1919

Interstate Commerce and Child Labor

Andrew A. Bruce

INTERSTATE COMMERCE AND CHILD-LABOR

THE reception which has been generally accorded to the recent so-called Child-Labor Decision of the Supreme Court of the United States[1] and the caustic if not contemptuous references in the magazines and public press to the majority that concurred therein,[2] can only be explained on the theory that desire often outruns judgment and that when one feels deeply it is difficult to pause and to think. It is but another example of the present-day tendency to forget that a rule of constitutional construction which is adopted for good and meritorious purposes and on the theory that the end justifies the means is none the less a rule of law and a precedent and may later be relied upon to accomplish that which may be pernicious in its consequences and subversive of all law and of all government. The act under consideration[3] provided that:

"No producer, manufacturer or dealer shall ship or deliver for shipment in interstate or foreign commerce any article or commodity the product of any mine or quarry situated in the United States, in which within thirty days prior to the time of the removal of such product therefrom, children under the age of fourteen years have been employed or permitted to work, or children between the ages of fourteen and sixteen years have been employed or permitted to work more than eight hours in any day, or more than six days in any week, or after the hour of seven o'clock post-meridian, or before the hour of six o'clock ante-meridian."

The majority of the members of the Supreme Court held that this statute was invalid and that it could not be sustained as an exercise by Congress of its power to regulate commerce. They also held that the act could "not be justified on any supposed theory of the right of the state to protect its manufacturers, who themselves were subject to the local laws which denied them the privilege of employing children under certain circumstances or under certain conditions, against the competition of goods which

[1] Hammer v. Dagenhart, (1918) 38 S. C. R. 529.
[2] Justices Day, Pitney, Van Devanter, McReynolds, and Chief Justice White.
[3] Act of Sept. 1, 1916, 39 Stat. 675, Chap. 432, Comp. Stat. 1916, Secs. 8819a-8819f.

were manufactured in another state and under less drastic enactments." They held, in short, that Congress could not, under its delegated power to regulate commerce, *destroy* commerce; nor could it by this indirect method impose its theories of sociology or public policy upon the several states. They explicitly stated that:

"The grant of power over the subject of interstate commerce was to enable it to regulate such commerce and not to give it authority to control the states in their exercise of the police power over local trade and manufacture," and that:

"The grant of power over a purely federal matter was not intended to destroy the local power, always existing and carefully reserved to the states in the Tenth Amendment to the Constitution" which provides that:

"The powers not delegated to the United States by the Constitution nor prohibited by it to the states, are reserved to the states respectively, or to the people."

They quoted with approval the language of Chief Justice Marshall when in the Dartmouth College Case[4] he said:

"That the framers of the Constitution did not intend to restrain the states in the regulation of their civil institutions, adopted for internal government, and that the instrument they have given us is not to be so construed may be admitted."

The minority opinion,[5] though expressly affirming the proposition "That the states have exclusive control over their methods of production and that Congress cannot meddle with them, taking the proposition in the sense of direct intermeddling," took the position, and this unhesitatingly, that the power to regulate commerce involved the power to prohibit and to destroy, and that Congress had an unlimited discretion in such matters and regardless of what might be the effect upon the industries and social policies of the several states. It closed with the following remarkable statement:

"The Act does not meddle with anything belonging to the states. They may regulate their internal affairs and their domestic commerce as they like. But when they seek to send their products across the state line they are no longer within their rights. If there were no Constitution and no Congress, their

[4] Dartmouth College v. Woodward, (1819) 4 Wheat. (U. S.) 518, 4 L. Ed. 629.

[5] Written by Mr. Justice Holmes and concurred in by Justices McKenna, Brandeis and Clarke.

power to cross the line would depend upon their neighbors. Under the constitution such commerce belongs not to the states but to Congress to regulate. *It may carry out its views of public policy whatever indirect effect they may have upon the activities of the states.* Instead of being encountered by a prohibitive tariff at her boundaries the *state encounters the public policy of the United States which it is for Congress to express. The public policy of the United States is shaped with a view to the benefit of the nation as a whole.* If, as has been the case within the memory of men still living, a state should take a different view of the propriety of sustaining a lottery from that which generally prevails, I cannot believe that the fact would require a different decision from that reached in *Champion v. Ames.* Yet in that case it would be said with quite as much force as in this, that Congress was attempting to intermeddle with the state's domestic affairs. *The national welfare as understood by Congress may require a different attitude within its sphere from that of some self-seeking state. It seems to be entirely constitutional for congress to enforce its understanding by all the means at its command."*

