THE NATIONAL POLICE POWER UNDER THE TAXING CLAUSE OF THE CONSTITUTION*

When the United States Supreme Court decided in the summer of 1918 that the Keating-Owen Act, closing the channels of interstate commerce to the products of mines and factories employing child labor, was an attempt by Congress to exercise a power not confided to it by the constitution and was therefore null and void, the child labor exterminators, in Congress and out, apparently undismayed, girt up their loins and sallied forth on what one of them aptly termed "a quest of constitutionality." There seemed to be no thought that Congress should abandon its efforts to prohibit child labor; the problem merely resolved itself into one of method. One method had failed and another must be found. Accordingly a rather astonishing variety of proposals was brought forward in the hope that an effective and at the same time constitutional federal child labor law might be evolved. Three resolutions were introduced proposing a child labor amendment to the national constitution. Senator Owen demanded the reenactment of the Keating-Owen Act with an added provision that no judge should have the power to declare it unconstitutional. Also a bill embodying the principle of the Webb-

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*This article, though complete in itself, is a development of the topic of National Police Power under the Commerce Clause, 3 MINNESOTA LAW REVIEW 289, 381, 452.
1 Act of September 1, 1916, Chap. 432, 39 Stat. at L. 675.
4 Senator Lodge declared in the Senate debate on the Child Labor Tax (see infra note 10), "The main purpose is to put a stop to what seems to be a very great evil and one that ought to be in some way put a stop to. If we are unable to reach it constitutionally in any other way, then I am willing to reach it by the taxing power, which the courts have held can be used constitutionally for such a purpose. I see no other way to do it." Cong. Rec., Dec. 18, 1918, Vol. 57, 611.
5 House Joint Resolution 300, introduced by Mr. Mason (Ill.), Cong. Rec., June 11, 1918, Vol. 56, 7652; House Joint Resolution 302, Mr. Rogers (Mass.), ibid, 7776; House Joint Resolutions 304, Mr. Fall (Pa.), ibid, 7776.
Kenyon Act was introduced, forbidding the shipment of the products of child labor into states which prohibit the employment of children.\(^7\) Again it was proposed that the use of the mails be denied to the employers of children.\(^8\) Still another bill relied upon the war power as a basis for a flat prohibition of child labor by declaring such a prohibition necessary for "conserving the man power of the nation and thereby more effectually providing for the national security and defense."\(^9\) Finally, proposals were made to drive child labor out of existence by use of the federal power of taxation; and when the Revenue Act of February 24, 1919, was passed, it contained provisions placing an excise tax of ten per cent upon the net profits of mining and manufacturing establishments employing children.\(^10\)

Within three months of the enactment of this law it was declared unconstitutional by a federal district judge in North Carolina on the ground that it was an invasion of the domain of


\(^10\) On June 27, 1918, Mr. Pomerene introduced a bill to tax the employment of children (S. R. 4763) which was referred to Committee on Interstate Commerce, Cong. Rec., Vol. 56, 8341. On Nov. 15, 1918, he introduced a similar measure drafted in collaboration with Senators Kenyon and Lenroot as an amendment to the general revenue bill (H. R. 12863). This amendment was finally enacted.

The pertinent part of the act as passed is the first section, Act of Feb. 24, 1919, 40 Stat. at L. 1138. It reads as follows: "Every person (other than a bona fide boys' or girls' canning club recognized by the Agricultural Department of a State and of the United States) operating (a) any mine or quarry situated in the United States in which children under the age of sixteen years have been employed or permitted to work during any portion of the taxable year; or (b) any mill, cannery, workshop, factory, or manufacturing establishment situated in the United States in which children under the age of fourteen years have been employed or permitted to work, or children between the ages of fourteen and sixteen 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, during any portion of the taxable year, shall pay for each taxable year, in addition to all other taxes imposed by law, an excise tax equivalent to 10 per centum of the entire net profits received or accrued for such year from the sale or disposition of the product of such mine, quarry, mill, cannery, workshop, factory or manufacturing establishment."

Other proposals for destroying child labor by taxation were made in Congress. Two bills (H. R. 12705, 13087) introduced by Mr. Green (Ia.) and Mr. Gard (Ohio) provided for the taxation of articles of interstate commerce in the manufacture of which child labor is employed. Cong. Rec., Vol. 56, 9051, 11310. It was proposed by Mr. Mason (Ill.) to levy
state authority.\footnote{May 2, 1919. The decision was handed down by Judge James E. Boyd, who rendered the district court decision in Dagenhart v. Hammer, invalidating the Keating-Owen Act. No opinion was written and the facts set forth above are based on press reports. See New York Times, May 2, 1919.} At the time of the writing of this article an appeal from this decision is pending before the Supreme Court of the United States.

It would seem that in no case could the question be more squarely raised whether there are any constitutional limitations upon the purposes for which Congress may use its power to tax. The friends of this law do not claim that it was designed for the purpose of raising revenue, or for any other purpose than the destruction of child labor.\footnote{With the possible exception of its author, Senator Pomerene, who insisted that the purpose of its enactment was two-fold, to raise revenue and to destroy child labor. He expressed the belief that it would produce some revenue. Cong. Rec., Dec. 18, 1918, Vol. 57, 613.} If it should be held that this is a constitutional use of the taxing power it follows that there is stored up in the power to tax a most substantial fund of congressional authority to deal with social and economic problems, a police power more comprehensive and far-reaching in scope than can be derived from any other grant of power to Congress.\footnote{See articles by the writer on National Police Power under the Commerce Clause of the Constitution, (1919) 3 Minnesota law review, 289, 381, 452; Judge Charles M. Hough, Covert Legislation and the Constitution, (1917) 30 Harvard Law Rev. 801; Paul Fuller, Is There a National Police Power? (1904) 4 Col. Law Rev. 563.} It is the purpose of this article to examine the nature of such national police power as may be derived from the power to tax and to determine what are the limitations, if there be any, to which that power is subject.

**THE CLAUSE GRANTING THE POWER TO TAX**

Congressional authority to tax is granted in the following words of the federal constitution: "The Congress shall have Power (1) To lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the common Defense and general Welfare of the United States."\footnote{Art. I, sec. 8, cl. 1.} For what seems at first glance to be a perfectly straightforward and unambiguous statement, this brief sentence has given rise to a surprising number of constitutional controversies of the very first magnitude. These disputes have related to two entirely separate
aspects of the taxing power. In the first place, there has been bitter disagreement as to the purposes for which Congress is authorized to raise revenue. In other words, what may Congress legitimately do with the money raised by taxation? In respect to this question, which is not the one under consideration, we may merely note in passing that the following principles are now settled: First, the clause, "to pay the debts and provide for the common defense and general welfare of the United States," is not a separate grant of general legislative power, but is a statement of limitation indicating the purposes for which Congress may use the power to "lay and collect taxes, duties, imposts and excises." In short, Congress may lay and collect taxes in order to pay the debts and provide for the common defense and general welfare. Second, Congress is not limited in the purposes for which it may spend money raised by taxation to such purposes as are covered by the legislative powers delegated to Congress by the constitution. It may spend money not only to aid in the exercise of those delegated powers but also for the more comprehensive and general objects of "providing for the common defense and general welfare."

15 Story, Commentaries on the Constitution, I, Sec. 958.

16 No one has expressed this more clearly than Jefferson in his opinion on the power of Congress to establish the Bank of the United States: "To lay taxes to provide for the general welfare of the United States, that is to say, 'to levy taxes for the purpose of providing for the general welfare.' For the laying of taxes is the power, and the general welfare the purpose, for which the power is to be exercised. Congress are not to lay taxes ad libitum, for any purpose they please; but only to pay the debts, or provide for the welfare of the Union. In like manner they are not to do anything they please to provide for the general welfare, but only to lay taxes for that purpose. To consider the latter phrase, not as describing the purpose of the first, but as giving a distinct and independent power to do any act they please, which might be for the good of the Union, would render all the preceding and subsequent enumerations of power completely useless" Jefferson's Correspondence, Vol. 4, 524, 525. On the same point see Story, op. cit., Secs. 907-930; Miller on the Constitution, 229; Hare American Constitutional Law, I, 241; Watson, Constitution, I, 390; Black, Constitutional Law, 207; Tucker, Constitution, I, 470; Federalist, No. 41.

Compare the opposite view of Chancellor Kent: "At present it will be sufficient to observe, generally, that Congress are authorized to provide for the common defense and general welfare; and for that purpose, among other express grants, they are authorized to lay and collect taxes, etc. . . ." Commentaries, 13th Ed., I, 259.

17 The classic argument in support of this position is that of President Monroe in his message accompanying his veto of the Cumberland Road Bill. Richardson: Messages and Papers of the Presidents, II, 164-167; Hamilton's Report on Manufactures, Dec. 5, 1791, Works, Lodge Ed., Vol. 4, 151. See also Story, op. cit. Secs. 975-991; Willoughby, op. cit., I, 588. For opposite view see Tucker, op. cit., I, 475.
The second group of controversies over the meaning of the taxing clause of the constitution has dealt, not with the question of the purposes for which revenue may legitimately be raised by taxation, but with the question whether or not Congress may use the power to tax for purposes which do not include the raising of any revenue at all, or include it only incidentally. For instance, may Congress tax solely in order to promote industry, or to drive out of existence practices or commodities injurious to the national welfare? It is clear that the scope and nature of any police power which Congress may enjoy under the taxing clause will depend upon the extent to which it may use its power to tax for purposes other than revenue.

