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CHILD LABOR, CONGRESS, AND THE CONSTITUTION

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TWICE CONGRESS has tried to reduce the number of children employed in the industries of the country. Twice the Supreme Court found the congressional effort without warrant in the federal Constitution. Both cases arose in North Carolina.

In each instance the court adduced the Tenth Amendment, which declares that "the powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." This Amendment, however, sets no standard for determining whether a power has been delegated to the United States. It merely embodies the elementary principle that Congress has only those powers delegated to it either by explicit enumeration or by the vague addendum of the "necessary and proper" clause. Thus, independently of the Tenth Amendment, the court had first to establish that the powers exercised by Congress were not delegated to it by the Constitution. While the decisions represent applications of the Tenth Amendment they can hardly be called interpretations thereof. As contributions to constitutional interpretation they belong to the law of the national commerce power and the national taxing power, respectively.

Undisputed as this must be from a strictly legal standpoint, it possibly falls somewhat short of telling the whole truth. Constitutional law is not made by a machine or by any automatic logic. Into its composition there enters not a little of instinct or emotion or judgment of a political tinge. The Tenth Amendment may have some political significance over and above its command to Congress not to exercise powers not delegated. As a canon of political policy it may carry a counsel of caution in deciding whether some proposed measure is really within or without the scope of national authority. The constitutional grants to Congress are for the most part so vague and indefinite that those who have to run the border lines can hardly escape the influence of a general prefer-

ence for leaning to one side or the other. If government were a matter of precise mechanics, such a preference should operate only in deciding whether power possessed should in fact be exercised. It could play no legitimate part in drawing the line between power and usurpation. With government, however, as an elastic and very human enterprise, and with a constitution that leaves wide scope for profound differences of interpretation, constitutional law inevitably takes color from views of legislative policy, and a feeling that a power should not be exercised passes over easily into a persuasion that it is not possessed.

Thus it may well be that in the actual operation of our governmental enterprise, the Tenth Amendment has some influence in the official determination of what is an exercise of the commerce power or of the taxing power. Whether such influence is legitimate is another matter. In so far as it operates on the self-restraint of Congress, it is immune from criticism. Clearly, however, the Supreme Court should be cautious in allowing it to bear upon its judgments. It is a serious matter to declare invalid a law that the representatives of the nation have put upon the statute books. Courts should seek to keep clear the formal distinction between the existence of power and the wisdom of its exercise. They should bear in mind that the reservation to the states secured by the Tenth Amendment is a reservation of nothing more than of powers not granted to Congress. It is not a limitation on Congress in the exercise of powers conferred. Therein it differs from the ordinary limitations in behalf of individual liberty and property. Congress may deny due process by what is a regulation of interstate commerce; but a regulation of interstate commerce cannot be an exercise of power reserved to the states. Moreover, the decision whether a regulation of something is a regulation of interstate commerce cannot logically be influenced by the circumstance that if it is not a regulation of interstate commerce it is an exercise of some power reserved to the states.

I

The first effort of Congress to restrict child labor was predicated on the commerce clause. The statute forbade the interstate transportation of the products of mines and factories in which children under the designated ages had been employed within thirty days prior to the removal of such products from the place of manufacture.¹ This, it will be seen, is different from prohibiting the transportation of goods made by children. A repenting and desisting employer of children could ship the fruits of their toil after the lapse of thirty days from his regeneration. The unregenerate operator of a factory in which children are employed could not ship any of its products to points outside the state. The choice of this somewhat peculiar designation of the articles denied interstate transit was deemed necessary because of the difficulty of proving whether any particular article owed something to the labor of children. It had the effect of making it impossible to escape the federal prohibition by confining the work

¹ Act of September 1, 1916, 39 Stat. at L. 675, Chap. 432, U. S. Comp. Stats., 1918, sec. 8819a-f.

of children in any given plant to the goods designed for local consumption. One who desired extra-state markets and who at the same time wished to employ children in manufacture for local consumption had to establish wholly separate plants for his two enterprises.

This statute was declared unconstitutional in *Hammer v. Dagenhart*,² by a vote of five to four. Nothing was made of the fact that the goods denied shipment were those from factories in which children worked rather than goods made by children. An amendment of the statute in this respect would not relieve it from condemnation. The issue presented by the case was one still open under the precedents. Therefore, the court was free to decide as its judgment dictated. The judgment of the majority could hardly be open to question had its analysis of the problem been correct. Of the earlier congressional embargoes on interstate transit Mr. Justice Day says rightly that "in each of these instances the use of interstate transportation was necessary to the accomplishment of harmful results."³ He falls into grievous error, however, when he declares that "this element is wanting in the present case."⁴ Equally without warrant is his hypothetical vaticination that "the far-reaching result of upholding the act cannot be more plainly indicated than by pointing out that if Congress can thus regulate matters entrusted to local authority by prohibition of the movement of commodities in interstate commerce, all freedom of commerce will be at an end, and the power of the states over local matters may be eliminated, and thus our system of government be practically destroyed."⁵

This would have been true enough had the condition which made the goods non-transportable been one to which transportation in no way contributed. No one would have the hardihood to argue in favor of the constitutionality of congressional prohibition of interstate transportation of all goods from states in which divorce is allowed or of all persons who beat their wives. Such interdictions of interstate transit would browbeat the states not to permit divorce and browbeat husbands not to browbeat their wives. They would wield the commerce power as a club to control local enterprises in no way dependent upon interstate commerce. Intra-marital pugilism would be dissuaded, not because belligerent husbands need interstate commerce for the achievement of this particular aim, but because for other reasons they are sufficiently eager for interstate wanderings to be willing to comply with the independent and unrelated condition which Congress selects as the criterion whether such wanderings may take place. This would partake of the nature of brigandage or blackmail. There would be no appropriate connection between the transportation and the conduct which makes it licit or illicit. Such a supposed statute should rightly be held to

² 247 U. S. 251, 38 Sup. Ct. 529 (1918). For an extensive bibliography of discussions of the decision and for a masterly objective summary and analysis of the contending arguments, see Robert Eugene Cushman, *The National Police Power Under the Commerce Clause of the Constitution*, Part IV, 3 Minn. L. Rev. 452.

