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Robert E. Cushman

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SOCIAL AND ECONOMIC CONTROL THROUGH FEDERAL TAXATION

By ROBERT E. CUSHMAN*

WHEN Randolph proposed the Virginia plan at the third session of the Federal Convention, it contained the only sound and workable principle by which the powers of nation and states could be divided. It was couched in these words: . . . "the national legislature ought to be empowered . . . to legislate in all cases to which the separate states are incompetent, or in which the harmony of the United States may be interrupted by the exercise of individual legislation."¹ This was the statement of a principle and not the description of a method; it declared the object for which national powers were to be conferred rather than the precise mechanism by which the delegation was to be made. In the ensuing debates it appears that this broad statement correctly expressed the basic intention of the convention, although it was fairly promptly suggested that the object so described might better be achieved through the enumeration of specific powers to be given to the new national government. The convention itself did not attempt to formulate this enumeration of national powers. On July 26th the principles upon which agreement had been reached during more than two months of debate were confided to a committee of detail with instructions to "prepare and report a constitution conformable thereto." And the instruction given to the committee of detail with respect to national powers was that:

"The national legislature ought to possess the legislative rights vested in Congress by the Confederation; and, moreover, to legislate in all cases for the general interests of the Union, and also in those to which the states are separately incompetent, or in which

*Professor of Government, Cornell University, Ithaca, N. Y.

¹ Farrand, Records of the Federal Convention 21.

the harmony of the United States may be interrupted by individual legislation."²²

It was the committee of detail which translated the broad principle of national legislative authority into the concrete enumeration of powers embodied in article I, section 8 of the constitution as finally adopted.

The delegated powers of Congress, therefore, were not conferred in a miserly spirit nor with a niggardly hand. They were given to serve the broad purpose of Randolph's original resolution. No power then deemed necessary for the "general interests of the Union," for the exercise of which "the several states are incompetent," or in respect of which the "harmony of the United States may be interrupted by individual legislation" was withheld from the new national legislature. If in the future new and different powers, not then identified, should be needed for the promotion of the national interest, such powers could be conferred by the process of constitutional amendment carefully outlined in article V. But there were no conscious omissions. The delegated powers were merely the concrete embodiment in terms of the political experience of the eighteenth century of the principle that the new national government was to have the powers necessary to deal with all truly national problems.

The delegated powers of Congress do not include a broad and undefined authority to legislate for the national welfare. There is, in short, no independent national police power as such. If Congress is to deal directly and effectively with the problems of national import which may be deemed to inhere in the field of marriage and divorce control, or in the punishment of those who participate in lynchings, it must secure the authority to do so by constitutional amendment. The emergence of a national problem does not automatically generate national power to solve it. But if we define the national police power to be the use by the federal government of its clearly delegated powers for the broad purposes of national social and economic welfare, we are then considering a power not only necessary and desirable in dealing with the nation's problems, but also one lying within the scope of the purposes for which powers were delegated to Congress by the statesmen who built our constitutional system. For this is merely to say that the power to tax, to regulate commerce, or to set up

²² Farrand, Records of the Federal Convention 131.

postal regulations, powers given to Congress in order that it might "legislate for the general interests of the Union, and also in those to which the states are separately incompetent, or in which the harmony of the United States may be interrupted," may be used by Congress for the broad national purposes for which they were thus conferred. By such national police power Congress may deal, with varying degrees of effectiveness, with any truly national problem which emerges within the range and sweep of the plenary powers enumerated in article I, section 8.

Nor should we feel that we are guilty of disloyalty to the fundamental principles of the founding fathers because the national purposes for which Congress uses its national powers in 1934 differ concretely from those which were or could have been envisaged by Randolph, Wilson or Gouverneur Morris. Those statesmen would have been the last to lay the strangling grip of the hand of the dead upon the normal development, expansion, and effective use of the national powers so generously conferred. To argue solemnly whether the men who drafted our constitution actually intended that Congress should use its power over interstate commerce to discourage the white slave traffic, or should use its power of taxation to prevent the sale of narcotic drugs, is to speculate about propositions the terms of which cannot possibly have any reality, and which strongly suggest the colloquy in the old play:

"Does your brother like cheese?"

"I have no brother."

"Well, if you had a brother, would he like cheese?"

All that we need to know is that the Convention of 1787 expected Congress to use its national powers for national purposes, and that that was the object that it had in conferring those powers.

The development of a national police power based on the theory of national powers for national purposes has, of course, not escaped criticism and attack. It aroused the bitter opposition of the strict-constructionist who believed that the powers of Congress should be rigidly construed as to content and even more severely limited as to the purposes for which they might be employed. It alarmed the ardent defender of states' rights who saw an expanding federal power penetrating some of the traditional fields of state authority. It has, however, been unquestioningly accepted by the public opinion of the country as a necessary

and desirable type of federal power; it has been employed by Congress with increasing freedom and eagerness to deal with newly emerging national problems; and it has received the acquiescence and recognition of the Supreme Court. In short, the national police power—the power of Congress to use its delegated authority for the protection and promotion of the social and economic welfare of the nation—is a recognized part of our present constitutional system.

There are three of the delegated powers of Congress which have served as the basis for practically all of the national police power which has thus far been exercised. These are the commerce power, the postal power, and the power of taxation.³ The broad economic policies embodied in the recovery legislation must find their ultimate constitutional sanction in the power of Congress to regulate commerce. The "New Deal" program exemplifies strikingly the employment of a delegated power—the commerce power—for the broad purposes of national social and economic welfare. While there has been no recent utilization of the postal power for police purposes of a new variety, the continued vitality of the legislation barring obscene literature from the mails and penalizing the use of the mails to defraud is a reminder that social purposes are still being achieved through the use of that particular delegated authority. Social and economic policies are expressed with varying degrees of articulateness in every major taxing statute passed by Congress; but the recently enacted statute enforcing a federal restriction upon cotton production by imposing a fifty per cent tax upon cotton produced in excess of quota indicates that Congress has not forgotten that national economic problems may be dealt with by regulatory or destructive taxation.