Though, indeed, asserting at the outset a doctrine of state's rights and state home rule, the opinion insists upon a United States as opposed to a state public policy, and though it admits that the furtherance of this policy can not be the subject of direct legislation, it withdraws the admission, as far as any practical value is concerned, by insisting that it may be the subject and object of that which is indirect. It in effect asserts that by these indirect methods a temporary political majority in Congress may superimpose its conception of public policy upon all of the states, may destroy their industries, and may control their social policies. It even goes so far as to intimate that over the exercise of these powers there is no judicial control, save only to ascertain whether the acts affect commerce or are enacted under the mantle of the taxing or treaty-making powers or the power to regulate the currency or to establish post roads. "But I had thought" says the writer of the opinion, "that the propriety of the exercise of a power admitted to exist in some cases was for the consideration of Congress alone and that this court always had disavowed the right to intrude its judgment upon questions of policy or of morals. It is not for this court to pronounce when prohibition is necessary to regulation if it ever may be necessary—to say that it is permissible against strong drink but not as against the product of ruined lives."

If this minority opinion states what is to be the law of the land, (and if it be true that the Supreme Court of the nation ultimately voices the public opinion and the public desires, it is soon destined to become so,[6]) it is well that we should realize what that law would mean.

It would mean that before the Civil War a northern majority could have settled the slavery question by excluding from the avenue of commerce the products of slave-labor, especially cotton, and that in our own time a northern majority of wool producers and woolen goods manufacturers could shut out from commerce cotton-made goods, or a southern majority woolen ones, just as to greater or lesser extent has the butter maker, by the exercise of the taxing power, driven oleomargarine from the market.[7] It would mean that a labor-vote awed congressional majority, such as passed the Adamson Bill, could exclude from transportation all articles of whatever nature or kind that did not bear the union label or were not made in closed shops. It would mean that a political majority, gathered together temporarily at Washington, and thousands of miles away from and utterly ignorant of the local and economic conditions of the states over which they were legislating, could dictate their social and economic policies, and this, if the opinion of the minority is correct, without even the opportunity to those states of a judicial review.

This is the law which is announced in the minority decision, and which has won so much journalistic applause. We hardly believe, however, that it is justified by the authorities which are cited, and it is a noticeable fact that the opinion advances but little reason or argument itself, but seems to rely upon authority and authority alone.

---

[6] That is to say if the journalistic comment really expresses that opinion, for a change in the vote of but one member of the court would affect the result.

[7] According to Congressman Burton of Texas, in 1901, before the passage of the law, 130,000,000 pounds were produced in the United States. This on the old basis of taxation of 2 cts. per pound produced a revenue of $2,600,000. Within two years after the passage of the recent law raising the tax to 10 cts. per pound, the production had fallen off 66⅔%, and the revenue derived even from the 10 ct. tax was only $160,000. According, also, to Representative Burton, before the passage of the act, oleomargarine sold at from 15 cts. to 18 cts. per pound in Washington, and butter at from 20 cts. to 30 cts., while two years later butter sold in Washington at from 48 cts. to 60 cts., an absolutely prohibitory price both for export purposes and as far as the poor man is concerned.

It is true, as stated by Mr. Justice Holmes, that in the case of *Veazie Bank v. Fenno*,[8] and "fifty years ago, a tax on state banks, the obvious purpose and actual effect of which was to drive them or at least their circulation out of existence, was sustained by the national court, although the result was one that Congress had no constitutional power to require" and that in its opinion the court said that "The judicial cannot prescribe to the legislative department of the government limitations upon the exercise of its acknowledged powers."

It is also true that in the case of *McCray v. The United States*[9] a federal corporation tax was sustained although, according to ex-President, then President Taft, and the minority opinion in the present case, among its primary purposes was the purpose to secure a control over a method of scrutinizing the affairs of these corporations.[10]

It is also true, as stated in the minority opinion, that "the manufacture of oleomargarine is as much a matter of state regulation as the manufacture of cotton cloth, but that the Supreme Court none the less sustained an act of Congress which levied a tax upon the compound when colored so as to resemble butter that was so great as obviously to prohibit the manufacture and sale."[11]

These acts and these opinions, however, appear to the writer to have been the result of popular pressure and of political exigency rather than of sober judicial thought. In them also the taxing power alone was involved,—a power which has generally been deemed arbitrary in its nature, and, if revenue is its object, practically to know no limits but the governmental needs. In any

---

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

[9] (1904) 195 U. S. 27, 24 S. C. R. 769, 49 L. Ed. 78, 1 Ann. Cas. 561.