³ 247 U. S. 251, 271.

⁴ *Ibid.*

⁵ *Ibid.*, 276.

transcend the commerce power because of its intended and necessary effect on matters to which interstate transportation has no necessary relation.

No such situation is presented by a congressional prohibition of interstate transportation of goods made by children. By such a statute the harmful results of child labor are forefended only to the extent that interstate transportation is economically necessary to their fruition. Here, then, is Mr. Justice Day's crucial blunder. He says that interstate transportation is not necessary to the employment of children to make goods that can find a market only by the use of interstate transportation. He does not put it thus baldly, but that is the unescapable application of the distinction upon which he insists. It is pitifully obvious that he is wrong. The case arose because children were discharged because their employer could not ship his goods to other states if they remained at work. Clearly goods produced only for sale will not be produced if opportunity of sale is denied. Sales to other states cannot occur without transportation to other states. Transportation is essential to a market; a market is essential to a sale; a sale is essential to production for sale. *Q. E. D.*

To this misconception that interstate transportation is not necessary to the harmful results of child labor dependent economically on interstate transportation, Mr. Justice Day adds another. He says that the statute permits the goods "to be freely shipped after thirty days from the time of their removal from the factory."⁶ This is not so. It forbade their shipment if "within thirty days prior to the time of the removal of such product therefrom" children within the designated ages had been permitted to work. To ship goods made by children or in factories in which children were working, the employment of children must have been abandoned for thirty days before the goods were removed. Goods removed from a factory within thirty days from the time when children were employed could never be shipped. The thirty-day interval specified in the statute was one prior to the removal of the goods and not one subsequent thereto. This was an act of grace, lifting the embargo on interstate transportation after the employment of children had been abandoned. It did not make the prohibition contingent on circumstances unrelated to interstate transportation, but it relaxed the prohibition sufficiently to exclude some manufacture that might be dependent on interstate transportation. It clearly was not an independent or additional vice in the statute. At most it merely reinforced the judgment that "the goods shipped are of themselves harmless."⁷

All will agree that the goods were of themselves harmless and that in a still broader sense they could not serve as instruments of harm. This distinguishes the statute from those prohibiting the interstate transportation of lottery tickets,⁸ liquor,⁹ and impure food and drugs.¹⁰ But, as Mr. Justice Holmes

⁶ 247 U. S. 251, 272.

⁷ *Ibid.*

⁸ Sustained in *Lottery Case (Champion v. Ames)*, 188 U. S. 321, 23 Sup. Ct. 321 (1903).

⁹ Sustained in *Clark Distilling Co. v. Western Maryland R. Co.*, 242 U. S. 311, 37 Sup. Ct. 180 (1917).

¹⁰ Sustained in *Hipolite Egg Co. v. United States*, 220 U. S. 45, 31 Sup. Ct. 364 (1911).

points out in the dissenting opinion, it does not distinguish it from the statute sustained in *Weeks v. United States*¹¹ which forbade the interstate transportation of articles "innocent in themselves, simply on the ground that the order for them was induced by preliminary fraud."¹² This decision is not referred to in the majority opinion of Mr. Justice Day. The statutes are distinguishable, but not on the ground of the noxious or harmless physical capacities of the goods themselves. Such a distinction could have no reasonable bearing on any issue under the commerce clause. It might apply to an issue raised under due process of law. The Fifth Amendment would restrain the suppression of interstate traffic with no taint of evil. This amendment was adduced by the complainant before the court, but the due process issue was not considered. The test of due process should depend on the evil affected by the statute. The evil of child labor is not one safeguarded from interference by the conception of due process of law.¹³

Another characterization of the situation before the court is apparently adduced by Mr. Justice Day as a distinction between the child labor law and the other congressional enactments that have been sustained. With reference to goods "of themselves harmless," he says that "when offered for shipment, and before transportation begins, the labor of their production is over, and the mere fact that they were intended for interstate commerce transportation does not make their production subject to federal control under the commerce power."¹⁴ But the production of food and drugs is "subject to federal control under the commerce power" so far as it is affected by a prohibition of interstate transportation after "the labor of their production is over." In so far as Mr. Justice Day is relying on the fact that the conditions specified as prerequisite to interstate shipment are conditions during the process of manufacture, he has no escape from the precedents. His reliance on the intrinsically harmless quality of the goods themselves has already been dealt with. He does not specifically put his finger on a distinction still left him. This is that the conditions prerequisite to shipment in the concededly constitutional prohibitions were ones that involved either the intrinsic qualities of the goods or some representation with respect to them. Such conditional prerequisites affect production and in that sense regulate production, but they touch evil not confined to the state of production.