The question of the purposes for which Congress may use the power to tax has been answered with different degrees of conservatism. On the one hand are those who believe that this power may be legitimately used only for the raising of revenue. Midway, a more numerous group has urged that Congress may properly tax for revenue and in addition to accomplish or promote any other legislative object within the enumerated powers of Congress. Finally, the friends of the new child labor tax and measures like it allege that Congress may levy taxes for the purpose of regulating or controlling indirectly problems clearly outside of its delegated legislative authority, provided that such taxation has for its object providing for the common defense and general welfare of the nation. An examination of the merits of these three views in the light of the arguments advanced in their support will help materially in determining whether or not there is a national police power properly deducible from the congressional power to tax; and if there is such a police power, what, if any, are its limits.

**Taxation for Revenue Only**

The proposition that Congress may use its grant of taxing power only to raise revenue is ancient and familiar doctrine. It has served as an argument for over a hundred years to those who have denied the constitutionality of the protective tariff. To that end it was vigorously urged by Calhoun and his South...

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For analysis of arguments for and against the constitutionality of protective tariffs, see passim Stanwood, Tariff Controversies in the United States in the Nineteenth Century. See also arguments on this point in Elliott's Debates, Vol. IV. Of course this is not the only argument urged against the validity of such tariffs.
Carolina adherents in 1829 during the critical period of the nullification controversy;¹⁹ and it stood as a solemn pronouncement in the party platform on which President Wilson was elected in 1912.²⁰

It must not be assumed, however, that this view of the federal taxing power is the sole property of the free trader. It is not even incompatible with a belief in the constitutional propriety of protection. Nor does it place one in the position of maintaining with an unyielding literalness that Congress may, under no circumstances, impose a money exaction or tax for a purpose other than revenue. The present day advocates of this theory usually recognize that Congress may levy a tax to make effective some other power delegated to Congress by the constitution, such as the power to regulate commerce or to control the currency. They insist, however, that in such cases Congress has exercised not its delegated taxing power but its commerce power or its currency power. In other words, the power of taxation granted by article I, section 8 of the constitution is definitely limited to the laying of taxes for revenue only: but in addition to this expressly delegated and definitely limited power, there is derived from the other grants of congressional authority an implied power to levy money exactions which may be called taxes, so that a tax is constitutional which furthers any object within the scope of the delegated powers of Congress even though it is not levied by virtue of the taxing power specifically granted in article I, section 8. To overlook this important distinction puts the adherent of the "revenue only" theory in an entirely false position.

This view that the power of taxation granted to Congress may constitutionally be used only for the purpose of raising revenue is supported by three main arguments which may be briefly reviewed.²¹

1. In its commonly accepted meaning as well as by legal definition, the term "taxation" is confined to the power of gov-

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¹⁹ Works, VI, 1-59.

²⁰ The Democratic Platform in 1912 contained the following declaration: "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 purpose of revenue. . . ." The Democratic Platform in 1892 contained a practically identical statement.

²¹ For an excellent presentation of this whole theory of federal taxation, see the valuable article by J. B. Waite, (1908) 6 Mich. Law Rev. 277.
ernments to raise revenue. All the English dictionaries concur in regarding the purpose of securing money as an inherent attribute of a tax.\footnote{Webster defines a tax as “a rate or sum of money assessed on the person or property of a citizen by the government for the use of the nation or state.”} The raising of revenue has been commonly recognized as the sine qua non of the taxing power.\footnote{While admitting that the purpose to raise revenue is a common attribute of the taxing power, there are those who deny that it is an essential attribute. See infra \footnote{License fees, occupation taxes, inspection fees, and other like exactions, which are not imposed for the purpose of raising revenue, but for the proper regulation of matters deemed essential to the public safety, health, or welfare, are not ‘taxes’ in the ordinary and proper sense of that term, and are not governed by the constitutional rules and maxims applicable to taxation, but by those which define and limit the exercise of the police power.” Black, Constitutional Law, 3d Ed., 467; Cooley, Constitutional Limitations, 7th Ed. 233, n. 1, 709, n. 1, 713; Cooley on Taxation, 3d Ed. II, 1125; Freund, Police Power, Sec. 25; McClain, Constitutional Law in the U. S., 133; 27 Amer. & Eng. Ency. of Law & Proc., 578; 37 "Cyc." 707.} This general impression of the layman and the lexicographer has been confirmed with definiteness and precision in the law, which has recognized and emphasized the distinction between money exactions for revenue purposes and money exactions imposed for purposes of regulation or destruction. Charges of the first class are based on the taxing power; those of the second class upon the police power. Commentators\footnote{Gundling v. Chicago, (1900) 177 U. S. 183, 189, 80 S. C. R. 633, 44 L. Ed. 725; Phillips v. Mobile, (1908) 208 U. S. 472, 478, 28 S. C. R. 379, 52 L. Ed. 578; Reymann Brewing Co. v. Brister, (1900) 179 U. S. 445, 45 L. Ed. 269, 21 S. C. R. 201; Pabst Brewing Co. v. Crenshaw, (1904) 198 U. S. 17, 49 L. Ed. 925, 25 S. C. R. 552; Tanner v. Little, (1916) 240 U. S. 369, 60 L. Ed. 691, 36 S. C. R. 379.} and courts\footnote{Gundling v. Chicago, (1900) 177 U. S. 183, 189, 80 S. C. R. 633, 44 L. Ed. 725; Phillips v. Mobile, (1908) 208 U. S. 472, 478, 28 S. C. R. 379, 52 L. Ed. 578; Reymann Brewing Co. v. Brister, (1900) 179 U. S. 445, 45 L. Ed. 269, 21 S. C. R. 201; Pabst Brewing Co. v. Crenshaw, (1904) 198 U. S. 17, 49 L. Ed. 925, 25 S. C. R. 552; Tanner v. Little, (1916) 240 U. S. 369, 60 L. Ed. 691, 36 S. C. R. 379.} have again and again insisted upon the observance of this classification. The state governments possess, of course, a general police power for the protection of public health, safety, morals and welfare. As a necessary and reasonable means of exercising this police power the state may levy what, for want of a better term, may be called taxes, which are prohibitive or repressive or regulatory in purpose and effect. In the legal and constitutional sense these taxes are to be regarded as police regulations, and not as exertions of the power of the state to tax. To prove this it is merely necessary to point out that these so-called “taxes” have been subjected to all the constitutional limitations resting upon the police power and when they have been imposed in a manner or for a purpose which cannot be justified under the police power, the courts have not hesi-
tated to declare them unconstitutional.\textsuperscript{26} If, therefore, it should be admitted that the power of taxation belonging to Congress is exactly the same in nature and scope as that which the states enjoy, a proposition which has been vigorously urged,\textsuperscript{27} it by no means follows that that power affords any basis for the exercise of a general federal police authority by means of regulatory and prohibitive taxation. When the state lays a tax for police purposes, it is exercising one of its admitted powers, the police power. No one will deny that Congress, also, may lay taxes as a means of carrying out its own granted powers.\textsuperscript{26} But the use by the state of the power to lay taxes in aid of an admitted state power can furnish no authority for the exercise by Congress of the power to levy taxes in aid of powers clearly not granted to the national government.

To regard the power of taxation as in its very nature limited to purposes of revenue is not to deny or discount the truth of Marshall's famous dictum, "the power to tax is the power to destroy."\textsuperscript{29} The two propositions are entirely compatible. This oft-quoted maxim, instead of being regarded as a blanket authorization of the unrestrained use of the taxing power for any and all purposes irrespective of revenue, is more reasonably construed as an epigrammatic statement of the political and economic axiom that since the financial needs of a state or nation may outrun any human calculation, so the power to meet those needs by taxation must not be limited even though the taxes become burdensome or confiscatory.\textsuperscript{30}


\textsuperscript{27} See infra, p. 267.

\textsuperscript{28} See infra, p. 261.

\textsuperscript{29} McCulloch v. Maryland, (1819) 4 Wheat. (U.S.) 316, 431, 4 L. Ed. 579; Weston v. City Council of Charleston, (1829) 2 Pet. 449, 7 L. Ed. 481. It should be noted that this statement is in reality obiter dictum. What Marshall was proving was that a state could levy no tax whatever on an instrumentality of the federal government even though the tax was neither burdensome nor destructive. See article by T. R. Powell, Indirect Encroachment on Federal Authority by the Taxing Powers of the States, (1918) 31 Harvard Law Rev. 321.

\textsuperscript{30} "The sense of the opinion is that, as a sovereign state, governments may be pressed for money, each may take from its people a portion of their possessions; that this right may be exercised again and again until the whole of the property has been exhausted: In this sense there is a like right in the federal government to destroy." Waite, op. cit., 6 Mich. Law Rev. 292.
to tax is the power to destroy” is to describe not the purposes for which the taxing power may be used but the degree of vigor with which the power may be employed in order to raise revenue.31

2. It is urged, in the second place, that the framers of the federal constitution intended to confer upon Congress the power to tax only for the purpose of raising revenue.32 It is true that the clause granting this power contains language susceptible of a more liberal construction. It authorizes the levying of taxes “to pay the debts and provide for the common defense and general welfare of the United States.” The power described by these words, however, is the power to tax for the purpose of securing the necessary money with which to pay the public debts and provide for the common defense and general welfare. In other words, “to provide for the common defense and general welfare” is a statement of the objects for which money raised by taxation may be spent rather than a statement of the objects for which the power to tax may be used irrespective of revenue. It is urged that such meagre evidence as is available regarding the meaning attached to this clause by those who framed it33 and by

31 This view finds support in Marshall’s further comment on the doctrine in the same case: “The people of a state, therefore, give to their government a right of taxing themselves and their property, and to the exigencies of government cannot be limited, they prescribe no limits to the exercise of this right, resting confidently on the interest of the legislator, and on the influence of the constituents over their representatives, to guard them against its abuse.” 4 Wheat. (U. S.) 316, 428.