It is the purpose of this paper to study the national police power which has grown up under the taxing power of Congress, with special emphasis upon the more recent manifestations of that power. This will involve an analysis and classification of the techniques which Congress has employed in using the taxing power as an implement of social and economic control. It will further

³In 1919 and 1920 the present writer published in the pages of the *MINNESOTA LAW REVIEW* an elaborate study of the police power of the national government as follows: *The National Police Power under the Commerce Clause of the Constitution*, (1919) 3 *MINNESOTA LAW REVIEW* 289, 381, 452; *The National Police Power under the Taxing Clause of the Constitution*, (1920) 4 *MINNESOTA LAW REVIEW* 247; *The National Police Power under the Postal Clause of the Constitution*, (1920) 4 *MINNESOTA LAW REVIEW* 402.

involve a study of the judicial doctrines upon the basis of which, with the aid of which, or under the limitations of which this type of national police power has been evolved. In fact these judicial doctrines as to the nature and outside limits of the federal taxing power may well serve as the major headings of this discussion. Proceeding from the simple and obvious to the more complex and controversial we may survey the development of a national police power under the taxing clause by considering in turn the nature and practical results of the following propositions.

1. *The Rate of Lawful Taxation Rests in the Discretion of Congress.* It may be regarded as axiomatic that a tax, otherwise lawfully levied, does not become unconstitutional merely because it is unduly burdensome. There is no constitutional limit upon the rate of taxation. Perhaps the best known epigram in the literature of constitutional law is Marshall's dictum in *McCulloch v. Maryland*,⁴ "The power to tax involves the power to destroy." It announces a doctrine which has been followed with approval in hundreds of cases state and federal. That doctrine was stated with more elaborate precision by Chief Justice Chase in the case of *Veazie Bank v. Fenno*.⁵ He said:

"The power to tax may be exercised oppressively upon persons, but the responsibility of the legislature is not to the courts but to the people by whom its members are elected. So if a particular tax bears heavily upon corporations, or a class of corporations, it cannot, for that reason only, be pronounced contrary to the constitution."

The rule rests upon considerations of obvious soundness and necessity. The power to tax is one of the vital attributes of a sovereign government. No one but the legislature can measure the fiscal needs of the nation. National emergencies may demand that the government impose tax burdens upon its citizens which approach confiscation. The way must be left open for the levying of taxes sufficient for the public needs. Furthermore, if the courts are to judge the validity of taxes by their rates, what measure of validity is to be applied? How can a court declare a tax to be void because it is too high without subjecting to judicial scrutiny all the many and diverse considerations of public policy and necessity which are the very essence of the legislative function? The courts have wisely refused to assume any such non-judicial duty, and the result is that, assuming that there is no

⁴(1819) 4 Wheat. (U.S.) 316, 4 L. Ed. 579.

⁵(1869) 8 Wall. (U.S.) 533, 19 L. Ed. 482.

other constitutional objection to it, a tax is valid even though its rate rises to a thousand per cent or more.

2. *Taxation Need Not Be for Revenue Only.* The most obvious and normal purpose and effect of taxation is to raise revenue. But it is equally true that this is not its only legitimate purpose and effect. The legislature may properly use the power of taxation not merely to raise funds but also to accomplish incidental regulatory results; and the tax is not unconstitutional because of the presence of that incidental purpose and the accomplishment of those incidental results. It is unnecessary to deal here with the arguments of the strict constructionists who have so persistently and bitterly contended that taxes may be validly levied only to raise money, except to state that their arguments have not prevailed either with Congress or with the Supreme Court.

In the first place, incidental regulation and control is inherently and inextricably bound up with any exercise of the taxing power. It would be impossible for Congress to levy a tax which did not have social and economic consequences of a non-fiscal character. Taxation means burden; freedom from taxation means freedom from burden. The selection by Congress of the persons and things and transactions which shall bear or escape that burden necessitates the formulation of a regulatory policy affecting the social and economic life of the nation, a function supplementary to but different from the mere job of filling the national treasury. In the levying of every tax Congress must inevitably have a purpose other than the raising of revenue since it cannot escape the responsibility of controlling in the national interest the non-fiscal regulatory effects of its distribution of tax burdens. There can, in short, be no such thing as taxation for revenue only.

In the second place, Congress throughout our national history has frankly assumed that responsibility. It has formulated its policies of taxation with one eye on the federal treasury and the other upon the problems of protecting domestic industries, or discouraging the importation, production or consumption of questionable or objectionable commodities. Even before the constitution was ratified, Hamilton had pointed out in the "Federalist" the social consequences of federal taxation. After suggesting that a tax of one shilling per gallon on "ardent spirits" would produce an annual federal revenue of two hundred thousand pounds he goes on to say:

"That article would well bear this rate of duty; and if it should tend to diminish the consumption of it, such an effect would be equally favorable to the agriculture, to the economy, to the morals, and to the health of society. There is, perhaps, nothing so much a subject of national extravagance, as this very article."⁶

Congress followed Hamilton's advice in the heavy taxation of liquor; and it also embarked under his leadership upon our national policy of protective tariffs. By the juggling of tariff rates it has not merely raised revenue to pay the nation's bills, but it has stimulated many of our industries just as effectively as, by the selection of the objects of certain of its internal revenue taxes, it has discouraged or destroyed certain other industries. And it is interesting to reflect upon the fact that if Congress, unfettered by the archaic requirement of apportionment of direct taxes, could embark upon a policy of land taxation founded upon the principles of Henry George it would not only raise revenue for national purposes, but it would accomplish social and economic results so revolutionary in character as to fill the soul of the modern real estate speculator with paralytic horror. It is clear that Congress can never escape the obligation to pay fully as much attention to the social consequences of the way in which it raises the federal revenue as to the problem of seeing that that revenue is adequate.

Finally, the Supreme Court has placed the seal of its approval upon the doctrine that taxation need not be for revenue only. It recognizes that social and economic results will attend the raising of national revenue; and it concedes that a sound policy as to the nature of those results may properly control the selection by Congress of the subjects of taxation. The Court's position is made clear by Chief Justice Taft in his opinion in *Hampton and Co. v. United States*⁷ upholding the constitutionality of the protective tariff. He said:

"So long as the motive of Congress and the effect of its legislative action are to secure revenue for the benefit of the general government, the existence of other motives in the selection of the subjects of taxes cannot invalidate congressional action. As we said in the Child Labor Tax Case, . . . :

"Taxes are occasionally imposed in the discretion of the Legislature on proper subjects with the primary motive of obtaining revenue from them and with the incidental motive of discouraging them by making their continuance onerous. They do

⁶The Federalist, No. 12.