This, then, is the distinction on which to judge the consistency of the Child Labor Case with prior decisions. It seems strange that the majority opinion does not explicitly point it out. Possibly it is what Mr. Justice Day has in mind when he puts forward the unwarranted distinction that in other cases the transportation was necessary to evil while here it is not. In all the other cases

¹¹ 245 U. S. 618, 38 Sup. Ct. 219 (1918).

¹² Thus characterized by Mr. Justice Holmes in his dissenting opinion in the Child Labor Case at page 279.

¹³ This is established where there is direct power over the subject matter. *Sturges and Burn Mfg. Co. v. Beauchamp*, 231 U. S. 320, 34 Sup. Ct. 60 (1913). Ingenious and logically possible arguments that the situation is different when the commerce power is exercised to avert an evil that is no menace to interstate commerce are summarized in Cushman, *op. cit.*, pages 468-469.

¹⁴ 247 U. S. 251, 272.

the transportation contributed to evil in the state of intended destination. Yet the evil was not always exclusively a post-transit one. Readers of *The Jungle* are aware that Congress was exercised over the state of the shambles as well as of the product. The white slave act¹⁵ minimizes seduction and enticement by restricting the area from which such acts acquire impetus and encouragement. The child labor law cannot be distinguished as the first to use the commerce power to prevent evil in the course of production. It cannot be distinguished as the first to prevent evil due to something else than the physical qualities of commodities. Goods sold by fraudulent representations need not be deleterious in themselves. Goods made in violation of the Sherman Act are commonly good goods. The use of the commerce power to prevent economic evil is firmly established. But in the earlier cases the physical or economic evils involved were not exclusively ante-transit. Can the child labor law be distinguished on this ground?

The government contended that it could not. It sought to sustain the law by reason of its beneficial effect on recipient communities. The argument was premised on the propositions that the influx of extra-state goods made by child labor makes it economically burdensome to suppress child labor where such goods are offered for sale, and that in general low standards in one state restrain high standards in another. Therefore, it was urged, the suppression of such competition by prohibition of interstate transportation is essential to the freedom of each state to adopt such standards of child labor as it may deem desirable. Such an argument is made on behalf of a protective tariff and it arises in connection with the sale of intoxicants on ships at sea. Mr. Justice Day in dismissing the contention asserted that "there is no power vested in Congress to require the states to exercise their police power so as to prevent possible unfair competition."¹⁶ This is beside the point. The issue was whether Congress may exercise its commerce power so as to prevent such possible unfair competition. Congress in no way coerced North Carolina to exercise its police power. It coerced North Carolina employers to comply with federal standards if they wished to sell their product outside of North Carolina. But Mr. Justice Day hits the point when he adds that the "commerce clause was not intended to give to Congress a general authority to equalize such conditions"¹⁷ as economic disparity between the different states.

Thus by judicial fiat Congress, though it can protect a state from the competition of cheap foreign labor, cannot protect it from the competition of cheap labor in another state. This would be unobjectionable if the state were allowed to secure the latter protection for itself. But such is not the case. It would be a regulation of interstate commerce if Massachusetts declined to receive goods made by children in North Carolina. As such regulation of interstate commerce,

¹⁵ Sustained in *Hoke v. United States*, 227 U. S. 308, 33 Sup. Ct. 281 (1913), and *Caminetti v. United States*, 242 U. S. 470, 37 Sup. Ct. 192 (1917).

¹⁶ 247 U. S. 251, 273.

¹⁷ *Ibid.*

a statute of Massachusetts would be unconstitutional.¹⁸ It is not a regulation of interstate commerce when Congress protects Massachusetts from invasion of goods made by child labor in North Carolina. As such not-a-regulation of interstate commerce, a statute of Congress would be unconstitutional. By the grant to Congress of the commerce power, Massachusetts has lost the power to protect itself and Congress has not acquired the power to protect it. Thus the beneficent operation of the commerce clause includes a license to what humanitarians unkindly call the "backward states" to sacrifice the health and strength of future citizens and soldiers of the nation to the domestication of gainful industry within their borders. There is no error of logic in Mr. Justice Day's avowal. The issue is one of a choice between a wise or a foolish judgment. On this issue Mr. Justice Day leaves us without reasons for his choice. Once his choice is accepted, however, the earlier precedents are distinguishable. They none of them sanctioned congressional embargoes with the sole object and effect of preventing evil in the state of production.

This, then, is the principle for which the Child Labor Case must stand: it is not a regulation of interstate commerce to prohibit the interstate transportation of commodities for the sole object and effect of safeguarding the health and safety of workers engaged in production dependent on interstate commerce for its economic existence. This can hardly be called the principle on which the case is decided, but it is safe to assume that the majority were more concerned with the result reached than with the ways of reaching it. Yet it is regrettable that such an important decision was supported so predominantly by inapposite truisms, unreasoned assertions, and palpable blunders. The reasoning, much of it fallacious, is devoted almost entirely to distinguishing the precedents adduced on behalf of the law. Little of it is bestowed on the proposition that the law is unconstitutional. When Mr. Justice Day says that "the act in its effect does not regulate transportation among the states, but aims to standardize the ages at which children may be employed in mining and manufacturing within the states,"¹⁹ he posits a false antithesis. The act did both what he said it did and what he said it did not. Whether this regulation of interstate transportation was a regulation of interstate commerce in the constitutional sense should depend upon the intimacy of the relation between the transportation and the condition which determined its legality.