[10] In a message to Congress recommending the imposition of this tax, President Taft used the following language: "Another merit of this tax is the federal supervision which must be exercised in order to make the law effective over the annual accounts and business transactions of all corporations. While the faculty of assuming a corporate form has been of the utmost utility in the business world, it is also true that substantially all of the abuses and all of the evils which have aroused the public to the necessity of reform were made possible by the use of this very faculty. If now, by a perfectly legitimate and effective system of taxation, we are incidently able to possess the Government and the stockholders and the public of the knowledge of the real business transactions and the gains and profits of every corporation in the country, we have made a long step toward that supervisory control of corporations which may prevent a further abuse of power."

[11] See McCray v. United States, (1904) 195 U. S. 27, 24 S. C. R. 769, 49 L. Ed. 78, 1 Ann. Cas. 561.

event, neither they nor the other cases which are cited in the opinion of Mr. Justice Holmes appear to be in any way conclusive of the controversy which is before us.

In the Veazie Bank case the court laid particular emphasis upon the fact that the tax which was laid upon the state banks was levied for the purpose of protecting the national currency, and that that currency was within the exclusive control of the federal government; while in the Lottery Case, the Pure Food and Drug Act Case,[12] and the White Slavery Cases,[13] the decisions dealt with things or articles of commerce, or with commercial practices, which in themselves were nuisances and inherently harmful and therefore not property at all, or whose production was tainted with fraud which would everywhere be condemned and everywhere be deleterious. The things themselves in short were outlaws or were branded with the brand of Cain.[14]

The so-called Lottery Case, indeed, which is so strongly relied upon and which Senator Beveridge[15] so strongly emphasized before Congress, though perhaps not erroneous in its judgment, contains absolute contradictions and is extremely vulnerable in its reasoning and in its argument.

Although, indeed, the court at one place in its opinion, states that these tickets were the subject of interstate commerce and therefore under the control of Congress, the underlying and controlling theory of the case appears to have been not so much that

[12] Hipolite Egg Co. v. United States, (1911) 220 U. S. 45, 55 L. Ed. 364, 31 S. C. R. 364.

[13] Hoke v. United States, (1913) 227 U. S. 308, 57 L. Ed. 523, 33 S. C. R. 281, Ann. Cas. 1913E 905, 43 L. R. A. (N.S.) 906; Caminetti v. United States, (1917) 242 U. S. 470, 61 L. Ed. 442, 37 S. C. R. 192, L. R. A. 1917F 502.

[14] The theory of the cases of Hipolite Egg Co. v. United States and Hoke v. United States, was not that Congress was directly naming or defining an evil and then legislating against it under its power to regulate commerce, but that it was simply supplementing the powers of the states and aiding them in the enforcement of their laws and in the control of the articles or practices which they and not congress had first outlawed. Thus in the case of Hoke v. United States, the court says: "There is unquestionably a control in the states over the morals of their citizens, and it may be admitted it extends to making prostitution a crime. It is a contol, however, which can be exercised only within the jurisdiction of the states; but there is a domain which states cannot reach and over which congress alone has power; and if such power be exerted to control what the states cannot, it is an argument for and not against its legality. Its exertion does not encroach upon the jurisdiction of the states."

[15] The grandfather if not the father of the present act. See Vol. 41, p. 2153 Congressional Record.

they were the subjects of interstate traffic and property and that Congress had the power to destroy as well as to regulate commerce (for this was not held at all), as that they were common nuisances in which there were no property rights whatever, and that, being nuisances and not property, the owners of them had no rights which Congress was bound to respect.

"If," the court said, "the carrying of lottery tickets from one state to another be interstate commerce, and if Congress is of the opinion that an effective regulation for the suppression of lotteries carried on through such commerce is to make it a criminal offense to cause lottery tickets to be carried from one state to another, we know of no authority in the courts to hold that the means thus devised are not appropriate and necessary to protect the country at large against a species of interstate commerce which, although in general use and somewhat favored in both state and national legislation in the early history of the country, has grown into disrepute and has become offensive to the *entire* people of the nation."