⁷(1928) 276 U. S. 394, 48 Sup. Ct. 348, 72 L. Ed. 624.

not lose their character as taxes because of the incidental motive.'

"And so here the fact that Congress declares that one of its motives in fixing the rates of duty is so to fix them that they shall encourage the industries of this country in the competition with producers in other countries in the sale of goods in this country cannot invalidate a revenue act so framed."

3. *Regulatory and Destructive Taxation May Be Used to Aid Congress in the Exercise of Its Other Delegated Powers.* Thus far we have been dealing with taxes designed clearly, perhaps primarily, for revenue, but calculated also to promote certain social or economic policies. From the point of view of constitutionality the revenue purpose pays the way of whatever goes along with it in the form of regulation or social control. We turn now to a group of taxes in which the legislative purpose as well as the practical result is primarily or exclusively to regulate or destroy the thing taxed and there is no serious expectation or desire to raise revenue. The line dividing these groups of taxing measures may not be clear or easy to draw; but the line is there and there can be no doubt that Congress has frequently crossed it. When Congress has crossed the line and has used its taxing power not to raise money but to regulate and destroy, has it exceeded its constitutional authority? The answer to this question is complicated and difficult. The latter part of this article will be devoted to its more controversial phases. But one aspect of the problem has been clearly and conclusively settled. Congress may use its taxation power primarily or even exclusively for purposes of regulation or destruction when to do so will aid it in regulating commerce, controlling the currency or exercising any other power delegated to it by the constitution. Regulatory or destructive taxation may properly be used as a means of doing anything falling within the delegated powers of Congress.

This seems too obvious to require extensive comment. Congress has used destructive taxation in aid of its commerce power and its currency power, and in each case the Supreme Court has given its approval. In 1866 Congress levied a tax of ten per cent upon state bank notes in order to protect the notes of the new national banks from competition.⁸ The tax was, of course, destructive and was intended to be so. In *Veazie Bank v. Fenno*⁹ the Supreme Court upheld this tax. In the course of its opinion

⁸Act of July 13, 1866, 14 Stat. at L. 146.

⁹(1869) 8 Wall. (U.S.) 533, 19 L. Ed. 482.

it pointed out that Congress enjoys the power of providing an adequate national currency for the nation. To accomplish this Congress "may restrain by suitable enactments, the circulation as money of any notes not issued under its own authority. . . . Viewed in this light, . . . we cannot doubt the constitutionality of the tax under consideration." In other words, the destructive ten per cent tax was merely an indirect but wholly proper method of doing what Congress, under its currency power, could have done by direct prohibition.

The question of the constitutionality of the protective tariff has long bothered many people, particularly Democrats.¹⁰ To be genuinely protective a tariff should completely bar importations, and if it did so of course it produced no revenue. Tariff rates have been known to rise as high as twelve hundred per cent. The Supreme Court never passed squarely on the validity of protective tariffs until the case of *Hampton and Co. v. United States*¹¹ was decided in 1928. In that case, as we have already seen,¹² the Court sustained the tariff on the ground that the regulatory and protective elements were incidental to the collection of revenue. In 1933, however, the Court found it convenient to abandon the theory that tariffs are taxes and to announce that they are instead regulations of foreign commerce.¹³ The University of Illinois had imported scientific apparatus for laboratory use, clearly a state governmental function. It objected to the payment of tariff duties on these imports on the ground that they were federal taxes on state instrumentalities forbidden by the doctrine of the duality of the federal system as embodied in *Collector v. Day*.¹⁴ If the duties were taxes, there seemed no escape from the state's contention. Escape lay in holding that the duties were not taxes but were rather exercises of the power to regulate foreign commerce, a power to which the doctrine of the duality of the federal system, for reasons made none too clear, does not apply. Since tariffs, therefore, are not exercises of the taxing power, even though they

¹⁰The platform on which President Wilson was elected in 1912 contained the following provision: "We declare it to be a fundamental principle of the Democratic Party that the federal government under the constitution has no right to impose or collect tariff duties except for the purposes of revenue. . . ."

¹¹(1928) 276 U. S. 394, 48 Sup. Ct. 348, 72 L. Ed. 624.

¹²*Supra*, p. 765.

¹³*University of Illinois v. United States*, (1933) 289 U. S. 48, 53 Sup. Ct. 509, 77 L. Ed. 1025.

¹⁴(1871) 11 Wall. (U.S.) 113, 20 L. Ed. 122.

levy duties, there is no occasion of course to be disturbed over the fact that their primary purpose and effect may have little to do with the producing of revenue.

It seems clear that the destructive tax of fifty per cent imposed by the recently enacted Bankhead Cotton Control Act¹⁵ upon the sale of all cotton in excess of the quotas set up in the statute rests upon the principle just discussed. If the act as a whole is constitutional, a point still undecided, it is because it is a legitimate exercise by Congress of its power over foreign and interstate commerce. The purpose to regulate such commerce is plainly declared in the title of the statute, and is explained still more fully in the elaborate "declaration of policy" at the beginning of the act. The destructive tax is, therefore, merely part of the machinery employed to control foreign and interstate trade in cotton. Its repressive or destructive consequences raise no separate constitutional problems since the underlying assumption of the entire statute is that those repressive or destructive consequences could properly be achieved by direct exercise of the commerce power. Destructive taxation, in other words, is always available as a means of carrying out any delegated federal power.

It must be noted, however, that the cases we have been considering do not afford direct support for the proposition that the federal taxing power may be used for purposes other than the raising of revenue. There is no sensible reason why one delegated power may not constitutionally be used to aid the exercise of another delegated power; and the Supreme Court has never denied the possibility. It has, however, preferred a different theory and has very carefully made clear that a tax levied as an aid in the regulation of commerce is not really a tax but a commercial regulation; it is not an exercise of the federal power of taxation but of the commerce power. This was sharply brought out in *University of Illinois v. United States*¹⁶ where it was necessary to hold that tariffs were regulations of commerce and not exercises of the taxing power, in order to avoid overruling or weakening the long line of decisions forbidding the federal taxation of state instrumentalities.

4. *Federal Police Power May Be Validly Derived from Regulations Incidental to the Imposition of Excises.* Congress has

¹⁵Act of April 20, 1934.