The majority in their opinion wholly misconceive this relation. They actually decide something quite different from what they professed to decide. Their apprehension that Congress, if not checked here, could roam unbridled was without warrant. The due process clause and the requirement of a decently close relation between transportation and the congressional criterion of its legality would prove most material checks. The federal system ordained by the Constitution did not stand on the brink of downfall. Judicial approval of the child

¹⁸ *Bowman v. Chicago and N. W. Ry. Co.*, 125 U. S. 465, 8 Sup. Ct. 689 (1888).

¹⁹ 247 U. S. 251, 271-272.

labor law would have sanctioned a practical increase of national commerce power over that of a century earlier, but this practical increase would have been due to the practical fact that interstate transportation is now essential to more productive enterprise than it was a century ago. If it be true that the Fathers would not have anticipated an act of Congress prohibiting the interstate transportation of goods made under objectionable conditions detrimental only to the producers, it is in all likelihood equally true that they would not have anticipated that a state would be powerless to forbid the sale within its borders of goods from other states. Such power was conceded to the states in 1847 in a decision²⁰ overruled in 1890.²¹ By the Constitution of the twentieth century, the states as consuming communities have lost what Congress has not gained.

The situation from the standpoint of the states as producing communities is described so strikingly in the dissenting opinion of Mr. Justice Holmes that it would be a sin to do other than quote it. Speaking of the child labor statute he says:

"The act does not meddle with anything belonging to the states. They may regulate their internal affairs and their domestic commerce as they like. But when they seek to send their products across the state line, they are no longer within their rights. If there were no Constitution and no Congress their power to cross the line would depend upon their neighbors. Under the Constitution such commerce belongs not to the states, but to Congress to regulate. It may carry out its views of public policy whatever indirect effect they may have upon the activities of the states. Instead of being encountered by a prohibitive tariff at her boundaries, the state encounters the public policy of the United States which it is for Congress to express. The public policy of the United States is shaped with a view to the benefit of the nation as a whole. . . . The national welfare as understood by Congress may require a different attitude within its sphere from that of some self-seeking state. It seems to me entirely constitutional for Congress to enforce its understanding by all the means at its command."²²

Earlier Mr. Justice Holmes had declared: "It does not matter whether the supposed evil precedes or follows the transportation. It is enough that in the opinion of Congress, the transportation encourages the evil."²³ But such is not the view of the majority. They must think that it does matter whether the evil precedes or follows transportation. This they cannot derive from any language of the Constitution. It comes from their idea of the proper balance between state and national authority. Somewhere or other a limit must be set to the criteria to be picked by Congress as determinants of the lawfulness of interstate transportation. The doctors of the Supreme Court have disagreed. In this they do not differ from the doctors elsewhere.

II

After the interment of the effort to restrict child labor by the use of the commerce power, a movement was started to suppress the evil by the use of the

²⁰ *License Cases*, 5 How. (U. S.) 504 (1847).

²¹ *Leisy v. Hardin*, 135 U. S. 100, 10 Sup. Ct. 681 (1890).

²² 247 U. S. 251, 281.

²³ *Ibid.*, 279-280.

federal taxing power. This produced a provision in the Revenue Act of 1918 imposing on any enterprise which at any time within the taxable year employs children under the designated ages an excise tax equivalent to ten per cent of its net income for the entire year, such tax to be in addition to all other taxes imposed by law.²⁴ The statute was sprayed with the fiscal perfume of detailed directions for estimating net profits. Much less fiscal was a clause exempting from the tax those whose hospitality toward children under the designated ages was indulged in under a mistake of fact as to their age and with no intention to evade the tax. While the enforcement of the law was vested primarily in the Commissioner of Internal Revenue, he was allowed to request the Secretary of Labor, or any person whom the latter authorized, to make inspections and investigations and to report the results.

No one can doubt that such a law would have a depressing effect on child labor. Miners and manufacturers would naturally prefer to enjoy this ten per cent of their net income in pursuits of their own rather than to devote it to the more or less laudable enterprises of the national government. Thus children would be likely to find the factory doors barred against them except when operators would figure that they might be hired at sufficiently low wages to make a saving in labor cost greater than ten per cent of anticipated net income. Such anticipations would be infrequent. Their realization would doubtless prompt the government to increase the rate of the tax so that similar margins would not appear again. Plainly the act of Congress spelled the doom of child labor unless some way was found to declare it unconstitutional. The effect of such a statute would not be confined to production for extra-state markets. It would impinge upon all child labor in the country. Such a tax, moreover, if successful, would be a precedent for the constitutionality of similar depressive exactions on enterprises paying less than a prescribed minimum wage, working labor more than a prescribed number of hours per day or per week, failing to comply with standards of safety or with any other police tests laid down by Congress as a discrimen between taxability and non-taxability.

Thus it is apparent that the power exercised by Congress, if sanctioned by the Supreme Court, would permit the national government to accomplish by heavy taxation almost everything that the states may accomplish by the exercise of their police power. Very likely Congress might by such taxation pass beyond the line of proper state police power. The states, for example, cannot in the name of police power suppress private employment agencies. Due process prevents.²⁵ But due process would not prevent a special excise on employment agencies, and the equal-protection clause of the Fourteenth Amendment would in the usual case be equally impotent. The Fifth Amendment has no equal-protection clause, and Congress is almost unrestrained in selecting what enterprise to subject to an excise.²⁶ A tax plainly and palpably prohibitive might be sub-

²⁴ The so-called Revenue Act of 1918 was approved February 24, 1919. 40 Stat. at L. 1057, 1138, U. S. Comp. Stat., 1919 Supp. sec. 6336 7-8a-h, 6371 1-2h.