33 The problem of the purposes for which Congress was to be authorized to lay taxes evoked little discussion in the Convention of 1787. The Virginia Plan as introduced by Randolph on May 29 contained no separate grant of the taxing power to Congress but provided “that the National Legislature ought to be empowered to enjoy the legislative rights vested in Congress by the Confederation, and moreover to legislate in all cases to which the separate states are incompetent, etc. . . .” Farrand, Records of the Federal Convention, I, 21.

Section 2 of the New Jersey Plan introduced by Patterson on June 15 provided that Congress “be authorized to pass acts for raising a revenue, by levying a duty or duties on all goods or merchandise of foreign growth or manufacture, imported into any part of the United States, by stamps on paper, vellum or parchment, and by a postage on all letters or packages passing through the general Postoffice, to be applied to such federal purposes as they shall deem proper and expedient.” Ibid, I, 243.

The plan for a new constitution proposed by Charles Pinckney on May 29, provided in Art. IV that “The legislature of the United States shall have the power to lay and collect taxes, duties, imposts and excises.” Ibid, III, 595. This was the form in which the clause was reported by the Committee of Detail on Aug. 6. Ibid, II, 181. A further report from the same committee on Aug. 22 added to the clause as quoted the
those who discussed it while ratification of the constitution was pending tends to support the view here urged. The clause was placed in the constitution in order to remedy that serious defect of the articles of confederation arising from the inability of Congress to raise revenue directly. The new government must enjoy this power to raise revenue, and these were the words in which that power was conferred. That the framers did not intend to give Congress a general police power to be exercised by means of destructive or regulatory taxation is evidenced by two more definite considerations. First, the fundamental principle on which the new national government was to rest was that of enumerated powers. Its founders desired it to deal with a definitely limited group of subjects and no others. They cannot therefore reasonably be presumed to have intended to confer upon Congress, under the guise of the power to lay taxes, the power to deal with any problem of social or economic policy which might be indirectly affected or controlled by an ingenious use of the taxing power. Had they so intended, they would have swept away by this one specific grant of power most of those limitations upon the scope of federal authority which it was the purpose of the other words, "for the payment of the debts and necessary expenses of the United States." Ibid, II, 366. Among the records of the Committee of Detail was found a proposal in Randolph's writing that Congress should have power "To raise money by taxation, unlimited as to sum, for the past or future debts and necessities of the union." Ibid, II, 142.

On Aug. 25 a motion was lost to add to the clause granting Congress the power to tax the clause "for the payment of said debts and for the defraying the expenses that shall be incurred for the common defense and general welfare." Ibid, II, 408.

34 The Federalist discusses the federal taxing power at length. See Nos. 30-36 inc. It nowhere suggests that the power could be used for purposes other than revenue.

Sherman and Ellsworth in transmitting a copy of the new constitution to the governor of Connecticut, Sept. 26, 1787, wrote: "The objects for which Congress may apply monies, are the same mentioned in the eighth article of the confederation, viz. for the common defense and general welfare, and for the payment of the debts incurred for those purposes." Farrand, op. cit., III, 99.

McHenry, member of the Convention of 1787 from Maryland, speaking on Nov. 29 before the Maryland House of Delegates, declared: "The power given to Congress to lay taxes contains nothing more than is comprehended in the spirit of the eighth article of the Confederation." Ibid, III, 149.

35 Art. VIII of the Articles of Confederation had provided that "All charges of war, and all other expenses that shall be incurred for the common cause or general welfare, . . . shall be defrayed out of a common treasury, which shall be supplied by the several States, in proportion to the value of all such land within each State, etc. . . ." It was the method of raising money, rather than the purposes of taxation which the framers of the Constitution sought to change.
cific grants of power to build up. And secondly, had the framers of the constitution desired to have Congress enjoy that generous police power which it has been urged it may exercise through the medium of taxation, is it probable that they would have limited Congress in the exercise of that police power to the inconvenient and indirect agency of taxation? Would they not rather have allowed a reasonable choice of method instead of saying, in effect, "you may exercise a police power, provided only you do it under the guise of taxation?"

3. Finally, in every case in which the Supreme Court of the United States has been willing to recognize that Congress has levied taxes for purposes other than revenue, it has looked upon these taxes not as exercises by Congress of its granted power to tax, but as means employed for carrying out other delegated congressional powers. And this view has been shared by distinguished legal commentators. In other words, the cases commonly cited to prove that the delegated power of taxation may be used for purposes of regulation and destruction prove nothing more in fact than that the power of Congress to lay taxes may be an implied power derived from other congressional powers, or that Congress may lay taxes as a necessary and proper means of carrying out its other granted powers.

This is, in the first place, the constitutional justification of the prohibitive tariff. While there is no decision of the Supreme Court squarely upon this point, the weight of authority leans to the view that a prohibitive tariff is not an exercise of the taxing power at all, but should rather be classified as a regulation of commerce. In cases where a tariff is levied not only to raise

36 Tucker writes: "It is surprising how this sophistical device has been upheld by learned commentators, for it is obvious that, by such construction of the Constitution, Congress may range with no limit but its discretion through the realms of reserved and ungranted powers by means of a clause to tax ad libitum and appropriate at will the money of the people to the promotion of anything through other agencies than its own and to the accomplishment of anything it may deem to be for the common defense and general welfare; for this, in effect, is worse than if the words 'to provide for the common defense and general welfare' were held to grant the unlimited power claimed, as it incites to profuse expenditure and excessive taxation as the only avenue to the unlimited usurpation of ungranted powers." Op. cit., I, 484. See also Bruce, op. cit., 3 MINNESOTA Law Review 101-103.


38 The authority most frequently cited is Cooley who writes: "Constitutionally a tax can have no other basis than the raising of a revenue for public purposes, and whatever governmental exaction has not this basis is tyrannical and unlawful. A tax on imports, therefore, the purpose of which is, not to raise a revenue, but to discourage and indirectly prohibit
revenue but also for the protection of home industry, it may be regarded as an exercise of both the taxing and the commerce powers. Even Story, who repudiates the doctrine of taxation for revenue only, regards the protective tariff as a means of regulating foreign commerce; and his view would probably be followed by any court before which the issue could be raised.

In the second place, Congress has laid destructive taxes as a means of regulating the currency. In 1866, shortly after the establishment of the national banking system, Congress laid a prohibitive tax of ten per cent upon state bank notes in order to protect the notes of the new national banks from their competition. The Supreme Court of the United States upheld the constitutionality of this tax in the case of Veasie Bank vs. Fenno, decided in 1869. Counsel for the bank urged upon the court that the tax was invalid because it was so excessive as to indicate a purpose on the part of Congress to destroy the thing taxed rather than to raise revenue. The court replied:

"The first answer to this is that the judicial cannot prescribe to the legislative department of the government limitations upon the exercise of its acknowledged powers. 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 a corporation, or a class of corporations, it cannot, for that reason only, be pronounced contrary to the constitution."

some particular import for the benefit of some home manufacture, may well be questioned as being merely colorable, and therefore not warranted by constitutional principles. But if any income is derived from the levy, the fact that incidental protection is given to home industry can be no objection to it, for all taxes must be laid with some regard to their effect upon the prosperity of the people and the welfare of the country, and their validity cannot be determined by the money returns. And perhaps even prohibitory duties may be defended as a regulation of commercial intercourse." Principles of Constitutional Law, 3d Ed., 58. See also Hall, Constitutional Law, 181; Watson on Constitution, I, 485 n. s.; Willoughby, op. cit., I, 607. See contra Pomeroy's statement: "A protective tariff is certainly not indispensable to the execution of the power to lay taxes; but it is so certainly one of the methods of exercising that power." Constitutional Law, 217.

39 "The protective tariff laws are measures properly enacted under the express power to raise revenue and to regulate foreign commerce." McClain, op. cit., 88.

40 Op. cit., Secs. 1084-1094. But note that Story also regards it as proper to base protective tariffs on the taxing clause, ibid, Secs. 962-965. He says, however, that the commerce power is the one from which the right to enact such tariffs "is more usually derived." Ibid, Sec. 763.

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

42 (1869) 8 Wall. (U. S.) 533, 19 L. Ed. 482.
It then went on to say that:

"Under the constitution the power to provide a circulation of coin is given to Congress. . . . Having thus, in the exercise of undisputed constitutional powers, undertaken to provide a currency for the whole country, it cannot be questioned that Congress may, constitutionally, secure the benefit of it to the people by appropriate legislation. To this end, Congress has denied the quality of legal tender to foreign coins, and has provided by law against the imposition of counterfeit and base coin on the community. To the same end, Congress may restrain, by suitable enactments, the circulation as money of any notes not issued under its own authority. Without this power, indeed, its attempts to secure a sound and uniform currency for the country must be futile. Viewed in this light, as well as in the other light of a duty on contracts or property, we cannot doubt the constitutionality of the tax under consideration."