¹⁶(1933) 289 U. S. 48, 53 Sup. Ct. 509, 77 L. Ed. 1025.

exercised a police power under the taxing clause which employs a wholly different technique from that thus far considered. Since the constitutionality of these police regulations has been uniformly sustained, we may dispose of the topic before passing on to more highly controversial problems. In this group of cases Congress has controlled social and economic policy not by imposing burdensome or destructive tax rates, but by the establishment of separate regulations ostensibly forming part of the administrative machinery designed to facilitate or protect the collection of the tax. These regulations are wholly independent of the rate of taxation.

Some of these police regulations are far less significant than the potentialities which inhere in the method used. The Dingley Tariff Act of 1897¹⁷ contained a provision forbidding the inclusion in packages of tobacco or cigarettes subject to excise anything except the tobacco or cigarettes, and then went on to provide, "nor shall there be affixed thereto, or branded, stamped, marked, written or printed upon, said packages or their contents any promise or offer of, or any order or certificate for, any gift, prize, premium, payment, or reward." In *Felsenheld v. United States*¹⁸ the Supreme Court upheld the power of Congress to impose this regulation. Premium coupons had been included in packages of tobacco. It was admitted by the government that "the coupon is printed on thin paper of inappreciable weight, without intrinsic value, and does not affect in any way the ascertaining of the proper tax payable upon the package, or interfere in any way with the collection of such tax." Mr. Justice Brewer's opinion declares that Congress assumes, or may constitutionally assume, responsibility for assuring the buying public that packages of excised goods contain the goods which under the law they purport to contain, and not other goods. He said:

"Take the matter of tobacco; can it be that a manufacturer may fill packages purporting to be of tobacco with half tobacco and half sawdust, and the government can pass no valid statute to prevent it? If the manufacturer is willing to pay a full tobacco tax on this package, half tobacco and half sawdust, must the government take the money, affix its stamp, and thus in effect certify that the contents are that which it has imposed a tax upon? . . . It is one thing to say that the government's stamp is not a guaranty of either quantity or quality, and that no liability attaches to it if the manufacturer imposes upon his customers by inserting

¹⁷Act of July 24, 1897, 30 Stat. at L. 151.

¹⁸(1902) 186 U. S. 126, 22 Sup. Ct. 740, 46 L. Ed. 1085.

something which is not that which is stamped, but it is a very different thing to hold that the government is absolutely powerless to legislate so as to protect the customer and prevent the manufacturer from putting within the package anything but the article which it proposes to tax. . . .

"It seems to us that, in the rules and regulations for the manufacture and handling of goods which are subjected to an internal revenue tax, Congress may prescribe any rule or regulation which is not in itself unreasonable; that it is a perfectly reasonable requirement that every package of such goods should contain nothing but the article which is taxed; that in order to make such a regulation constitutional it is not necessary that there be, either expressly or by implication, an exception of those articles or things which by virtue of their minute size or weight do not apparently affect the collection of the tax."

Congress has made little use of the authority which Mr. Justice Brewer here indicates that it has. Besides the premium coupon regulation it has added one other minor provision forbidding the inclusion in packages of excised tobacco or cigarettes of lottery tickets, obscene pictures or writing.¹⁹ No one saw fit to question the validity of this regulation. But it seems clear from the theory of the *Felsenheld Case* that Congress, by ancillary regulations attached to its excise power, could accomplish everything in the way of social policy that has been achieved under the Pure Food and Drugs Acts and do it more thoroughly. In levying an excise tax Congress carefully defines and describes the article upon which the tax is to fall. This may include obviously minute details as to quantity, quality, standards of purity, and honesty of representation. The law may then forbid under heavy penalty the sale under the government tax stamp of any article or commodity not conforming to the prescribed standards. And since all commodities produced or sold in the United States may be subjected to federal taxation, the protective regulations thus set up are not limited in their application, as at present, to articles which move through the channels of interstate commerce. The compulsory registration under federal law of all trademarks in order to impose an excise tax upon them would give Congress the right, under the doctrine here set forth, to penalize the use of trademarks not so registered, or the use of them in violation of regulations set up to prevent their infringement. It is obvious that there is a vast reservoir

¹⁹U. S. Code, 1926, Title 26, Sec. 838, p. 800, 26 U. C. A. sec. 838, 3 Mason's U. S. Code, tit. 26, sec. 838.

of federal police power latent in this method of using the taxing power.

An analogous, and even more drastic, type of social control has been exercised by Congress under the taxing power as directed against the sale of narcotic drugs. Both the technique and the theory of this legislation are slightly different from that just discussed. The Harrison Act of 1914²⁰ required all persons importing, manufacturing, selling or giving away narcotic drugs to register with the collector of internal revenue and pay a tax of one dollar per year. The sale or dispensing of the drugs could be lawfully made only upon written orders made out by purchasers upon blanks provided by the commissioner of internal revenue, copies of which must be kept for public inspection for two years. Separate rules applied to physicians and dentists who were, nevertheless, required to keep elaborate records of drugs dispensed, and it was further made unlawful to secure the drugs save for use in a lawful business or the legitimate practice of one's profession. Violations of the act were punishable by a fine of not more than \$2,000, imprisonment for five years, or both. It was perfectly apparent that this whole elaborate structure of drastic control of the drug traffic rested constitutionally upon the relatively microscopic interest which the government had in collecting a dollar a year from those registered under the law. The act was held valid, however, in *Doremus v. United States*²¹ in a five-to-four decision. Doremus, a physician, had paid the tax but dispensed large quantities of heroin to an addict without complying with the other regulations of the act. Mr. Justice Day, speaking for the Court, addressed himself to the question, "have the provisions in question any relation to the raising of revenue?" Undoubtedly well aware that Congress was here making the cart pull the horse he solemnly announced:

"Congress, with full power over the subject, short of arbitrary and unreasonable action, which is not to be assumed, inserted these provisions in an act specifically providing for the raising of revenue. Considered of themselves, we think they tend to keep the traffic above-board and subject to inspection by those authorized to collect the revenue. They tend to diminish the opportunity of unauthorized persons to obtain the drugs and sell them clandestinely without paying the tax imposed by the federal law. . . . Congress may have deemed it wise to prevent such possible dealings because of their effect upon the collection of the revenue."

²⁰Act of Dec. 17, 1914, 38 Stat. at L. 785.

²¹(1919) 249 U. S. 86, 39 Sup. Ct. 214, 63 L. Ed. 493.