²⁵ *Adams v. Tanner*, 244 U. S. 590, 37 Sup. Ct. 662 (1917).

²⁶ See *La Belle Iron Works v. United States*, 256 U. S. 377, 41 Sup. Ct. 528 (1921).

jected to scrutiny under due process, but this is by no means clear.²⁷ Even if the principle were established that prohibitive taxation violates due process, it would be difficult to apply it to a tax on net income. Such a tax cannot render conduct completely unprofitable unless with other taxes it takes 100 per cent of the net income. Protection from prohibitive exactions would not be enough to keep the federal fiscal power within the due process limits of state police power. Long before a tax became unescapably prohibitive it might be so burdensome that the taxable course of conduct would be abandoned in favor of some alternative that required less rendering unto Cæsar. Thus plainly due process cannot circumscribe the indirect regulatory effects of taxation to the extent that it can restrict the direct regulatory effects of police power. The child labor tax, therefore, was pregnant with all the possibilities of federal regulation which Mr. Justice Day's defective diagnosis found in the earlier law prohibiting interstate transportation of child labor products.

This comparison, however, does not necessarily establish that the child labor tax is unconstitutional. Some federal powers have wider scope than others. The postal power and the taxing power, unlike the commerce power, have no concern with state lines. The war powers may be wielded with little thought of what in ordinary times is within the protected province of state control. The national income and estate taxes with their highly progressive rates affect profoundly the enjoyments and privileges which the states alone may directly curtail. If the child labor tax was in substance and truth an exercise of the taxing power, its collateral effects on the conduct of taxpayers could not be adduced to defeat its constitutionality. The issue is rather whether demonstrable collateral effects afford a sufficient basis for a judgment that what professes to be a tax is masquerading under false colors and is in reality something else. The conflict is one of form against substance. The analysis of substance presents, not the easy enterprise of discovering whether a law is 100 per cent fiscal or 100 per cent something else wholly different, but the far more ticklish task of balancing opposing characteristics and determining whether the disqualifying elements so far outweigh the legitimating ones as to justify a judgment that the latter may be disregarded in favor of the former. Such a judgment is far more qualitative than quantitative. To afford the basis of a judicial veto of legislation, it needs a preponderance in its favor so strong as to be hardly open to question.

As an issue of simple common-sense judgment, the child labor tax presented no serious problem. Its purpose and effect were necessarily to reduce child labor almost to the vanishing point. Its proponents were the exterminators of child labor and not the financiers of the government. Those who lament

²⁷ No federal tax has thus far been held to be a violation of the Fifth Amendment and there are several intimations in the opinions of the Supreme Court that the Fifth Amendment does not limit the taxing power of Congress. These, however, are offset to a degree by the recognition that a so-called tax may be so atrociously outrageous as to be not a tax but an arbitrary exaction. Thus the situation seems to be that the Fifth Amendment does not limit the federal taxing power as the Fourteenth Amendment limits the taxing power of the states, but that there still is a limit of reasonableness beyond which Congress may not go.

its failure to pass muster with the court are led by Mr. Lovejoy, not by Mr. Mellon. True, the tax was not completely prohibitive. One of the cases which came before the court was a suit to recover a tax that had been paid. Some concerns might prefer to pay an added ten per cent of their profits rather than to deny to children the opportunity to aid in supporting themselves and their family. But a little raising of the rate of the tax would soon squelch such beneficence, and if the present tax had been sustained it would be almost impossible to balk at a higher one. Those who would contend that the child labor tax was constitutional must either rely on arguments that offend common sense or else insist that the court can never go behind form to substance or that the issue raised had been already foreclosed in favor of the law by the precedents.

The strongest hope for the constitutionality of the tax lay in the precedents, particularly in *McCray v. United States*,²⁸ which sustained a federal excise of ten cents a pound on oleomargarine colored to resemble butter. This was a suit for a penalty for knowingly purchasing for resale some colored oleomargarine to which required revenue stamps had not been affixed. The bill averred that the ten-cent tax would make it impossible for the product to compete with butter and so would destroy the industry. For the purposes of the case this was conceded to be true by the demurrer of the government. Here then was taxation, not for revenue, but for suppression. The product to be suppressed was not all oleomargarine but only oleomargarine colored to resemble butter. This was evident from the fact that the tax on uncolored oleomargarine was only one quarter of a cent per pound. Thus the government by a specific description of a particular ingredient physically harmless had drawn the line between high and low taxation so as to induce the abandonment of the manufacture of oleomargarine palatable to the eye. The contention that such a selective exaction is not a tax but a regulation of manufacture and sale and thus an encroachment on the reserved powers of the states in violation of the Tenth Amendment was put forth and rejected.

The opinion of the court was written by Mr. Justice White, who was Chief Justice when the child labor tax first came before the court. He had been with the majority in annulling the interstate-transportation prohibition in *Hammer v. Dagenhart*.²⁹ It could hardly be doubted that he would be naturally disposed to follow the substance of this decision and find similar flaws in the child labor tax. Yet his opinion in the Oleomargarine Case had been so sweeping that even his unrivalled intellectual ingenuity must have paused before the task of writing an opinion annulling the child labor tax which would have squared with his opinion sustaining the oleomargarine tax. The issue came before the court in a case argued December 10, 1919. This was a suit by the father and "next friend" of a boy to enjoin his employer from discharging him. Instead

²⁸ 195 U. S. 27, 24 Sup. Ct. 769 (1904).