The first of the paragraphs quoted has frequently been cited as authority for the statement that Congress can tax to an unlimited degree for any purpose it chooses, irrespective of revenue and without fear of judicial interference.\footnote{43} While it is hard to see in the passage much more than a statement of the perfectly obvious doctrine that a tax, otherwise legal, cannot be held void because a court thinks it is too high, it must be admitted that it does indicate an opinion on the part of the court that the power which is being exercised is the taxing power. Since the power is quite obviously not being employed to raise revenue, such a view conflicts with the theory of taxation for revenue only which now is under consideration. But whatever comfort those who contend for a federal police power through taxation may derive from this statement will be minimized if not destroyed by the second of the paragraphs quoted, wherein it is plainly stated that this destructive tax is merely a convenient method of protecting the national currency. As a matter of fact, the Supreme Court in subsequent decisions\footnote{44} as well as

\footnote{43} This is apparent from a scrutiny of the debates in Congress upon any of the regulatory or destructive taxes which have been passed. See infra, p. 266.

\footnote{44} Miller, J. in The Head Money Cases said: "In the case of Veazie Bank v. Fenno, the enormous tax of eight per cent [it was in fact ten per cent] per annum on the circulation of state banks, which was designed, and did have the effect to drive all such circulation out of existence, and was upheld because it was a means properly adopted by Congress to protect the currency which it had created; namely the legal tender notes and the notes of the national banks. It was not subject, therefore, to the rules which would invalidate an ordinary tax pure and simple." (1884) 112 U. S. 580, 595, 5 S. C. R. 247, 28 L. Ed. 798. In National Bank v. U. S., (1879) 101 U. S. 1, 6, 25 L. Ed. 979, the court
numerous text writers and other authorities have with practical unanimity regarded the Veazie Bank case in this light and leaned to the opinion that the constitutional basis for the levy imposed by the act of 1866 was the currency power and not the taxing power.

In one or two other cases of less importance the Supreme Court has recognized the distinction between levies made under the taxing power and those made under other granted powers of Congress. In the Head Money Cases involving the validity of a duty of fifty cents for every alien immigrant brought by vessel into the United States, the court met such objections to the law as rested upon its alleged non-conformity to the constitutional requirements regarding federal taxation by declaring that "the true answer to all these objections is that the power exercised in this commented on the Act of July 13, 1866, as follows: "The tax is on the notes paid out, that is, made use of as a circulating medium. Such a use is against the policy of the United States. Therefore the banker who helps to keep up the use of paying them out, that is, employing them as the equivalent of money in discharging his obligations, is taxed for what he does. The tax was no doubt intended to destroy the use; but that, as has just been seen, Congress had the power to do." Flint v. Stone Tracy Co., (1911) 220 U. S. 107, 31 S. C. R. 342, 55 L. Ed. 389, Ann. Cas. 1912B 1312.

Those who adhere to the second and third of the three general views of the scope of the federal taxing power place a different interpretation on the Veazie Bank Case. There is eminent authority holding the power therein discussed to be the taxing power. See Cooley, Constitutional Limitations, 681, n. 685; Cooley, Principles of Constitutional Law, 58; Pomeroy, op. cit., 233. See also dissenting opinion of Holmes, J. in Hammer v. Dagenhart, (1918) 247 U. S. 251, 277, 62 L. Ed. 1101, 38 S. C. R. 529. Senator Spooner declared in the Senate in 1902 that the tax of 1866 did not rest on the currency power but that it was upheld "not because it was required in aid of another power, but because under the plain language of Sec. 8, it [Congress] had the power to do it." Cong. Rec., Apr. 1, 1902, Vol. 35, 3506.

(1884) 112 U. S. 580, 5 S. C. R. 247, 28 L. Ed. 798. The court used these words: "If this is an expedient regulation of commerce by Congress, and the end to be attained is one falling within the power, the act is not void, because, with a loose and more extended sense than was used in the constitution, it is called a tax." Ibid, p. 596.
instance is not the taxing power. The burden imposed on the ship owner by this statute is the mere incident of the regulation of commerce." Thus the requirement that a stamp be placed on goods intended for export in order to prevent fraud is not levying a tax even though a charge is made for the stamp. But if the charge is made for purposes of revenue rather than regulation it becomes a tax.

USE OF TAXING POWER NOT FOR REVENUE BUT IN FURTHERANCE OF DELEGATED CONGRESSIONAL AUTHORITY

The second view of the real scope of the federal taxing power may be regarded as middle ground between the revenue only doctrine just discussed and the theory that the power may be used for general police purposes. This second position admits the propriety of using the power of taxation for purposes other than revenue, but not for all such purposes. Its adherents claim that the grant of taxing power may be exercised for purposes of revenue plus any other purposes lying within the scope of delegated congressional authority. It has been seen that those who defend the revenue only theory are under the necessity of maintaining that when taxes are laid by Congress in order to regulate commerce or protect the currency, those taxes must be viewed constitutionally not as expressions of the granted power of taxation but rather as expressions of the power to regulate commerce or the currency respectively. The constitutional basis for such taxes is not the power of taxation at all but the particular power in aid of which the taxes are laid. Those who hold the second view, now being analyzed, maintain that taxes laid in order to help regulate commerce are exercises of the granted power of taxation and that it is quite proper to employ the taxing power as a means of supplementing and supporting any other granted power of Congress. Having thus admitted that the power of taxation itself, not as an implied power but as a granted power, may be used for purposes other than the raising of revenue, it is necessary to defend the position that there are still definite limits upon its scope. It is necessary to show why, from a constitutional viewpoint, the power of taxation may be used to regulate commerce or the national currency but not to regulate such mat-

ters as child labor, lotteries, or political campaign contributions.52

The argument in support of this position may be summarized as follows: The powers of Congress are enumerated and delegated. The grants of power to Congress taken together were clearly intended to constitute the sum total not only of the powers confided to that body but also of the legislative objects about which or in furtherance of which Congress might exercise those powers. In short, the various delegations of power must be regarded not merely as legislative instruments placed in the hands of Congress to be used for any or all purposes; they must be regarded also as the ends, objects, or purposes for which Congress may exercise legislative power. This, it is stated, is what Marshall had in mind when he said, "Let the end be legitimate, let it be within the scope of the constitution, and all means which are appropriate, etc. ... are constitutional," and when in the same case, he declared, "Should Congress, under the pretext of executing its powers, pass laws for the accomplishment of objects not entrusted to the government, it would become the painful duty of this tribunal, should a case requiring such a decision come before it, to say that such an act was not the law of the land."54

It follows, therefore, that when Congress attempts, through the

61 A destructive tax on lotteries was urged upon Congress with great vigor. See remarks of Senator White (now Chief Justice) of Louisiana upon the propriety of this legislation: "When my people were clamoring for its suppression and crowding upon me petitions to introduce a bill suppressing the Louisiana Lottery by the exercise of the power of federal taxation, I said to them, 'Great as is this evil, there is an evil yet greater, and that is the disruption and the destruction of all the great principles of our government by calling upon the Federal Government to do an illegal and unconstitutional thing....' I declined to introduce a bill taxing the Louisiana Lottery by the Federal Government because I thought it violated the Federal Constitution." Cong. Rec., July 21, 1892, Vol. 23, 6519. Such bills were, however, introduced. Compare with this the view of Judge Cooley, set forth in an article advocating such a tax, infra, note 81.

52 Senator Thomas (Col.) introduced an amendment to the war revenue bill of 1919, providing for a tax of 100% on any campaign contribution in excess of $500 in any primary or election campaign for the nomination or election of presidential electors, senators, or members of the House. Cong. Rec., Oct. 10, 1918, Vol. 56, 11169. The amendment was defeated.

53 McCulloch v. Maryland, (1819) 4 Wheat. (U. S.) 316, 421, 4 L. Ed. 579.

instrumentality of a granted power such as that of taxation, to regulate or control a subject matter nowhere confided to its authority by virtue of any delegation of power, such as the subject of child labor, it has exceeded its powers, usurped the reserved authority of the states, and violated the tenth amendment.\footnote{This doctrine has been accepted by the supreme court of the Commonwealth of Australia. In King v. Barger, (1908) 6 Com. L. R. 41, a federal tax on articles manufactured in the states, dependent upon the rate of wages paid and designed to control such wage rate, was held to be invalid on the ground that the federal government had no authority to control wages in the states. The following excerpts indicate the main features of the reasoning of the court:}

This same doctrine may be put in slightly different form by saying that in exercising the powers delegated to it by the constitution Congress must be regarded as exercising them under the implied limitation that they shall be employed only for the objects or ends confided by the constitution to congressional authority. The taxing power has long since been held subject to two other implied limitations, the binding force of which there is no disposition to question: one is the limitation of public purpose in respect to the use of the money raised by taxation;\footnote{Loan Association v. Topeka, (1875) 20 Wall. (U.S.) 655, L. Ed. 455. This case involved the taxing power of the states but the principles of taxation.} the other is the limitation implied from the essential nature of our federal
system which forbids Congress to tax the governments, agencies, or functions of the state. It is urged that the taxation by Congress of the salary of a state judge is no more subversive of the fundamental principles of our constitutional system than the use by Congress of its taxing power to destroy child labor within the states. For to what purpose did the framers of the constitution reserve certain subjects to the exclusive jurisdiction of the states if Congress, under the guise of an exercise of the power to tax, may step in and control those subjects? To admit the power to tax on the part of Congress for any and all purposes would "abrogate and destroy every limitation found in the constitution and every reservation in favor of the states."