Chief Justice White, with three justices concurring, dissented without formal opinion, contenting himself with the brief comment:

“the court below correctly held the act of Congress, in so far as it embraced the matters complained of, to be beyond the constitutional power of Congress to enact because to such extent the statute was a mere attempt by Congress to exert a power not delegated; that is, the reserved police power of the states.”

The subsequent history of the narcotic legislation before the courts is not without interest. In 1925 the case of *Linder v. United States*²² was decided. Linder, a physician, had been indicted under the Harrison Act for having prescribed in the ordinary course of his professional practice four doses of narcotic drugs to an addict to be self-administered, the prescription being made without the written application on the government's forms which is required by law. In a unanimous opinion by Mr. Justice McReynolds, who had dissented in the *Doremus Case*,²³ the Court held that the statute could not be validly construed to forbid Linder's act. The specific requirement which he had violated had no reasonable relationship to the efficient collection of the revenue. The *Doremus Case* was not overruled, but “the sharp division of the Court in this cause,” said Mr. Justice McReynolds, required that the narcotic act “be strictly construed and not extended beyond the proper limits of a revenue measure.” The opinion further declares:

“Congress cannot, under the pretext of executing delegated power, pass laws for the accomplishment of objects not intrusted to the federal government. And we accept as established doctrine that any provision of an act of Congress ostensibly enacted under power granted by the constitution, not naturally and reasonably adapted to the effective exercise of such power, but solely to the achievement of something plainly within power reserved to the states, is invalid and cannot be enforced.”

Mr. Justice McReynolds was still not satisfied. In 1926 the case of *United States v. Daugherty*²⁴ raised the question of the legality of a criminal sentence imposed under the Harrison Act. In his opinion disposing of this technical point Mr. Justice McReynolds interjected, quite gratuitously and apropos of nothing in particular, the following observation:

²²(1925) 268 U. S. 5, 45 Sup. Ct. 446, 69 L. Ed. 819.

²³(1919) 249 U. S. 86, 39 Sup. Ct. 214, 63 L. Ed. 493.

²⁴(1926) 269 U. S. 360, 46 Sup. Ct. 156, 70 L. Ed. 309.

"The constitutionality of the Antinarcotic Act, touching which this court so sharply divided in *United States v. Doremus*,²⁵ was not raised below and has not been again considered. The doctrine approved in *Hammer v. Dagenhart*,²⁶ *Child Labor Tax Case*,²⁷ *Hill v. Wallace*,²⁸ and *Linder v. United States*,²⁹ may necessitate a review of that question if hereafter properly presented."

This most unusual judicial invitation to give the Court an opportunity to overrule a five-to-four decision produced prompt results. By questions certified by the circuit court of appeals the broad question of the validity of the narcotic act was presented in *Nigro v. United States*³⁰ in 1928. In an opinion by Chief Justice Taft the act was again held valid. Mr. Justice Day's language in the *Doremus Case* is quoted at length and with approval. The chief justice then makes an interesting contribution. He refers to the fact that by amendments passed in 1919 taxes imposed by the narcotic act have been substantially increased. The dollar a year levy of the original act has been replaced by rates of \$24, \$12, or \$6, and an excise has been placed on the sale of the drugs. He then goes on to say:

"Thus the income from the tax for the government becomes substantial. Under the Narcotic Act, as now amended, the tax amounts to about one million dollars a year, and since the amendment in 1919 it has benefited the treasury to the extent of nearly nine million dollars. If there was doubt as to the character of this act as an alleged subterfuge, it has been removed by the change whereby what was a nominal tax before was made a substantial one."

This wholly novel suggestion that constitutional vulnerability of the Narcotic Act has been removed by increasing the rates of the taxes levied does not seem logically relevant to the main issue involved. It is not surprising that Mr. Justice McReynolds again dissents in vigorous language, emphasizing that he can see no relation between the broadly regulatory features of the statute and the collection of revenue. It is certainly no answer to this objection to say that a good deal of revenue is coming in. If the act is constitutional, it is because the police regulations set up bear some rational relationship to the efficient collection of the taxes imposed; and that relationship is the same whether the tax is a

²⁵(1919) 249 U. S. 86, 39 Sup. Ct. 214, 63 L. Ed. 493.

²⁶(1918) 247 U. S. 251, 38 Sup. Ct. 529, 62 L. Ed. 1101.

²⁷(1922) 259 U. S. 20, 42 Sup. Ct. 449, 66 L. Ed. 817.

²⁸(1922) 259 U. S. 44, 42 Sup. Ct. 453, 66 L. Ed. 822.

²⁹(1925) 268 U. S. 5, 45 Sup. Ct. 446, 69 L. Ed. 819.

³⁰(1928) 276 U. S. 332, 48 Sup. Ct. 388, 72 L. Ed. 600.

dollar a year or a thousand dollars a year. Chief Justice Taft's comment, quoted above, is obviously not intended to announce an independent and exclusive test of the validity of the Narcotic Act; but it seems rather to be thrown in by way of supplementary reinforcement. The judicial theory remains undisturbed that the Harrison Act is valid because its drastic drug traffic control helps the government collect its money. It is obvious that Congress could, with some circumspection, build a substantial federal police power upon the doctrines announced in the Narcotic Act cases.

5. *Destructive or Regulatory Taxes May be Levied if "On Their Face" They Are Revenue Measures—The Test of "Objective Constitutionality."* We turn now to a group of federal taxes which present much more difficult constitutional problems than any thus far discussed. These are the taxes which have been levied by Congress to control through regulatory or destructive tax burdens matters wholly outside the scope of any delegated federal power. They are not intended to raise revenue, and they are not, like the state bank note tax and the protective tariff, taxes which may be justified as exercises of other admitted congressional powers. If valid they place at the disposal of Congress an implement for the effectuation of broadly national policies affecting the social and economic life of the nation.

The acts falling clearly within this group have not been numerous. In 1902 Congress, under pressure from the powerful lobby representing the dairy farmers of the country, drove colored oleomargaine out of the market by levying a prohibitive tax of ten cents per pound upon its manufacture.³¹ In 1912 the "phossy-jaw" match industry was destroyed by a tax of two cents per hundred upon matches in which white, or poisonous, phosphorus is used.³² At the same time through the successful diplomacy of President Taft non-poisonous match patents were generously released to the industry, so that the complete abandonment of poisonous match-making was due as much to voluntary agreement as to the impact of the tax. In 1919 Congress imposed a tax of ten per cent upon the net incomes of establishments employing children in violation of the standards set up in the act.³³ This was obviously designed to force the abandonment of child labor throughout the country. In 1921 the Future Trading Act placed

³¹Act of May 9, 1902, 32 Stat. at L. 193.