²⁹ Note 2, *supra*.

of deciding the case the court ordered a re-argument. When this was had on March 7 and 8, 1922, Chief Justice White had been succeeded by Chief Justice Taft. In the meantime the boy had been growing older, so that in *Atherton Mills v. Johnston*,³⁰ decided on May 15, 1922, the appeal from the court below was dismissed because the issue raised by the injunction had become moot.

On the same day, in *Bailey v. Drexel Furniture Co.*,³¹ the child labor tax was declared unconstitutional by a vote of eight to one. Mr. Justice Clarke alone dissented, and he filed no opinion. With the majority were Justices McKenna, Holmes and Day, who had sat in the *Oleomargarine Case* and concurred in sustaining the tax. Chief Justice Taft, who wrote the opinion condemning the child labor tax, professed not to overrule the *Oleomargarine Case* but to distinguish it. He recognized the continuing power of the earlier case when he said of the exaction before him that "if it were an excise on a commodity or other thing of value, we might not be permitted, under previous decisions of this court, to infer, solely from its heavy burden, that the act intends a prohibition instead of a tax."³² This apparently still leaves Congress free to put specific prohibitive excises on the making of described commodities. Clearly, however, the description must be rather narrowly confined to the identification of the selected commodity by some of its inherent and continuing characteristics, and may not include detailed specifications of the conditions under which the commodity is made. This is to be inferred from the later statement in the child labor opinion that the oleomargarine law did not "show on its face, as does the law before us, the detailed specifications of a regulation of a state concern and business with a heavy exaction to promote the efficacy of such regulation."³³ It is made certain by the decision in *Hill v. Wallace*,³⁴ handed down on the same day, which invalidated the federal excise of twenty cents a bushel on all sales of grain for future delivery with the exception of sales by producers or owners of grain and sales on boards of trade designated by the Secretary of Agriculture upon fulfilment of detailed requirements set forth in the statute and in administrative regulations. Plainly, therefore, Congress could not remove the taint from the child labor tax by changing it from a tax on income to a specific exaction on the manufacture or sale of goods produced by child labor, or in mines or factories in which children work.

The opinion of the Chief Justice presents a major and a minor premise from which his conclusion follows inevitably. The major premise is that a federal excise, in form a tax, may be in substance a police regulation so obvi-

³⁰ 259 U. S. —, 42 Sup. Ct. 422 (1922).

³¹ 259 U. S. —, 42 Sup. Ct. 449 (1922). For a valuable consideration of the background of the issue raised by this case, see Robert Eugene Cushman, *The National Police Power Under the Taxing Clause of the Constitution*, 4 Minn. L. Rev. 247. Editorial notes on the Supreme Court decision appear in 10 Calif. L. Rev. 501; 22 Colum. L. Rev. 656; 21 Mich. L. Rev. 88; 6 Minn. L. Rev. 606; 8 Va. L. Rev. 625; and 31 Yale L. J. 894. Earlier discussions of the issue are contained in 10 Calif. L. Rev. 95; 22 Colum. L. Rev. 370; 35 Harv. L. Rev. 859, 881; 20 Mich. L. Rev. 446; 6 Minn. L. Rev. 318; and 31 Yale L. J. 310.

³² 42 Sup. Ct. 449, 450.

³³ *Ibid.*, 452.

³⁴ 259 U. S. —, 42 Sup. Ct. 453 (1922).

ously unrelated to any fiscal enterprise as to be outside the taxing power vested in Congress. No one with sense can deny the substantial wisdom of this. The proper test to apply is the test of practical results. This is the test adduced by the Chief Justice when he says:

"Grant the validity of this law, and all that Congress would need to do, hereafter, in seeking to take over to its control any one of the great number of subjects of public interest, jurisdiction of which the states have never parted with, and which are reserved to them by the Tenth Amendment, would be to enact a detailed measure of complete regulation of the subject and enforce it by a so-called tax upon departures from it. To give such magic to the word 'tax' would be to break down all constitutional limitation of the powers of Congress and completely wipe out the sovereignty of the states."³⁵

At the moment we are not inquiring whether such results would necessarily follow from the approval of the particular tax before the court. That is an issue of the minor premise. The question now is whether there must be some line drawn between form and substance. On this question, as applied to the formal exercise of the taxing power of Congress, there can be no debate unless one is to conceive of the federal system ordained by the Constitution as one giving Congress full power of police throughout the country, provided only this power is exercised under some other name than that of police. Such a conception may find support in fine-spun formalistic reasoning, but it so violates history and common sense that it may be dismissed without more ado.

It is possible, however, to accept this major premise and yet adduce against it another which may set a train for a different conclusion of the practical issue in hand. Thus we may bring forward the premise relied on by Mr. Justice White in the *Oleomargarine Case*. We may put to one side his expressions that beg the crucial question, as, for example, that "if a tax be within the lawful power, the exertion of that power may not be judicially restrained because of the results to arise from its exercise,"³⁶ or that "the decisions of this court from the beginning lend no support whatever to the assumption that the judiciary may restrain the exercise of a lawful power on the assumption that a wrongful purpose or motive has caused the power to be exerted."³⁷ Of course, if the power exercised is a lawful power, a lawful power has been exercised and that is the end of it. But there is the wholly different issue whether in determining whether the power exercised is a lawful power, the court may inquire into the motives of the legislature or may test the law by its results. Mr. Justice White concedes that "undoubtedly, in determining whether a particular act is within a granted power, its scope and effect is to be considered."³⁸ He then adds: "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,

³⁵ 42 Sup. Ct. 449, 451.