The opinion, in short, when properly analyzed, takes the position that the lottery ticket is a nuisance much to the same extent as a disease-infected article of clothing, that it has become offensive to and has been condemned by the *entire people* of the nation, and that Congress, as a sort of a trustee of the welfare of all, when that all has expressed its opinion and formulated its public policy and as the only agency which has direct supervision over interstate lines of communication, has the power if not the duty to supplement the police activities of *all* of the states and to prohibit the transportation of such articles as *all* have outlawed and all have condemned. The case falls far short of holding that Congress may deny the use of the interstate lines of communication to goods or articles which are not, as lottery tickets or disease-infected articles of clothing, useless or inherently harmful, and whose sale or manufacture is not forbidden by the laws of all of the states, or at any rate between two states in neither of which are they outlawed or condemned.[16]

[16] During the argument on the so-called Beveridge Bill in the United States Senate, Senator Knox said: "I had something to do with the Lottery case. The final argument was made when I was attorney general and I had something to do with the preparation of the case, and the reason why I say I would be under a personal obligation for a direct decision upon the proposition that the control over interstate commerce is just the same as it is over foreign commerce is because we used every one of those cases which the Senator has cited and we worked every one of those statements for all they were worth in order to get the court to base the decision in the Lottery case upon

There is, in short, no authority cited in the minority opinion, which, on the right to regulate commerce alone, would induce us to believe that Congress may forbid the carriage of the products of child-labor out of a state where the employment of children is not forbidden and into states where it is also not forbidden, and, if the case of *Leisy v. Hardin*[17] still announces the law, into any state whatever.

Nor is there any support, in the Lottery case, for the proposition that by means of the commerce clause of the constitution Congress may superimpose its conception of public policy upon the public policy of the several states and may accomplish by indirect means that which it cannot or dare not accomplish by direct. The difficulty in the way of the national state agency or trustee theory suggested in the Lottery case, when applied to the bill which is before us, lies in the fact that few of the states have adequately legislated against the evils of child-labor,[18] and that such laws as have been adopted are by no means uniform as to the ages at which children may be employed or the hours that they shall work, and that the confessed purpose of the so-called Beveridge bill and the primary purpose of the present act is to force a uniformity in these matters. We must remember that though the lottery ticket is a nuisance and an article of no intrinsic value, the coat, the axe handle, or the other manufactured product is a legitimate article of commerce and is useful, and that it is its method of manufacture alone that is reprehensible, and that, in the majority of states where it is manufactured, even its method of manufacture is not condemned by the law.

We must not be misled by the so-called fraud order cases[19] for these were decided entirely upon the theory that the power vested in Congress to establish post offices and post roads embraced the regulation of the entire postal system of the country; that congress was given the power to create a postal system which it should itself operate and that, being the creator, it could neces-

---

that ground, which would have been conclusive ground and would not have necessitated the court going elsewhere. But if the Senator will examine that decision he will see that they put it on other grounds." Congressional Record Vol. 41, p. 2180.

[17] (1889) 135 U. S. 100, 10 S. C. R. 681, 34 L. Ed. 128.

[18] For a summary of laws see Congressional Record Vol. 41, p. 2152.

[19] Ex parte Jackson (1877) 96 U. S. 727, 24 L. Ed. 877; In re Rapier, (1892) 143 U. S. 110, 36 L. Ed. 93, 12 S. C. R. 374; Horner v. United States, (1892) 143 U. S. 207, 36 L. Ed. 126, 12 S. C. R. 407; No. 2, same case, 143 U. S. 570, 36 L. Ed. 266, 12 S. C. R. 522.

sarily regulate the use of that which it had created. In the case of interstate commerce, however, Congress has created and was given the power to create nothing. It was given the power merely to regulate that which was before in existence and that which itself neither owned nor operated. The leading case on the subject, indeed, expressly repudiates the idea that the same power of exclusion can be exercised in interstate commerce generally that can be exercised in the case of the postal system. "We do not think, (the court says), that Congress possesses the power to prevent the transportation in other ways as merchandise that which it excludes from the mails. To give efficiency to its regulations and to prevent rival postal systems, it may perhaps prohibit the carriage by others for hire, over postal routes, of articles which legitimately constitute mail matter in the sense in which those terms were used when the constitution was adopted—consisting of letters and newspapers and pamphlets when not sent as merchandise—but further than this, its power of prohibition cannot extend."[20]