³²Act of April 9, 1912, 37 Stat. at L. 81.

³³Act of Feb. 24, 1919, 40 Stat. at L. 1057.

a tax of twenty cents a bushel on contracts for the sale of grain for future delivery except such sales as were made on boards of trade operating under the detailed regulations set up in the act and administered by the secretary of agriculture.³⁴ Here are four clear cases of the exercise by Congress of a definite and far-reaching police power through the delegated authority to lay taxes. The oleomargarine tax was held valid;³⁵ the match tax was never litigated; and the child labor and grain future taxes were declared unconstitutional.³⁶ These confusing and inconsistent results are due to the use in these cases of two distinct judicial doctrines or techniques employed in testing the validity of these statutes. These may now be explained and analyzed.

In upholding the validity of the oleomargarine tax in *McCray v. United States*,³⁷ Mr. Justice White developed what may be called the doctrine of "objective constitutionality" as applied to federal taxing measures. He stated it as follows:

"Undoubtedly, in determining whether a particular act is within a granted power, its scope and effect is to be considered. Applying this rule to the acts assailed, it is self-evident that on their face they levy an excise tax. That being their necessary scope and operation, it follows that the acts are within the grant of power. The argument to the contrary rests on the proposition that, although the tax be within the power, as enforcing it will destroy or restrict the manufacture of artificially colored oleomargarine, therefore the power to levy the tax did not obtain. This, however, is but to say that the question of power depends, not on the authority conferred by the constitution, but upon what may be the consequence arising from the exercise of the lawful authority."

It seems probable that at least four ingredients were compounded in Mr. Justice White's mind to produce this doctrine that a tax measure must be held valid if "on its face" it levies a tax. First, there is the general presumption of constitutionality which attaches to all statutes; second, there are no constitutional limits upon the mere rate of taxation; third, Congress has, and must of necessity have, virtually unlimited discretion in the selection of the objects of taxation; and finally, it is no part of the

³⁴Act of Aug. 24, 1921, 42 Stat. at L. 187.

³⁵*McCray v. United States*, (1904) 195 U. S. 27, 24 Sup. Ct. 769, 49 L. Ed. 78.

³⁶*Bailey v. Drexel Furniture Co.*, (1922) 259 U. S. 20, 42 Sup. Ct. 449, 66 L. Ed. 817; *Hill v. Wallace*, (1922) 259 U. S. 44, 42 Sup. Ct. 453, 66 L. Ed. 822.

³⁷(1904) 195 U. S. 27, 24 Sup. Ct. 769, 49 L. Ed. 78.

judicial function to explore the motives which led Congress to use a delegated power. This was all perfectly orthodox constitutional law, and furthermore, it led to a result which avoided the highly embarrassing necessity of formulating a judicial test of constitutionality whereby a tax of ten cents a pound on colored oleomargarine could be held void, and a tax of ten cents a pound on smoking tobacco could be held valid. Any such test would, in White's judgment, involve the consideration by the Court of legislative purposes and results not discernible in the text of the act, and hence not properly within the range of judicial scrutiny. The doctrine of "objective" constitutionality as applied to federal taxing measures was a doctrine of judicial self-denial. It was indeed very genuine self-denial for White, for we know that he believed that Congress had exceeded its constitutional power in passing the oleomargarine tax act, or any similar act, for in his view the federal taxing power could validly be employed only for revenue or for purposes safely within the scope of delegated federal powers.³⁸ But a tax thus "subjectively" unconstitutional from the standpoint of the member of Congress was "objectively" valid from the standpoint of the Supreme Court if it bore the earmarks identifying it as a revenue measure.

The judicial laissez faire theory of the *McCray Case* is eminently satisfactory to those who believe that the taxing power of Congress ought to be available for the furtherance of any national policy, or the solving of any national problem. It permits and invites the direct and drastic regulation of social and economic interests through repressive or destructive taxation. As long as the proper label is attached to the act and the proper formula is employed, the discretion of Congress as to the purposes to be accomplished by the ostensible use of the taxing power seems to be unlimited. If the power is abused, Congress alone is responsible. It is true that Mr. Justice White includes in his opinion his customary caveat that if a case arose in which the taxing power was clearly being used "solely for the purpose of destroying rights which could not be rightfully destroyed consistently with the principles of freedom and justice upon which the constitution rests" then the Court would be obliged to invalidate the

³⁸In the writer's earlier article, *The National Police Power under the Taxing Clause of the Constitution*, (1920) 4 MINNESOTA LAW REVIEW 247 there is an extensive examination of White's views on this problem as expressed by him in the Senate in 1892 in a debate on a taxing proposal which he deemed "subjectively" bad, but "objectively" good.

act. But this restriction is obviously directed only against palpable and flagrant invasions of private right, and would hardly serve to check the steady growth of a broad police power through federal taxation. The *McCray Case* doctrine, in short, comes close to making the validity of destructive and regulatory federal taxation a "political question."

From the standpoint, however, of those who believe that there should be some outside judicial restrictions upon the purposes for which Congress uses its power of taxation, the doctrine of "objective constitutionality" is far from acceptable. As developed by White it is logically none too satisfying. The validity of the taxing act is to be tested by the presence or absence of certain "objective" attributes in the statute which unmistakably brand it as a revenue measure "on its face." If these are discovered, then the act is valid. For reasons which are not made clear the Court must ignore other objective attributes of the statute which quite as plainly suggest that the measure is not a revenue measure. It is one thing to say that the Court may not properly speculate as to the motives which led Congress to put a tax of ten cents a pound on colored oleomargarine, may not search the Congressional Record to discover what Congress thought it was trying to do, or may not examine evidence tending to prove that the levies will bring in no revenue; it is quite a different thing to declare that the Court may not rationally analyze the provisions of the act and draw the obvious conclusion which needs no extraneous evidence to support it, that this tax is completely destructive of the business upon which it is imposed. The assumption that the destructive purpose and effect of this tax cannot be plainly read in the language of the statute itself, merely because some other tax using the same rate is equally obviously not destructive, is clearly contrary to fact. The Court, in other words, denies itself the right to transfer its judicial gaze from the objective evidence that the act is a revenue measure, and pay any attention to the equally objective evidence that it is nothing of the sort. It insists upon pretending to be ignorant of what every one else knows. The doctrine, furthermore, has a certain inflexibility. It leaves no room for the consideration of differences of degree. If the objective test is met, the Court must uphold the act, taking the bad with the good no matter how much bad there is. It provides no technique for distinguishing between the statute which "on its face"