It is interesting to note that the present Chief Justice of the United States seems to share the view now under consideration. Mr. White was United States senator from Louisiana at the time a destructive tax upon cotton and grain futures was being debated in Congress in 1892. At that time he expressed himself vigorously and at length upon the constitutionality of the proposed tax, taking the position that such "subterfugeous and cheating" use of the taxing power was clearly outside the constitutional authority of Congress. He took occasion in the course of his argument to draw the distinction between the use of regulatory or destructive taxation in aid of the exercise of delegated congressional power and its use for purposes not so delegated.

"In other words, I contend," he declared, "that where power to destroy exists, the use of a wrong instrumentality to do the destruction, may be the abuse of an instrumentality but not an abuse of power, because the power to destroy is vested. But where the power to destroy does not exist, the use of an instrumentality to destroy that which there is no power to destroy is involved are applicable with equal force to the federal taxing power. It should be noted that the limitation of public purpose does not rest on the due process of law clause as has been sometimes assumed.


58 "The principle is equally applicable to a case where the court can see that a power of government is called into play not for its professed object but solely for the purpose of defeating rights that cannot be destroyed consistently with any other of the principles upon which the constitution rests, but there is no principle more fundamental than the principle in fulfillment of which the national government was created of circumscribed powers, each conferred for the accomplishment of a specified object, purpose or end." Green, op. cit., Ill. Law Bull., April, 1917, 26.


60 The question of the constitutionality of this bill was discussed at great length. Senator White's long speech against the bill is found in Cong. Rec., July 21, 1892, Vol. 23, 6513-6520. The bill was defeated.
not alone an abuse of the instrumentality but a usurpation of power itself."

And in commenting upon the Veazie Bank case, he went on to state that according to that decision the destructive tax on state bank notes could be regarded as either a prohibition or a tax. If it be viewed as a prohibition, then it is merely an exercise of the admitted power of Congress over the currency. If it be viewed as a tax, it is not unconstitutional, "because Congress had the power to use the taxing power to prohibit that which it had the right to prohibit under another provision of the constitution."

But he was emphatic in his belief that this affords no precedent for the use of the power to tax for purposes not confided to congressional authority.62

DESTRUCTIVE OR REGULATORY TAXATION FOR POLICE PURPOSES OUTSIDE THE SCOPE OF DELEGATED CONGRESSIONAL AUTHORITY

It is clear that Congress has not acceded to either of the views thus far presented. It has regarded the purposes for which it may use its power to tax as limited neither to the raising of revenue nor to the furtherance of objects within its delegated authority. It has legislated more than once upon the theory that the power to tax is available as a means or instrument for accomplishing any purpose which will further the national welfare and that Congress may regulate or destroy by taxation things over which it plainly has no direct authority. Such legislation may be briefly reviewed.

1. Instances of Federal Taxation for General Police Purposes.63 In 1886 it was proposed to levy an excise tax of ten cents per pound upon all oleomargarine manufactured in the

61 Ibid, 6517.
62 Ibid, 6517. He further pointed out that the power to lay a prohibitive tariff did not furnish a precedent for the tax under discussion. To argue that it does, "overlooks the clear distinction between the nature of the taxing power lodged in the federal government for the purpose of imposts and the nature of the taxing power lodged in the federal government for the purpose of internal taxation. . . . When the federal government deals with imposts the constitution has vested in it the power which would be vested in any government in that regard. . . . No power as to imposts was reserved in the states by the federal constitution. All the lawful powers of government which could be exercised in that particular passed into the life and being of the federal government by the lodgment in that government of the power to levy imposts—imposts deal externally beyond our borders. Beyond those borders the power of the federal government was restricted and restrained by no limitation resulting from a reservation in the constitution." Ibid, 6516.
63 No attempt has here been made to search out all the cases in which Congress has laid taxes for purposes of regulation. Only those are here treated regarding which there has been sharp controversy on the point of constitutionality.
United States. After considerable debate in both houses of Congress, the tax was reduced to two cents per pound, a rate so low as to preclude the tax from being classed as destructive in character. In 1902, however, a tax of ten cents per pound was placed upon all oleomargarine colored to look like butter, and this tax has accomplished the purpose for which it was admittedly imposed, the destruction of the business of manufacturing colored oleomargarine. In 1892 it was proposed in Congress to place a license tax of $1000 upon all brokers or dealers engaged in the selling of cotton or grain on future contracts or options and a tax of five cents per pound or twenty cents per bushel upon all products so sold. This tax did not become law, but in 1914 Congress did impose a tax of two cents per pound upon all cotton sold on future contracts. In 1890 a tax of ten dollars was imposed upon the sale of smoking opium. In 1914 this tax was raised to $300 per pound. In 1912 Congress drove out of existence the manufacture of matches made from poisonous phosphorus by subjecting these matches to the crushing tax of two cents per hundred. Finally, as has been already stated, Congress has placed a tax of ten per cent upon the net profits of establishments employing children.

An examination of the congressional debates on these measures makes perfectly clear that Congress was not trying to raise revenue but was trying to exercise police power in matters outside the scope of its delegated authority. The oleomargarine taxes were openly defended upon the ground that the legitimate dairy interests of the country must be protected against the destructive competition of a product alleged to be not only inferior but positively dangerous to health. The taxes on options or sales on future contracts were urged as necessary restraints on com-

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66 The text of this proposed measure is printed in the Cong. Rec. July 21, 1892, Vol. 23, 6514.
67 Act of Aug. 18, 1914, 38 Stat. at L. 693. This was declared unconstitutional by a United States district court because, being a revenue measure, it originated in the Senate rather than in the House of Representatives as required by art. 1, sec. 7, cl. 1 of the constitution. Hubbard v. Lowe, (1915) 226 Fed. 135. It was re-enacted as Act of Aug. 11, 1916, 39 Stat. at L. 476.
70 Act of April 9, 1912, 37 Stat. at L. 81. The constitutionality of this act has never been passed upon by any court.
71 Supra, note 10.
72 See debates on H. R. 9206, Index to Cong. Rec., Vol. 35.
When the tax on white phosphorus matches was being discussed in the Senate in 1912, Senator Lodge, who was sponsoring the bill, declared without hesitation, "The real purpose of the bill is to destroy an industry that ought to be destroyed." He was equally frank as to the purpose of the recent child labor tax, as were most of the other friends of the bill. In fact, the debates on this measure show that the Senate Committee on Finance, in estimating the revenue expected from the various taxes included in the Revenue Act of 1919, placed no estimate opposite the child labor tax, indicating that they did not expect any revenue to flow from it into a sadly depleted treasury.

2. Argument in Support of This Theory. In order to show that Congress enjoys the broad power of taxation for police purposes it is necessary at the outset to dispose of the revenue only theory already discussed. There are two steps in this process of refutation. It is pointed out, first, that the power of taxation granted to Congress is no different in character and no more limited, save as to the specific requirements of apportionment and uniformity and the specific prohibition against export taxes, than is the power of taxation possessed by the states of the union or by any other sovereign government. As Senator Edmunds expressed it in the debate on the oleomargarine tax statute of 1886, "the taxing power of the United States is just as extensive, just as supreme, just as illimitable as the taxing power of every state is." Gray states this position even more strikingly in the following passage commenting upon the intentions of the framers of the federal constitution:

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73 See debates on Senate bill 110; Index to Cong. Rec., Vol. 51.
74 Cong. Rec., April 3, 1912, Vol. 4235. In regard to the same bill Mr. Longworth (Ohio) declared in the House, "It is the purpose of the bill to destroy it [the poisonous match industry] and that is the reason I am for the bill, because I want it stamped out." Ibid, 3973.
75 Supra, notes 4 and 12.
76 In response to a question on this point, Senator Simmons, chairman of the Committee on Finance, stated: "I can only say to the Senator that I do not think there was an estimate made as to the amount of revenue that would be raised by it ... and I do not think any one suggested that any would be derived." Cong. Rec., Vol. 57, 612. It is interesting to compare this with the argument of Mr. Miller Outcalt for the plaintiff in error in the McCray case: "It is not out of place to advert to an overflowing treasury, and the expediency which this same Congress felt in reducing the revenue derived under the Spanish War Acts, in this same year, by an amount equal to $70,000,000. The law was avowedly not a revenue measure but a police regulation." 43 L. Ed. 78, 80.
77 Supra, p. 251.
"The example of a strong general government which they had in mind, and the only one with which most of them were familiar, was the government of Great Britain. The powers of that government were well known to them, its machinery had been copied in most of the states. In view of these facts it may be generally stated that in their bestowal of powers on the general government and in their restriction of those powers (particularly of taxing powers, since dispute as to taxation was one of the chief causes of the Revolution) they intended:

1. To grant to the general government those powers usually exercised by the government of Great Britain, and in matters of taxation to grant the same general authority of classification and selection as was possessed by the British government and by the state governments modeled upon it.