It is noticeable indeed that the minority opinion lays no stress upon and, with the exception of the Lottery case, nowhere cites the authorities which were relied upon by Senator Beveridge when he urged the parent act upon the Congress, and this perhaps for the reason that they contained dicta merely which were uttered in cases where the total destruction by Congress of interstate commerce in any article or thing was not sought to be justified, but in which the imposition of restrictions by the states was sought to be prevented. In the case of *Stockton v. Baltimore R. R. Co.*,[21] for instance, from which the Senator quoted the following language: "We think the power of Congress is supreme over the whole subject of interstate commerce uninterrupted and unembarrassed by state lines or state laws; that in this matter the country is one and the work to be accomplished is national, and that state interests, state jealousies and state prejudices do not require to be consulted. In matters of foreign and interstate commerce there are no states," the question before the court was not as to the power of Congress to prohibit or destroy commerce, but its right and power to extend and to promote it. It was whether Congress had the power to authorize two railroad companies to construct a bridge across Staten Island Sound and to

[20] Ex parte Jackson, (1877) 96 U. S. 727, 24 L. Ed. 877.
[21] (1887) 32 Fed. Rep. 9.

establish the same as a post road. In other words, whether Congress could legally provide for commercial intercourse between two states by land as well as by water, by rail as well as by steamboat.

So, too, in the case of *Brown v. Houston*,[22] from which the Senator also quoted, "the power to regulate commerce among the several states is granted to Congress in terms as absolute as is the power to regulate commerce with foreign nations," the language was used merely in connection with a discussion concerning the power of a state to levy a tax on interstate commerce and not in connection with a consideration of the power of Congress to destroy it. While in the case of *Crutcher v. Kentucky*,[23] on which perhaps more stress was laid than on any other, unless it was the Lottery Case, the language quoted was used in connection with a discussion of the right of a state to require foreign express companies to pay local license fees and to make a deposit with the state officers.

The writer is willing to concede that a state has the inherent right to self-protection, that it should be allowed to exclude from its borders that which brings pestilence either to the body or to the mind, that it should be allowed, by child-labor or other laws, to protect the morals and the health and to promote the educational welfare of its children, and that to this end it should have the power to call upon Congress for the exercise and Congress should be and is permitted to exercise its powers of interstate commerce control to prevent the introduction of whatever would be injurious to that self-protection, such as intoxicating liquors or the products of child-labor manufactured in a state where child-labor is less rigorously controlled than in its own borders and the competition of which would make it impossible for its manufacturers to continue in business if they obeyed the local laws;[24] but beyond this he believes Congress cannot constitutionally go, at least under its interstate commerce powers.

There would seem indeed to be but little doubt that the theory of the constitution was that of a complete commercial freedom between the several states, and even a practically complete freedom of exportation to foreign countries. It is true that the right to enforce an embargo as a sort of war measure was from

[22] (1885) 114 U. S. 622, 5 S. C. R. 1091, 29 L. Ed. 257.
[23] (1891) 141 U. S. 47, 11 S. C. R. 851, 35 L. Ed. 649.
[24] And in this I respectfully differ from the principal opinion.

an early time conceded to the national government, and was no doubt contemplated by the framers of the constitution, but an embargo is at the most a suspension of commerce rather than a destruction of it—a suspension imposed as a retaliatory war measure, not that commerce may be destroyed but that it may ultimately be the freer. The primary idea was that the power to control commerce was to be used by the federal government to promote and not to destroy, that it was to be used for commercial purposes and not to dictate local policies. Although, in the Federalist and other literature of the day, the right to restrict commerce is spoken of and conceded, it is treated of in the light of a protective tariff or of an embargo and as a weapon of defense in the commercial warfare of the nations. It was to be used as a temporary restriction in order that greater freedom might result and as a weapon by which to prevent the crushing out of our industries by the hostile legislation or other hostile acts of foreign powers. Why, indeed, if the power over the commerce between the several states and with foreign nations was to be all-inclusive and to involve the powers of inhibition and of destruction, did the constitution expressly provide that "no tax or duty shall be laid on articles exported from any state?"[25]

The only theory, indeed, on which legislation of the kind that is before us can be logically sustained as between states where no anti-child-labor legislation exists or where the restrictions are not as drastic as those imposed by Congress is that the United States is of itself a parens patriae and that from the very fact of a United States citizenship and of a nationality there arises the power to protect and watch over the individual citizen wherever he may be found. Drastic and far reaching as this theory would be it is not nearly as dangerous or revolutionary as the theory of the power of destruction by indirect means and without the opportunity for judicial review that has been asserted by the promoters of the bill and by the minority opinion.