levies a tax and at the same time exerts an incidental power of repression or regulation of that which is taxed and the statute which also levies a tax "on it face," as in the case of the oleo-margarine tax, and at the same time completely destroys its object. There is a certain irony in the fact that White's test of "objective constitutionality" is a really satisfactory measure of the validity of federal taxing measures only for those who hold views as to the scope and purposes of federal taxation which White himself feared and detested. It was wholly to be expected that sooner or later the Court would be led to evolve some judicial technique for imposing more rigorous and definite limitations upon the destructive use of the federal power of taxation for the broad purposes of social and economic control. Such a doctrine was announced by Chief Justice Taft in the *Child Labor Tax Case*.³⁹

6. *Regulatory and Destructive Tax Levies May be Penalties Rather than Taxes. When Is a Tax Not a Tax?* The Child Labor Tax of 1919 and the Future Trading Act of 1921 were held unconstitutional by the Supreme Court on the same day, the former in the case of *Bailey v. Drexel Furniture Co.*,⁴⁰ and the latter in *Hill v. Wallace*.⁴¹ The decision in each case rested upon the same ground, namely, that what purported to be an exercise of the power of Congress to tax was in reality not a tax at all, but the imposition of a penalty, and that it was therefore not an exercise of the delegated power of taxation or of any other delegated power, and was consequently unconstitutional. In the *Bailey Case* a ten per cent tax upon the net incomes of those employing children below specified ages was declared to be "on its face" a penalty and not a tax. Chief Justice Taft's argument in support of this conclusion emphasized four points. First, the amount of the tax did not vary with the amount of the thing taxed. The same tax was imposed upon the employer who hired a single child for a day as upon the employer who hired a hundred or five hundred children for a year. Each paid ten per cent of his total net income. This certainly strongly suggests a punitive rather than a fiscal purpose. Second, the tax is not imposed upon those who unwittingly employ children below the lawful ages, but only upon those who do so wilfully. This emphasis upon intent

³⁹*Bailey v. Drexel Furniture Co.*, (1922) 259 U. S. 20, 42 Sup. Ct. 449, 66 L. Ed. 817.

⁴⁰(1922) 259 U. S. 20, 42 Sup. Ct. 449, 66 L. Ed. 817.

⁴¹(1922) 259 U. S. 44, 42 Sup. Ct. 453, 66 L. Ed. 822.

is an attribute of a criminal law rather than a revenue measure. Third, the statute sets up an elaborate code of regulation of conduct over which Congress admittedly has no direct authority, and then imposes a severe fiscal burden upon those who deviate from those regulations. Fourth, these regulations of conduct are quite obviously the paramount and dominant features of the act, constitute its obvious purpose, and cannot therefore be viewed as instances of the merely incidental regulations which are commonly and permissibly associated with revenue measures. These four characteristics spelled out a penal measure and not a tax. It is apparent that the first two of these were present in the statute rather fortuitously and were in no sense necessary to accomplish the purpose of Congress to destroy child labor. They are not likely to be common characteristics of taxing measures. It would have been quite feasible to make the amount of the tax vary with the amount of child labor employed, either by placing an ad valorem levy upon all goods in the making of which children were employed, or by taxing employers two dollars upon every day's labor performed by children. It was also quite unnecessary to exempt from the payment of the tax those who mistakenly and in good faith employ children under the lawful age. In fact, state child labor laws commonly place upon employers the burden of seeing that they do not make these mistakes and hold them responsible if they do. Furthermore, these two attributes of the child labor tax were not present in the Future Trading Act. In that statute a tax of twenty cents a bushel was placed upon grain sold on future contracts except upon boards of trade operating under the regulations provided in the act. Quite obviously the amount of the tax here does vary with the amount of the thing taxed; nor is there any occasion or opportunity for exempting any one from the payment of the tax because of his innocent intentions. The third and fourth characteristics of the child labor tax mentioned above were, however, common to both statutes. In each case the act itself outlined an elaborate body of regulations not within the scope of any delegated federal power and then exacted heavy payments from those violating those regulations. And in each case these regulations, as unmistakably indicated in the act itself, constituted the obvious and sole purpose of the statute, and could not be mistaken by any rational person for regulations reasonably incidental to the collection of revenue. It

was in terms of these two attributes that Chief Justice Taft formulated his answer to the question, "When is a tax not a tax?"⁴²

There are several points about the "penalty" doctrine developed in these two cases which deserve comment. In the first place, the test of the validity of the alleged taxing measures lies in the purpose and effect of the act as determined by all its provisions sensibly construed, plus anything else which the Court may "know judicially" in common with other rational men. This does not involve an examination of legislative "motives" save as those motives become translated into the purposes obviously expressed in the language of the statute. A glance at the superficial earmarks indicating the purpose to raise revenue does not bar the Court from examining and evaluating other evidences present in the act that a wholly different purpose and effect are involved. It seems clear that there may be no clearly described and ever present characteristic which will inevitably brand an act as "penal" rather than fiscal. Different statutes, as in the case of the two before the Court, will present different kinds of evidence that they impose penalties rather than lay taxes. The significance of the rule laid down lies not so much in the kind of concrete evidence of forbidden purpose which is found in any statute as in the fact that the Court is willing to look for that evidence and take it all into consideration.