2. To restrict those powers thus granted in such a way as to prevent discrimination among the states.\(^7^9\)

In short, unless state governments and the governments of sovereign nations generally at the time of the formation of our national government were limited in the use of their taxing powers to the raising of revenue, there is no reason to assume that the taxing power granted Congress was so limited.

This raises the question, in the second place, whether the power of taxation enjoyed by sovereign governments at this period was thus limited to the raising of revenue. On this point there can be no clearer or more definite statement than that of Story's:

"Nothing is more clear, from the history of commercial nations, than the fact that the taxing power is often, very often applied for other purposes than revenue. It is often applied as a regulation of commerce. It is often applied as a virtual prohibition upon the importation of particular articles, for the encouragement and protection of domestic products, and industry; for the support of agriculture, commerce and manufactures, for retaliation upon foreign monopolies and injurious restrictions; for purposes of state policy and domestic economy; sometimes to banish a noxious article of consumption; sometimes, as a bounty upon an infant manufacture, or agricultural product; sometimes, as a temporary restraint of trade; sometimes, as a suppression of particular employments; sometimes, as a prerogative power to destroy competition and secure a monopoly to the government.

"If, then, the power to lay taxes, being general, may embrace, and in the practice of nations does embrace, all these objects, either separately or in combination, upon what foundation does the argument rest which assumes one object only, to the exclu-

\(^7^9\) Limitations of the Taxing Power, p. 350.
sion of all the rest, which insists, in effect, that because revenue may be one object, therefore it is the sole object of the power...?80

Among the eminent authorities who have agreed with this view may be mentioned Judge Cooley, who, in 1892, in urging Congress to place a destructive tax on lotteries, declared, "Revenue is not and has never been the sole object of taxation."81

In the third place, it should be noted that the constitutional clause granting the power of taxation seems to repudiate the revenue only doctrine. By the plain words of that clause, Congress enjoys the power to "lay taxes, to pay the public debts and provide for the common defense and general welfare." Now, as Story pertinently inquires:

"If the common defense or general welfare can be promoted by laying taxes in any other manner than for revenue, who is at liberty to say that Congress cannot constitutionally exercise the power for such a purpose? No one has a right to say that the common defense and general welfare can never be promoted by laying taxes, except for revenue. No one has ever yet been bold enough to assert such a proposition."82

That Hamilton placed a similar broad construction upon this clause is evidenced by the fact that he defended the constitutionality of the protective tariff as an exercise of the congres-

80 Commentaries, Sec. I, 965, 966. For analysis in this respect of the taxes imposed by England to which the American colonists took exception see Farrand, The Development of the United States, p. 37. Farrand quotes Madison's statement made after the Revolution, that "The line of distinction between the power of regulating trade and that of drawing revenue from it, which was once considered the barrier of our liberties, was found, on fair discussion, to be absolutely undefinable." Ibid, 38. See also Story, op. cit., II, Sec. 1080. For careful argument from the standpoint of economics that taxes laid for purposes of regulation and destruction should be subsumed under the power of taxation and not under the police power, see Seligman, Essays in Taxation, pp. 402-406, 411-413.

81 Federal Taxation of Lotteries, (1892) Atlantic Monthly, Vol. 69, 523. Supplementing the phrase quoted in the text, Judge Cooley adds that the lawmaker "must not aim to make his law as productive as possible, but rather to make the demand upon the people as little burdensome as may be, and at the same time, as far as possible, incidentally beneficial." Commenting further upon the proposed tax he says: "Such taxation would of course, contemplate no revenue to the government. It would be imposed for the express purpose of destroying altogether the institutions which, by any unfriendly action of Congress, taken with the express intent of destruction and shaped professedly to that end, it would be powerless to reach. It would, in other words, be making a practical application by the federal government of the legal aphorism that 'a power to tax is a power to destroy.'" Ibid, p. 526. Arguments for and against the tax are discussed in the article. Compare with the statement of same writer in his work on Taxation, 3d Ed. I, 191.

82 Commentaries, I.
sional taxing power for the purpose of providing for "the com-
mon defense and general welfare."  

After dealing thus with the revenue only theory of the fed-
eral taxing power, the friends of the child labor tax and similar
legislation, in order to establish their case, must still demolish
the proposition that Congress may use its power of taxation for
only such purposes as fall within the scope of the other dele-
gated powers of Congress. The argument on this point may
be summarized thus: In the first place, while Congress enjoys
only delegated powers, those powers, save when limited by an
express restriction or prohibition, are plenary and complete.
This is elementary constitutional law. "Except when expressly
limited, . . . a power granted to the federal government is con-
strued to be absolute in character." This means that apart
from these specific exceptions Congress has the same power to
lay taxes or to regulate commerce as is possessed by the British
Parliament or any other sovereign government in the world.
Its granted powers do not shrink or melt away by the insidious
working of implied restrictions or reservations. Secondly, it
must be remembered that what section 8 of article I of the con-
stitution grants to Congress is "power." Nothing is said about
the purposes for which the various grants of power there dele-
gated are to be used. The grant stands as an independent and
self-sufficient delegation of authority. Congress is not given
a list of topics about which it is to be allowed to pass laws; nor
is it given merely a set of legislative tools or methods to be used
in doing a certain limited group of assigned tasks and in the
use of which, to borrow Professor Powell's apt phrase, Congress
"suffers the limitations of the player at jackstraws," fearful

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IV, 151. It should be noted, however, that Hamilton's argument did
not proceed on the assumption that no revenue would be raised by the
protective tariffs proposed.
84 Supra, p. 261.
85 "But it must not be forgotten that when the constitution was
adopted there came into existence a nation (as distinguished from a
league of states) which possessed absolute and unlimited inherent pow-
ers." Black, op. cit., 35; Hall, op. cit., 255; Hare, op. cit., 94; McClain,
op. cit., 43; Pomeroy, op. cit., 70. McCulloch v. Maryland, supra, p.
86 Willoughby, op. cit., I, 54.
87 Supra, p. 268. Story, op. cit., II, 1081.
88 The Child Labor Decision, The Nation, June 22, 1918, Vol. 106,
p. 730.
always of trespassing on the domain of state authority.\textsuperscript{89} It is given the power to lay taxes and to coin money and to regulate commerce and these powers are to be used in the broad discretion of Congress for the promotion of the national welfare. Finally, by very definition it is utterly impossible for the reserved powers of the states to operate as a limitation upon the scope or method of operation of the powers delegated to Congress by the constitution. Such a conception involves a flat contradiction in terms. What are the reserved powers of the states but the powers left after the powers of Congress have been delegated?\textsuperscript{90}

Curious indeed would be the arithmetical process of subtraction in which the remainder, somewhat rendered inviolable in advance, helped determine the size of the subtrahend. And yet precisely this absurdity is involved in the theory that the reserved powers of the states have become transformed into a sort of ark of the covenant which Congress in the exercise of its granted authority must not touch. If a power is delegated to Congress, then by virtue of that very fact there can be no reserved power of the states with which it could in any way or under any circumstances conflict.\textsuperscript{91}

If Congress is not limited in using its power to tax to the raising of revenue or to such purposes as may be subsumed under the grants of power in article I, it follows that that power may be wielded generously in any way which will promote the common defense and general welfare. It may stimulate industry; it may regulate the size of incomes or private fortunes; it may

\textsuperscript{89} "The question then is narrowed to whether the exercise of its otherwise constitutional power by Congress can be pronounced unconstitutional because of its possible reaction upon the conduct of the states in a matter upon which I have admitted that they are free from direct control. I should have thought that that matter had been disposed of so fully as to leave no room for doubt. I should have thought that the most conspicuous decisions of this Court had made it clear that the power to regulate commerce and other constitutional powers could not be cut down or qualified by the fact that it might interfere with the carrying out of the domestic policy of any state." Dissenting opinion of Mr. Justice Holmes, Hammer v. Dagenhart, supra.

\textsuperscript{90} "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." Constitution of U. S., Amendment X.

\textsuperscript{91} Compare Professor Powell's argument on this point in respect to the Keating-Owen Act: "If the child labor law was a proper exercise of the power to regulate interstate commerce, it was by the explicit terms of the tenth amendment not an exercise of a power reserved to the states. If it was not a proper exercise of the power to regulate interstate commerce, it was unconstitutional, and nothing more need be said about it." The Child Labor Law, the Tenth Amendment and the Commerce Clause, (1918) 3 So. Law Quar. 175.
suppress vice or other conditions fraught with menace to the people. In short, questions which may arise regarding the purposes for which Congress uses its power of taxation are questions solely of legislative policy and not in any sense questions of constitutional law.\textsuperscript{22}

The right to use the taxing power for these broad purposes would not, even in the judgment of its advocates, warrant its exercise in such a way as to destroy fundamental private rights. Should Congress impose a tax of a thousand dollars upon all persons who ate bread or were members of the Roman Catholic Church, the court would of necessity decide that such an exercise of the power to tax was an invasion of the rights which are, in any free government, inviolable.\textsuperscript{5} Such a limitation would clearly be in line with the theory upon which the Supreme Court has held that taxes may be levied only for a public purpose.\textsuperscript{94}

But these limitations in behalf of the fundamental rights of the citizen would not interfere with the use of the congressional taxing power for any purposes related to the common defense and general welfare of the nation.