³⁶ 195 U. S. 27, 59.

³⁷ *Ibid.*, 56.

³⁸ *Ibid.*, 59.

it follows that the acts are within the grant of power."³⁹ Here, then, is a major premise that if a federal statute on its face levies an excise tax, it is an exercise of the federal taxing power. To this is added the further major premise that "the motive or purpose of Congress in adopting the acts in question may not be inquired into."⁴⁰

This second major premise is in the nature of a canon of administration for the exercise of the function of judicial review of legislation. Like the *de facto* rule and the doctrine of estoppel it closes the door to certain inquiries or avoids the natural effect of certain elements in a situation. Unfortunately, however, the scope and meaning of the canon are by no means clear. Mr. Justice White, in the *Oleomargarine Case*, treats the issue as one whether an exertion of lawful legislative power may be annulled because the court thinks that the legislature has been animated by "the object or motive of reaching an end not justified."⁴¹ This is to inquire whether the legislature has done what it may do in order to do what it may not do. The canon which forecloses such inquiry can sensibly mean no more than that a law which in and of itself is constitutional continues constitutional notwithstanding the fact or the surmise that the law-makers sought to accomplish thereby something which in and of itself would be unconstitutional. This is to say that the court must consider only what is in the law itself to the exclusion of what was in the minds of the men who made

³⁹ *Ibid.* In support of this conclusion Mr. Justice White continues:

"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 upon the authority conferred by the Constitution, but upon what may be the consequence arising from the exercise of a lawful authority."

This is one of the manifestations of the late Chief Justice's unfortunate propensity for so mis-stating the arguments he is in process of rejecting as to make them carry the seeds of their own destruction. The argument to the contrary rested on the proposition that the acts on their face not only levied an excise tax but also showed an exercise of the taxing power not for regulation but for suppression or prohibition, and that this latter aspect of their scope and operation was so predominant as to be controlling and therefore to establish that they were the exercise of an unlawful and not of a lawful power.

Another instance of the perversion of the argument adduced against the law appears in the statement that "it is insisted that wherever the judiciary is called upon to determine whether a power exercised by Congress is within the authority conferred by the Constitution, the duty is to test the validity of the act, not merely by its face, or, to use the words of the argument, 'by the label placed upon it by Congress,' but by the necessary scope and effect of the assailed enactment," (195 U. S. 27, 52). This wrongly assumes that the "label" is all that appears upon the face of the act.

⁴⁰ 195 U. S. 27, 59.

⁴¹ His statement is as follows:

"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 function 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 by one department of the government of its lawful powers is to be corrected by the abuse of its powers by another department." (195 U. S. 27, 54).

With this statement of the argument against the tax so as to make it self-destructive, compare the following paragraphs of the brief of Mr. Guthrie as given in the summary in 49 L. Ed. 81-88:

"If the object of the act be legitimate taxation, the excise in question is concededly within the constitutional powers of Congress; but if, under the pretext of laying an excise on manufactures, the object sought to be accomplished is to prohibit or destroy the manufactures and internal commerce of the states, then it is submitted that the legislation is not a legitimate taxation at all, and is beyond the authority delegated to Congress, and conflicts with the powers expressly reserved to the states. . . .

Whatever may be the motive or pretext or guise of a statute, or in whatever language it may have been framed, its purpose and its validity must be determined by its natural and reasonable effect, to be ascertained from the practical operation of its provisions. . . .

If, therefore, the courts, looking beyond form and considering substance in the cases at bar, shall be persuaded that the purpose and necessary operation of this legislation be to accomplish an end or object not entrusted to this government, the legislation may and should be declared unconstitutional."

it. That this, after all, may have been the idea in the back of Mr. Justice White's mind is possibly inferable from his statement that "all of the propositions" advanced against the oleomargarine law "obviously rest not only on inferences drawn from the face of the acts, but also on deductions made from what it is assumed must have been the motives or purposes of Congress in passing them."⁴² Thus he distinguishes inferences from the statute itself from deductions from assumed motives or purposes of Congress. The contrast can be complete only by giving full significance to the word "assumed," since inferences from the statute itself may of course relate to the motives or purposes of those who passed it. Whatever Mr. Justice White may have meant, it is plain that what he ought to have meant is that in determining an issue of constitutionality a court must not go beyond inferences drawn from the statute itself.⁴³ To this may be added that while these inferences may include revelation of motives and purposes, motives and purposes are not significant as such. You discover the motive or purpose only by the results which the statute will necessarily attain. You judge its constitutionality by those results, whether the lawmakers desired them or not.

To this canon against judicial assumption of congressional motives as thus interpreted, Chief Justice Taft in the Child Labor Tax Case gives full recognition. He spares himself the toil of unravelling the mysteries of his predecessor's locution and goes directly to the difference between sticking to the statute and going outside it. After analysis of the provisions of the statute under consideration he says:

"Out of a proper respect for the acts of a coördinate branch of the government, this court has gone far to sustain taxing acts as such, even though there has been ground for suspecting, from the weight of the tax, it was intended to destroy its subject. But, in the act before us the presumption of validity cannot prevail, because the proof of the contrary is found on the very face of its provisions."⁴⁴

Again in discussing the tax on state bank notes which was sustained in *Veazie Bank v. Fenno*,⁴⁵ he contrasts it with the one before him as follows:

"It will be observed that the sole objection to the tax here was its excessive character. Nothing else appeared on the face of the act. It was an increase of a tax admittedly legal to a higher rate and that was all. There were no elaborate specifications on the face of the act, as here, indicating the purpose to regulate matters of state concern through an exaction so applied as to give it the qualities of a penalty for violation of law rather than a tax."⁴⁶

⁴² 195 U. S. 27, 53.