In the second place, the "penalty" doctrine presents a flexible test of the validity of this type of tax measure. It leaves room for the recognition of differences of degree in the relative impact of the penal and fiscal purposes disclosed in the language of the statute itself. The mere presence of evidence of "objective constitutionality" is no longer conclusive as it was under White's rule; nor is the presence of similar evidence of legislative purpose to regulate or destroy deemed conclusive. The two kinds of evidence are weighed the one against the other, and the Court leaves itself free to uphold the act if the penal or regulatory features are "reasonably incidental" to the fiscal purposes, or to invalidate it if such penal or regulatory purposes are dominant or exclusive. At some point in the development of a police power under the taxing clause Congress crosses the line which divides

⁴²For an acute analysis of these cases, see Thomas Reed Powell, *Child Labor, Congress and the Constitution*, (1922) 1 *The North Carolina Law Review* 61. See also Professor E. S. Corwin's briefer comment in (1922) 16 *The American Political Science Review* 612.

fiscal measures from those that impose penalties. It is a movable line, and its precise location will depend upon a judicial judgment as to the relative practical significance of the different ingredients which went into the making of the statute, in other words, upon a realistic appraisal of net results.

In the third place, the theory under discussion avoids the pitfalls, practical and logical, inherent in the doctrine which Professor E. S. Corwin has aptly named the doctrine of "dual federalism."⁴³ Reduced to its simplest terms this doctrine means that Congress is limited in its use of its clearly delegated powers to purposes and results which do not fall within the range of the reserved powers of the states. As Corwin puts it, "The co-existence of the states and their powers is of itself a limitation upon national power." This was the backbone of Mr. Justice Day's opinion in *Hammer v. Dagenhart*,⁴⁴ invalidating the first federal child labor law, though it was not the sole argument used. The child labor law was void because it involved the use of the commerce power in such a way as to impinge upon a range of authority (to deal with child labor) reserved to the states by the tenth amendment. The weakness of this doctrine has been ably exposed by Professor Corwin and need not be discussed in detail here. Its general result is to deny to Congress the right to exercise its granted powers for broad national purposes; and it is logically defective because the reserved powers of the states which it is alleged may not be disturbed by the exercise of the powers granted to Congress are by definition merely those powers which have not been given to Congress or denied to the states. If Congress is exercising a delegated power, then, by the very language of the tenth amendment, it cannot possibly be exercising a power reserved to the states.⁴⁵ Now while Chief Justice Taft in the *Bailey* and *Hill* cases refers to *Hammer v. Dagenhart* with approval, he does not apply this doctrine of "dual federalism." The child labor and the grain future taxes are not held void because they are exercises of the federal power of taxation for purposes reserved to the states, but because they are not taxes at

⁴³See his penetrating study, *Congress's Power to Prohibit Commerce: A Crucial Constitutional Issue*, (1933) 18 *Cornell Law Quarterly* 477.

⁴⁴(1918) 247 U. S. 251, 38 *Sup. Ct.* 529, 62 *L. Ed.* 1101.

⁴⁵See the able analysis of this point in Thomas Reed Powell, *The Child Labor Law, The Tenth Amendment, and the Commerce Clause*, (1918) 3 *Southern Law Quarterly* 175, dealing with the first child labor case.

all. They are not taxes for bad purposes; they simply are not taxes. Of course, if they are not taxes, then they are not exercises of a power delegated to Congress and are void for that reason. This is far more satisfactory analysis than that employed in *Hammer v. Dagenhart*.

Finally it may be pointed out that *Bailey v. Drexel Furniture Co.* and *Hill v. Wallace* do not overrule the *McCray Case*, and yet the two groups of cases are logically irreconcilable. Chief Justice Taft's reasoning in the child labor tax case and the grain futures tax case leads inevitably to the conclusion that the oleomargarine tax imposed a "penalty" rather than levied a tax and was therefore void. The logical application of the doctrine employed by Mr. Justice White in the *McCray Case* to the child labor tax or the grain futures tax would result in a finding of "objective constitutionality," based on the presence of attributes apparent on the "face of the act," and would consequently compel the court to hold the act valid. No amount of analysis will disclose any inherent differences between these various taxes which can provide a logical basis for classifying them into different categories as to their validity. There may be differences in degree; there may be differences in the degree of judicial willingness to interfere with legislative results; but there are no differences in kind.

The net result is that we have at present two available judicial techniques for dealing with the validity of national police regulations under the taxing power. The criterion of "objective constitutionality," which may not inaccurately be called the doctrine of "judicial obtuseness," permits the Court to uphold any carefully drawn taxing statute designed to promote the social and economic well-being of the country through regulation or repression by the simple process of keeping the judicial eye discreetly on the portions of the act which spell "tax" and discreetly off those which spell "regulation and destruction." It may be invoked to sustain whatever degree of national police power under the taxing clause the Supreme Court deems safe and desirable. It makes a strong appeal to the Court by reason of its almost naive simplicity and the character of the results which can be attained by its use. It is not surprising to find the Court employing it in a very recent case, *Magnano Co. v. Hamilton*,⁴⁶ to uphold the validity of a statute of the state of Washington imposing a tax of fifteen cents

⁴⁶(U.S. 1934) 54 Sup. Ct. 599.

a pound upon all butter substitutes. Mr. Justice Sutherland said:

"The statute here under review is in form plainly a taxing act, with nothing in its terms to suggest that it was intended to be anything else. It must be construed, and the intent and meaning of the legislature ascertained, from the language of the act, and the words used therein are to be given their ordinary meaning unless the context shows that they are differently used."

All of which would, of course, be equally applicable to a federal tax of fifteen cents a pound on all butter substitutes. It is apparent that under the generous protection of the "objective validity" doctrine the Court may permit Congress to employ its taxing power for all broadly national purposes, as an implement for the solution of national problems of social and economic policy.

But when, in the judgment of the Court, this power has been exercised too drastically, or pushed too far, and there is no precise logical test by which it can be surely determined when this point has been reached, then it may with equal ease shift over to the "penalty" theory. It may look not merely at part of the statute but at all of it, and may say as Chief Justice Taft said in the Bailey case,

"Its prohibitory and regulatory effect and purpose are palpable. All others can see and understand this. How can we properly shut our minds to it?" [as we did in the oleomargarine tax case].⁴⁷

And deciding not to shut its mind to it, it may announce that the statute imposes a penalty, rather than levies a tax, and is therefore void. Here then is an available check upon what the Court deems an abuse by Congress of its police power derived from taxation. The wide discretion which the Court enjoys in determining which of the two doctrines it will apply to any given exercise of the federal power of taxation for purposes of social or economic control places it in a strategic position with respect to national policy. If its decisions in the premises take on the aspect of what we sometimes speak of as "judicial legislation," it is, at least, judicial legislation of the conventional type with which we have grown familiar through its presence in so many other parts of our constitutional system.

⁴⁷Brackets supplied by writer.