**THE PROBLEM OF OBJECTIVE CONSTITUTIONALITY**

Thus far the purposes for which Congress may use its power to tax have been considered in the light of general constitutional

\textsuperscript{92} After adverting to the implied restriction that Congress may not tax the states or their instrumentalities, Cooley states: "With the exception of cases resting on like or kindred reasons to those suggested, the protection as against the abuse of the federal power to tax must be looked for in the good sense of the representatives of the people, and in keeping alive the feeling that for all improper legislation they may be held to strict accountability by their constituents." Op. cit., Atlantic Monthly, Vol. 69, 534. "In selecting objects of taxation we have a right to keep in mind, as every Congress has kept in mind, the general welfare of the people of the United States. The object of taxation is revenue. The motive with which, for one, I vote to select this particular article for taxation is the interest, as I understand it, of the people." Speech of Senator Spooner on Oleomargarine Tax of 1902, Cong. Rec., April 1, 1902, Vol. 35, 3506.

\textsuperscript{94} Loan Association v. Topeka, supra.
principles. The questions discussed here have been those which each member of Congress must settle in his own mind before voting for a taxing bill regarding which these controversies might arise, since he is bound by his oath of office to support the constitution. They have all been concerned with the broad issue: Is the use of the taxing power for general police purposes defensible on sound constitutional principles? They all relate, therefore, to what has been aptly termed the problem of subjective constitutionality.95

There remains to be considered what may be called the problem of objective constitutionality. Assuming for the sake of argument that the child labor tax or some analogous act violates sound constitutional principles, can the Supreme Court actually get hold of that unconstitutionality and declare the tax null and void? In other words, is the constitutionality of the act of such a nature that the courts can afford judicial relief? For it must be borne in mind that there are plenty of instances in our constitutional system in which the Supreme Court is powerless to prevent even the flagrant violation of our fundamental law.96 Does the use by Congress of a constitutional power for an unconstitutional purpose create a case in which the remedy for unconstitutional action must be political rather than judicial?

Consideration of this problem may well begin with an examination of the case of McCray v. United States,97 in which in 1904 the Supreme Court sustained the validity of the oleomargarine tax of 1902. It was urged upon the court in this case that the tax of ten cents per pound upon colored oleomargarine was not designed to raise revenue but to suppress the manufacture of the article taxed. Everyone knew of course, that this was true. Such a tax was alleged to be unconstitutional because it amounted to an invasion of the reserved power of the states, because it was not in itself a legitimate means of exercising the taxing power, because of its destructive nature, and because it amounted to a deprivation of liberty and property rights which no free government might destroy.

The opinion of Mr. Justice White in the McCray case declared, first, that the court could not inquire into the motives

95Infra, p. 275.
96These instances are those in which the Court faces what it has called "political questions." See Black, op. cit., 100; Cooley, Principles, 157, Hall, op. cit., 40, Willoughby, op. cit., II, 999.
which actuated a particular exercise of an admitted power of Congress. This is, of course, familiar doctrine.98

"No instance is afforded," said the court, "from the foundation of the government where an act which was within a power conferred, was declared to be repugnant to the constitution, because it appeared to the judicial mind that the particular exertion of constitutional power was either unwise or unjust. . . .

"It is, however, argued if a lawful power may be exerted for an unlawful purpose, and thus, by abusing the power, it may be made to accomplish a result not intended by the constitution, all limitations of power must disappear, and the grave functions lodged in the judiciary, to confine all the departments within the authority conferred by the constitution, will be of no avail. This, when reduced to its last analysis, comes to this: that because a particular department of the government may exert its lawful powers with the object or motive of reaching an end not justified, therefore it becomes the duty of the judiciary to restrain the exercise of a lawful power wherever it seems to the judicial mind that such lawful power has been abused. But this reduces itself to the contention that, under our constitutional system, the abuse of one department of the government of its lawful powers is to be corrected by the abuse of its powers by another department."

In the second place, the court refused to invalidate the act on the ground that the results of the law, irrespective of its form or the motives of its framers, were such as to indicate an unconstitutional use of the taxing power. The court said:

"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."

The upshot of the McCray case, then, seems to be that the Supreme Court will not invalidate any congressional act which "on its face" levies a tax, no matter what the motive or results

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of that act may be. This is all that the case actually decided. The court suggests by way of dictum that there may be attempts by Congress to exercise the taxing power which are not "on their face" acts of taxation and which not only amount to "an abuse of delegated power, but the exercise of an authority not conferred." But it seems clear that what Mr. Justice White had in mind was the possibility of the use by Congress of its taxing power for the destruction of fundamental private rights. 99

This raises the interesting question, when, if ever, does a law purporting to be an exercise by Congress of its power to tax cease to be a tax "on its face," so as to justify the court in declaring it null and void. 100 The answer to this question is not to be found in Mr. Justice White's opinion in the McCray case, but some light upon the meaning which he attached to the phrase "on its face" may be gleaned from a further perusal of his remarks in the United States Senate while he was a member of that body.

In the first place, it is apparent from the statements of Senator White that a law purporting to be a tax law does not in his judgment necessarily cease to be a tax "on its face" and thereby fall under the judicial ban even when as a member of Congress he would be obliged to vote against the bill as unconstitutional because he knows the purpose of the tax to be not revenue but prohibition or regulation. 101 He cannot necessarily know and act upon as a judge the things which he knows as a legislator.

"It is perfectly self-evident when a bill, which is a revenue bill, comes to me for consideration, as to whether I will vote for it or not, it may be to me—if I may be allowed to use the word, a philosophical word—subjectively unconstitutional per se, and I may not vote for it as constitutional, because I know that, although it is a revenue bill, there is a purpose of destruction and prohibition contained in it. But when it comes to the court, the court can only look at it objectively. The court must look at its provisions, and if on its face it is a revenue bill, if on its face it be for the purpose of raising revenue, the court will say that it cannot consider the motive, but must decree its enforcement. . . .

99 For the full context see note 93, supra.

100 It is interesting to note that Cooley also uses this phrase "on its face" in discussing the validity of taxing acts. He says: "Practically, therefore, a law purporting to levy taxes, and not being on its face subject to objection, is unassailable, whatever may have been the real purpose." Principles of Constitutional Law, p. 58.

101 It is clear, of course, that Senator White adhered to this narrower view of the proper purposes of federal taxation. Supra, p. 264.
"If I were the Executive or a judge and the bill came to me, then having passed out of this sphere and into another sphere where motives could not enter, I should say the sole question presented to me was, does it raise revenue on its face, and if so, I would hold it constitutional."\textsuperscript{102}

But in the second place, if a judge is convinced from a study, not of the congressional debates, but of the provisions of the taxing measure itself, that it cannot in practical effect raise any revenue, but must of necessity result in regulation or destruction of things outside congressional authority, he may then conclude that it is not a tax law "on its face" and may hold it unconstitutional. This was Senator White's attitude toward the destructive taxes proposed to be levied upon cotton and grain futures. He declared that:

"On the very face of the bill not even a pretext of taxation can be found. By the very terms of the bill no tax can result from its provisions. . . .

"It is perfectly true that in two or three cases the Supreme Court of the United States has said that where on the face of a statute there was the exercise of taxation, as the statute was on its face a taxing statute, the court would not destroy the face of the statute with the sponge of the motives which may have actuated the members who passed it. Is that the case here? Where the face of the statute shows no tax, where the face of the statute itself eliminates all human possibility of the exercise of the taxing power for revenue, then I say the mission of jurisdiction is given to the courts of this land to brush that statute away for its flagrant and open violation of the constitution. . . . If the usurpation is clear on the face of the act, if the act itself shows the usurpation, the power exists in the Supreme Court to prevent the usurpation."\textsuperscript{103}

In short, when the court concludes from a scrutiny of the act itself that the act cannot in effect produce revenue, it need not

\textsuperscript{102}Cong. Rec., July 21, 1892, Vol. 23, 6518-6519.

Compare with this the following statement by President Cleveland in his message accompanying his approval of the Oleomargarine Tax Act of 1886: "It has been urged as an objection to this measure that while purporting to be legislation for revenue its real purpose is to destroy, by the use of the taxing power, one industry of our people for the protection and benefit of another.

"If entitled to indulge in such suspicion as a basis of official action in this case, and if entirely satisfied that the consequences indicated would ensue, I should doubtless feel constrained to interpose executive dissent. "But I do not feel called upon to interpret the motives of Congress otherwise than by the apparent character of the bill which has been presented to me, and I am convinced that the taxes which it creates cannot possibly destroy the open and legitimate manufacture and sale of the thing upon which it is levied." Richardson, Messages and Papers of the President, VIII, 427.