It would involve a broad construction of the fourteenth amendment and a holding that this amendment qualified if not amended the ninth and the tenth. It would have to be argued that, although prior to the Civil War and prior to the adoption of the fourteenth amendment there was no specific reference to or recognition of a citizenship of the United States, as distinguished from a citizenship of a particular state, and although

[25] Sec. 9, Art. I, Const.

Congress was given the power to establish a uniform system of naturalization, citizenship of the United States arose from citizenship in the several states and was not superimposed upon it, that amendment and the logic of the Civil War created a nation rather than a confederation of states, and in providing that "Every person born or naturalized in the United States shall be a citizen [first of the United States and then] of the state in which he resides," pushed into the foreground the question of United States citizenship and the power of the federal government in relation thereto. It would then have to be argued, since the whole can be no greater or stronger than the sum of all of its parts and the strength of a nation depends upon the strength and intelligence and morality of its individual citizens and the child is after all but the future citizen and the future soldier whom the federal government may draft into its service in time of war,[26] that government is not only vitally interested in his welfare but may take whatever means are necessary for his protection, and that just as in times of war it may prohibit him from cutting off his fingers and otherwise maiming himself so that he cannot handle a rifle, so in times of peace it may see to it that he does not lose in strength, intelligence and morality.

This is the real theory which underlies the argument of the minority and which lay beneath the arguments in the national Congress when the present act and the so-called Beveridge bill were under discussion. It is true that in both these arguments and in the minority opinion it was virtually repudiated, but the logical necessity of its recognition is none the less apparent. Surely the framers of the constitution never intended that an indirect power of regulation could accomplish that which a direct action could not constitutionally accomplish, and that local self-government could be overthrown by indirection but not by direction.

Congress then, it would seem, if it should act at all in the matter, should act directly. It should take the broad position that the protection of the health and of the lives and of the morals of its citizens is as much a matter of national concern as the protection of the currency and of the flag; that the protection of the health and lives of its citizens while at home is as much within its province as their protection while abroad. It should directly

[26] See opinions in Holden v. Hardy, (1898) 169 U. S. 366, 18 S. C. R. 383, 42 L. Ed. 780.

prohibit the employment of child-labor and establish as far as possible a uniform rule in relation thereto, a rule, however, which should adapt itself to climatic and other conditions. Whether this action would be wise or not, we do not pretend to say, nor do we attempt to say whether we are so far a nation that this can be done. All we do say is that this is the real theory of the child-labor legislation that is now before the country, only that its promoters have chosen the indirect method so that a court review may be impossible. If the legislation was direct, the courts could be resorted to[27] and it could not be said that the measures were adopted under a power which knew no limits but the discretion of Congress.

The direct attack is certainly just as constitutional and defensible as is the indirect. In fact the indirect method can only be justified on the assumption that the direct could be made, and it stretches the constitution just as far as does the direct attack itself. It is dangerous because it is covert, because if we but once establish the precedent and grant to Congress the unlimited right to destroy commerce, not as a punishment for crime or because the thing transported is injurious, but because it enters into competition with other articles or its method of manufacture is not approved by a temporary majority in Congress, we place in the hands of that majority a power which may prove absolutely subversive of individual liberty and of the freedom of commerce, which the constitution was above all other things created to preserve.

Equally vicious and we believe equally historically and legally indefensible is the threatened attempt by Senator Lenroot of Wisconsin to overcome by an excise tax the difficulties presented by the majority decision and opinion in the case which is before us, and thus to deprive the persons interested of an appeal to the courts and a reliance on the fifth amendment to the constitution, and thus to test the reasonableness and necessity of the legislation.

