different. If these allegations had been made, the Court would have been presented not with the issue of the constitutionality of the effect of a tax but the exercise of a forbidden power in the guise of a tax.

**Constitutional Limitations on Taxation: A Suggested Approach**

The Pennsylvania court's decision in *Alco* represented a break from the narrowly confined review of taxation presently employed by the courts. As we have seen, however, the rule developed in the Pennsylvania decision was necessarily limited by the difficulties of its application and was subsequently overruled. Nevertheless, the approach used by the Pennsylvania court in *Alco* suggests a method of analysis for courts to employ when reviewing a tax which will give adequate weight to constitutional provisions protecting against legislative abuse. The attempt will be made here to clarify and add to this method of analysis so as to make it applicable whenever a court is called upon to review the constitutionality of a tax.

It is important to note at the outset that every tax may be viewed as either a revenue raising or a regulatory measure. This distinction is important because the constitutional limitations imposed depend on the nature of the tax. If the tax is revenue raising it is, if it is on the federal level, an enactment based on a specifically enumerated power;\(^{80}\) if the tax is on the state or local level it is an exercise of a power inherent in the government's sovereignty.\(^{81}\) A revenue raising tax is therefore afforded different constitutional consideration than a regulatory tax, because the latter lacks either the independent constitutional basis of the former or its status as an inherent attribute of sovereignty.

Since all taxes may have an inherent regulatory effect,\(^{82}\) it is necessary to have a means of determining whether a given tax is in fact revenue raising or regulatory. This determination may be accomplished by evaluating several objective aspects of the tax in relation

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to five general guidelines. First, a tax should be examined in light of the number of people subjected to it; the greater the number of people required to pay the tax, the greater the probability the tax is for purposes of raising revenue. Second, a court might examine whether the tax is of the nature that has traditionally been considered either revenue raising (e.g., income, sales, etc.) or regulatory. Third, the group taxed should be noted; a tax on individuals would be indicative of a revenue measure, while a tax on a business would tend to suggest regulation. Fourth, the anticipated amount of revenue to be raised by a tax should be taken into account; the greater the revenue raised, the greater the likelihood that the tax is revenue raising. Finally, any statement of purpose by the legislature should be given judicial consideration. The combined conclusions drawn from the above would provide an indication of the real purpose of the tax involved and would enable a court to determine the basic nature of the tax it is reviewing.

If an application of the above criteria results in a determination that a particular tax is a revenue measure, the tax is subject to relatively few constitutional limitations.\(^8\)\(^3\) Being the exercise of either a specifically enumerated power or of sovereignty, the legislative use of taxation for raising revenue is limited only by its own terms\(^8\)\(^4\) and specific constitutional provisions, especially those containing rights that may not be abridged by the exercise of any legislative power.\(^8\)\(^5\)

The incidental regulatory effect that may be inherent in every tax is unavoidable and should not be considered when a court reviews a revenue tax. To give recognition to a revenue tax's unavoidable regulatory effect would be to confuse revenue raising with regulation. Such confusion might tie the ability to tax for revenue to the existence of an independent regulatory power, an unwarranted restriction of the governmental power to tax for purposes of maintaining itself; or, such recognition would release regulatory taxation from the requirement of an independent regulatory power, thereby giving the legislature unfettered power to do by taxation what it could not otherwise accomplish. If the regulatory effect of a tax is not incidental then the tax itself is regulatory and other limitations become significant.

If the tax is found to be regulatory the constitutional limitations on the tax should be recognized so that the legislative body will be unable to accomplish by taxation what it is unable to accomplish through the exercise of any other power. This proposed approach to

\(83.\) People ex rel. Hatch v. Reardon, 184 N.Y. 431, 444 (1906), aff'd, 204 U.S. 152 (1907).
\(84.\) See notes 4 \& 83 supra.
\(85.\) See text accompanying notes 37-42 \\& note 51 supra.
regulatory taxation compels a retreat from the present judicial refusal to ascribe a regulatory intent to the legislature and to look beyond the face of a tax.\textsuperscript{86} By almost requiring an express admission that a tax is regulatory prior to an inquiry into the existence of an independent regulatory power, the courts have effectively given unbridled discretion to the legislature. A return to the requirement that there be regulatory power separate from the taxing power before taxation may be used as a means of regulation would once again confine the power to regulate by taxation to the boundaries contemplated in our Constitution.

Once it has been determined, by applying the above five guidelines, that the tax is regulatory the inquiry should be made as to the existence of an independent regulatory power. If no such power exists then the tax is invalid as an attempt to exercise a constitutionally prohibited power. If such a power does exist the tax is valid as long as the regulation by taxation does not extend beyond the regulation that could validly be exercised without the use of taxation. For example, if an independent power allows regulation but not prohibition,\textsuperscript{87} a tax used to effectuate the regulation may not also be prohibitive.

**Conclusion**

The Supreme Court of Pennsylvania in *Alco Parking Corp. v. Pittsburgh* departed from the traditional pattern of judicial deference to the legislature in the area of taxation. In so doing, the court sought to bring new life to the "special instances" rule enunciated in *Magnano* by altering the scope of judicial review. The Pennsylvania court was willing to look beyond the mere fact that the legislative body imposing the tax had the power to do so and to examine the reasonableness of the tax rate. Thus it was willing to examine the actual effects of the tax in light of constitutional standards.

The United States Supreme Court, however, reversed the Pennsylvania court on the grounds that the judiciary is not the proper body to supervise the reasonableness of tax rates or to determine the existence of government competition. The Court, while adhering to the established judicial deference to the legislature in the area of taxation, did not delineate a standard to be employed by the courts when re-

\textsuperscript{86} See text accompanying notes 27-31 *supra*.

\textsuperscript{87} Generally if the power to regulate exists, the Court will not strike down a law that is prohibitory because a less drastic measure is available. The Court will not substitute its judgment for that of the legislature as to the choice between regulation or prohibition. *Ferguson v. Skrupa*, 372 U.S. 726, 730 (1963); *Olsen ex rel. Western Reference & Bond Ass'n v. Nebraska*, 313 U.S. 236, 246 (1941).
viewing the constitutionality of a tax. Although the actual rule laid down by the Pennsylvania Supreme Court was inconsistent with precedent and has been overruled, the court's general analysis suggested the specific method of analysis outlined in this note to review the constitutionality of a tax. This method not only gives recognition to the reality that government cannot be too strictly constrained when raising revenue, but also ties the use of taxation for purposes of regulation to the existence of an independent power, thereby preventing the abuse of the taxing power.

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