\textsuperscript{103}Cong. Rec., July 21, 1892, Vol. 23, 6516.
hesitate, according to Senator White, to declare that Congress has tried to wield an authority which it does not possess and that such an exercise of the taxing power is "objectively" unconstitutional.\textsuperscript{104}

Senator White's standard for judging the objective constitutionality of a congressional use of the taxing power has much more than an academic interest, first because his present position as Chief Justice of the United States gives him an opportunity to apply it or urge its application in the forthcoming decision on the validity of the child labor tax, and also because he has already had one opportunity to apply it, namely, in the \textit{McCray case}, and it is therefore possible to observe its nature and limitations. The fact that the oleomargarine tax of 1902 was under the circumstances found objectively constitutional throws some light upon the true value of Senator White's test as a check upon the use of the federal taxing power for police purposes. In commenting in the Senate in 1892 upon the oleomargarine tax of 1886, Senator White declared that when this measure was introduced into Congress it provided for a "prohibitive tax" but that in spite of the pressure for its passage it was too much for the "constitutional stomachs" of some of the members and it was accordingly reduced to a revenue-producing capacity.\textsuperscript{105} The implication is perfectly clear that Senator White regarded this "prohibitive" tax as one which was objectively unconstitutional; while the tax in its reduced form was objectively constitutional. Now this objectively unconstitutional tax on oleomargarine was a tax of ten cents per pound. In 1904, however, when as associate justice of the Supreme Court, Mr. White wrote the opinion in

\textsuperscript{104}"Now let us reason out the consequences, if it be not true. If this be not true, then the beautiful system by which, as I said just now, all the departments of the government move in a common orbit, vanishes out of the sidereal universe of government and passes into confusion and chaos. The precedents are against it. The power which the Supreme Court of the United States exercises in the review of statutes is like unto the power exercised by the supreme courts of all the states. The books are full of cases in the state courts drawing the distinction which I have made. In the Topeka case it is drawn in plain words by the Supreme Court of the United States. There a government appropriated a sum of money, declaring it to be for a public purpose. The case went to the Supreme Court of the United States and it said your motive and your purpose cannot be inquired into. That is removed beyond the domain of controversy or question. But where you have called the statute one thing and the very terms of the statute indicate another thing, and that other thing is outside the powers of government, then it is not a statute at all, but it is a violation of authority and we strike it from the statute books." Cong. Rec., July 21, 1897, Vol. 23, 6516.

\textsuperscript{105}Cong. Rec., July 21, 1892, Vol. 23, 6518.
the *McCray case*, the same tax of ten cents per pound on colored oleomargarine seemed to him "on its face" to be a revenue measure and therefore objectively constitutional. A tax objectively unconstitutional in 1886 turns out to be objectively constitutional in 1904.\(^{106}\) One is forced to the conclusion that he found as justice of the Supreme Court insurmountable difficulties in the way of declaring "objectively unconstitutional" a taxing statute which as a legislator he had felt convinced should fall under the judicial ban.

It is not at all surprising that the Supreme Court, even had it been unanimously inclined to do so, should have found it exceedingly difficult to declare unconstitutional a law purporting to be an exercise by Congress of its delegated power of taxation because it did not "on its face" levy a tax. In addition to the general presumption of constitutionality which attaches to any act of the legislature there is added, unless Congress is unusually careless, the presumption arising from the legislative label declaring the act to be for the raising of revenue.\(^{107}\) It is necessary also for the court to give full weight to the unquestioned freedom of Congress to select the subjects of lawful taxation,\(^{108}\) and, having selected them, to impose rates which are restricted only by legislative discretion.\(^{109}\) The court must also exercise sufficient self-control to rule out of consideration all that it may know about the purposes and motives actuating the legislators responsible for passing the law.\(^{110}\) It is not at liberty to decide

\(^{106}\) There is a theory on which the Act of 1886 can be distinguished from the Act of 1902. The earlier law levied a uniform tax upon all oleomargarine. The Act of 1902 levied a tax of one-quarter of a cent per pound on uncolored oleomargarine and a tax of ten cents per pound on that which was colored. It was argued in Congress that the destructive tax upon the colored product was to aid the government in the enforcement of the revenue-producing tax on the uncolored product by preventing a deception which would facilitate tax evasion. See remarks of Senator Hoar, Cong. Rec., Mar. 26, 1902, Vol. 35, 3282, and of Senator Spooner, ibid 3506. This is the theory upon which the Supreme Court upheld the Harrison Anti-Narcotic Act in the recent case of the United States v. Doremus, (1919) 249 U. S. 86, 63 L. Ed.—, 39 S. C. R. 214. There is no evidence, however, that Mr. Justice White attached any significance to this point when writing his opinion in the McCray case.

\(^{107}\) The entire statute was entitled "An Act to Provide Revenue and For Other Purposes;" the section relating to child labor was entitled "Tax on the Employment of Child Labor."


\(^{110}\) See note 98, supra.
whether or not "on its face" the act raises revenue by finding out whether or not, when set in operation, it actually does raise any revenue.\footnote{111}{See paragraph quoted from Mr. Justice White's opinion in the McCray case, note 93 supra.} Probably in most cases also such evidence would be lacking at the time the court needed it,\footnote{112}{As when the question of the validity of the taxing act is raised in an action seeking an injunction to restrain enforcement. This was the nature of the proceeding in the United States district court in which the child labor tax has been held invalid. Supra, note 11. The court might be compelled to determine this question before the law had been fairly put into operation.} and such evidence might be of very questionable reliability as a guide to the court.\footnote{113}{It is, of course, well known that even fiscal experts are frequently deceived as to the actual revenue-bearing capacity of a particular tax. Furthermore, interested parties might secure the payment for a temporary period even of prohibitive taxes in order to provide evidence of the ability of the tax to produce some revenue.} If the court is able thus to orient itself sufficiently and to bring to bear on its problem the mental complex which should result from the considerations above noted, it must then address itself to the problem whether the provisions of the statute which it is scrutinizing are, in and of themselves, of such a character as to leave no reasonable doubt that the act is not an act to raise revenue. To make this judicial guess as to what the statute was probably meant to accomplish and what it probably will accomplish, the court must deal with factors which are not only highly speculative in character but have an awkward tendency to fluctuate. Whether an alleged revenue law may be reasonably presumed to produce revenue will depend upon circumstances, and circumstances may change. The measure of constitutionality might thus tend to shift.\footnote{114}{This was pointed out in humorous fashion by Mr. Hepburn in the debate in the House on the oleomargarine tax of 1886: "In the year 1887, when the effect of the bill, we will suppose, is to prohibit the manufacture of oleomargarine, the bill becomes unconstitutional. But suppose the next year on account of the withdrawal of 20,000,000 pounds of this spurious butter that is sold, and used as butter, leaving on the market 1,000,000 pounds of good butter, the price of butter is enhanced, going up to 25c or 30c a pound. The manufacturer of the bogus article can then compete, if he can make the article and pay the tax, so that there will be a revenue of $20,000,000 to the government. Then the law becomes a constitutional measure! So that according to the gentleman's argument the bill may be constitutional in 1886, unconstitutional in 1887, and again become constitutional in 1888. The bill is not constitutional or unconstitutional because of the nature of the enactments that it contains, but because of the price of butter!" (Laughter.) Cong. Rec., Vol. 17, 4901.} In short, in applying this test of objective unconstitutionality, the court will properly feel that it must be more than usually sure of its ground in respect to a
problem so vague and baffling in character that sureness of
ground will frequently be well nigh unattainable.

The writer ventures the opinion that should the majority of
the Supreme Court adopt either the revenue only theory of
federal taxation or Chief Justice White's theory that the purposes
for which Congress may tax are limited by the reserved powers
of the states, it would find the problem of applying any satis-
factory test of objective constitutionality for the purpose of
enforcing such limitations so fraught with difficulties that those
limitations would practically cease to function. Congress would
find itself possessed in reality of practically the same broad pow-
ers of taxation which the states and other sovereign governments
enjoy. Such power would continue to be subject to all the
express limitations found in the constitution; it would be subject
to the implied limitation that the revenue raised must be for a
public purpose; it would be subject to the implied limitation that
it must not burden the governments or functions of the states;
it would be subject to the implied limitation that it must not
infringe the individual rights which under a free government are
inviolable. It seems exceedingly doubtful that any instance will
arise in which a law passed by Congress in exercise of its power
to tax which was safely within all these express and implied
restrictions will be declared null and void by the Supreme Court
because "on its face" it does not "levy a tax." If Senator White's
standard of objective constitutionality failed to function in the
McCray case, it is not easy to imagine the kind of taxing statute
to which it would apply. If it was inapplicable to the oleomarg-
arine tax of 1902 it is hard to discover its applicability to the
child labor tax of 1919.

By way of summary and conclusion it may be suggested that
the nature of the purposes for which Congress may properly
use its power to tax is a question on which there is now and
has always been a wide difference of opinion. There is plenty
of respectable authority for the support of each one of the three
views discussed. It may be noted that Congress has proceeded
upon the theory that it may use its power to tax for the accom-
plishment of any purposes which will aid the common defense
and general welfare. It is apparent that the Supreme Court has
never put its official sanction upon any one of the three theories
of federal taxation to the exclusion of the others. It seems
probable that the narrower and more restricted conceptions of
the taxing power would, from the standpoint of the practical problem of judicial construction, prove incapable of satisfactory enforcement. There is every indication that Congress, if it is sufficiently circumspect, may continue to exercise a liberal police power through the medium of regulatory and destructive taxes without fear of judicial interference.

But if the child labor tax is upheld, either because the Supreme Court decides upon broad grounds that the law is constitutional or because it finds its unconstitutionality inaccessible, Congress will be justified in feeling that it has been substantially fortified in its position that it may use its power to tax as an instrumentality for the exercise of a broad national police power. It will be reasonable to look for further and more far-reaching measures seeking by means of taxation to regulate conditions and suppress evils over which Congress has no direct authority.*

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This series of articles will be concluded by an article, "The National Police Power under the Postal Power."