The claim, we believe, is made by the Senator[28] that not only is the taxing power of the federal government arbitrary and practically unlimited in its objects and its scope, but that the clause "and provide for the common defense and general welfare of the United States" in first paragraph of Section 8 of Article I of the

[27] And the 5th Amendment be relied upon.
[28] We rely upon the press reports alone.

constitution gives to Congress the power to tax anything out of existence and by this indirect means absolutely to dictate the domestic policies of the several states. He takes, in short, the absurd position that though at the time of the adoption of the federal constitution the several states were extremely jealous of each other and fearful of the new government which they were about to create, so much so that some of them refused to ratify the constitution at all until a promise had been made that the first ten amendments should be incorporated therein, and though in these amendments they reserved to themselves the right of local home rule, and expressly stated that the powers not granted should be reserved to them, and in the constitution itself expressly provided that Congress should not have the power to levy any tax upon exports and thus interfere with the marketing of their domestic products, they nonetheless so construed the paragraph in question as to confer upon a temporary majority in the national Congress by means of the taxing power alone the right to destroy all of these safeguards and all of these liberties. The proposition appears to the writer of this article to require merely to be stated in order to be refuted.

It is clear to him that the purpose of conferring the taxing power upon the federal government was that it might be able to raise money to be used for the purposes of the public defense and the promotion of the public welfare, and not that it could use the power as a club in order to force its will upon the states regardless of whether it raised any money or not. The money, in short, and not the taxing power, was to be used to pay the debts and provide for the common defense and general welfare. The taxing power was merely to be an incident and a means for paying for and carrying out the projects and purposes which the federal congress had provided for by direct legislation and on which the constitution authorized it to legislate. It is true that in many cases the courts have said that the power to tax involves the power to destroy, but this has been said as a warning against an unwise and indiscriminate use of the power rather than a sanction for its use as an agency of destruction. It is true that the Congress and the legislatures may tax again and again, and may, if the exigencies of the government require it, tax the public so heavily that many may be unable to pay, but this power is con-

ceded merely that the government may live and that it may have money.[29]

It may be that under the holding of the United States Supreme Court in the case of *Veazie Bank v. Fenno,* the courts cannot inquire into the motives of Congress in these matters nor seek to discover whether the purpose of the tax was to destroy rather than to raise revenue,[30] but honorable men should hardly legislate upon this theory. It is well indeed to remember that the same oath to support the constitution which is required of the judges of our courts is required of our senators and representatives also, and that if one votes for a measure knowing that it is unconstitutional and relying on the fact that the presumption of legislative good faith is so great that no court will inquire into his purposes and his motives, he violates his oath of office to the same extent as does the judge who knowing that an act is unconstitutional affirms and enforces it.

Have we not already carried the practice of destruction by indirection too far? Would it not be much more honest and much more in accordance with the principles of orderly government to legislate directly against the evils we condemn, and thus allow an appeal to the courts and a determination of reasonableness

[29] "Chief Justice Marshall says in McCullough v. Maryland, that 'the power to tax involves the power to destroy.' And again, 'If the right to tax exists, it is a right which in its nature acknowledges no limits. It may be carried to any extent within the jurisdiction of the state or corporation which imposes it, which the will of such state or corporation may prescribe.' Weston v. Charleston, 2 Pet., 499. The learned Chief Justice in these cases was arguing against the existence of the power; and the idea he expresses so forcibly is that the power to tax is so vast, and rests upon reasons which at times are so imperative that it may be exercised again and again, as the exigencies of the state may demand, until the property taxed is exhausted or the privilege taxed can no longer be exercised. This statement has abundant illustrations in history, of people absolutely impoverished by taxation, and even, in individual cases, sold into slavery because they could not meet the demands of the state upon them. It may justly be questioned, whether this strong statement, which was put forth as a defense against an injurious tax, will fairly justify an affirmative exercise of power that has not revenue in view, but is only called a tax in order that it may be employed as an instrument of destruction. In other words, whether the unavoidable incident to the exercise of a power to demand and collect revenue, can lawfully be the inducement to the exercise of the power when revenue is not contemplated or sought." Cooley, Taxation, p. 10, note 2.

[30] Cooley, Principles of Constitutional Law 58.

and necessity and power under the fifth amendment, rather than to destroy at will under the theory that none can call us to account? We have been fighting for a government by law in Europe. Let us take care that we preserve that government at home and that our constitution be not turned into a mere scrap of paper.

ANDREW A. BRUCE.

UNIVERSITY OF MINNESOTA.