⁴³ See Mr. Cushman's quotation from a speech of Mr. Justice White, when a member of the United States Senate, in opposition to a proposed destructive tax on cotton and grain futures, as given in 4 Minn. L. Rev. 276. This closes with the statement that "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." Later, when Justice of the Supreme Court, ex-Senator White confined his inquiry to the question whether the act on its face showed that it was in form an excise. Assuming from the affirmative answer that the statute was a lawful exercise of power, he dismissed all inquiry whether the statute also on its face showed a usurpation of power as directed only to the question whether the court may check the abuse of a lawful legislative power. Mr. Cushman's comments on the contrast between the two attitudes are illuminating. See 4 Minn. L. Rev. 272-281.

⁴⁴ 42 Sup. Ct. 449, 450-451.

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

⁴⁶ 42 Sup. Ct. 449, 452.

This implies the propriety of considering "purpose" to the extent that it appears on the face of the law; but the purpose is significant not as something inside the heads of congressmen and senators but as something apparent from what they have put on the statute book. The court does not care about the end aimed at except so far as it is accomplished. The functional use of the word "purpose" in the sentence quoted is the same as though the Chief Justice had said "necessary effects or results." He excludes judicial inquiry into any realm to which he is not led by the language of the law. If his practice accords with his profession, he escapes from the toils of the administrative canon against judicial inquiry into congressional motives as a canon against judicial speculation on matters extrinsic to what Congress has actually said and done. The question of his practice will come up when we consider the alternative minor premises.

This brings us back to the primary, substantive major premises in the Oleomargarine Case and the Child Labor Case. Mr. Justice White lays down that a statute which on its face levies an excise tax is an exercise of the federal taxing power. Chief Justice Taft says that a statute which on its face imposes detailed police regulations of a sufficiently extensive character is not an exercise of the federal taxing power. Thus phrased, these two major premises do not verbally conflict. Trouble arises when a statute on its face imposes both an excise tax and detailed police regulations. This trouble was avoided by Mr. Justice White by failing to inquire whether the oleomargarine law on its face did anything else than levy an excise tax. If he meant to lay down that such further inquiry is not permissible, his premise is that a statute which on its face levies an excise tax is an exercise of taxing power, no matter what else appears also on the face of the statute. Such a premise is rejected in the Child Labor Case. If Mr. Justice White took for granted that the oleomargarine law on its face imposed no police regulations, his premise may have been that a statute which on its face imposes an excise tax and nothing else is an exercise of the taxing power. Only by assuming that this is the premise he had in mind can we conjure up any charity toward his numerous question-begging, self-proving assertions. Apparently Chief Justice Taft thus interprets the premise of his predecessor, for he declares that the oleomargarine law did not on its face contain police regulations and he assumes that, if it had, it would have been declared unconstitutional. Whatever Mr. Justice White may have meant that he failed to say, we may now terminate the annoying enterprise of analyzing his opinion, since any of its premises inconsistent with the premise of the Child Labor Case are now authoritatively rejected by the Supreme Court.

It is a welcome relief to turn to the opinion of Chief Justice Taft in the Child Labor Case. This recognizes fully that the distinction between a tax and a police regulation is not sharp and clear, and that a statute may have the characteristics of both so that the problem is to determine which predominate. The alternatives are put as follows: "Does this law impose a tax with only that in-

cidental restraint and regulation which a tax must inevitably involve? Or does it regulate by the use of the so-called tax as a penalty?"⁴⁷ The Chief Justice points out that the problem is one of degree and that the solution is far from an easy one when he says:

"The difference between a tax and a penalty is sometimes difficult to define, and yet the consequences of the distinction in the required method of their collection often are important. Where the sovereign enacting the law has power to impose both tax and penalty, the difference between revenue production and mere regulation may be immaterial, but not so when one sovereign can impose a tax only, and the power of regulation rests in another. Taxes are occasionally imposed in the discretion of the legislature on proper subjects with the primary motive of obtaining revenue from them and with the incidental motive of discouraging them by making their continuance onerous. They do not lose their character as taxes because of the incidental motive. But there comes a time in the extension of the penalizing features of the so-called tax when it loses its character as such and becomes a mere penalty, with the characteristics of regulation and punishment."⁴⁸

This does not say that police regulations annexed to a tax law necessarily deprive it of the character of an exercise of fiscal power. It puts for a test the extent and character of such police regulations and the closeness of their relation to the primary fiscal purpose of getting a revenue.

The minor premise is that the child labor tax law on its face imposes such detailed tests of taxability unrelated to any fiscal object that its predominant characteristic is that of a regulatory measure. This is amply supported by recital of the provisions of the statute itself. Attention is called to the exemption of those who are honestly mistaken as to the immaturity of their employees. This evokes the telling comment that "scienters are associated with penalties, not with taxes."⁴⁹ Stress is laid on the fact that "the employer's factory is to be subject to inspection at any time not only by the taxing officers of the Treasury, the Department normally charged with the collection of taxes, but also by the Secretary of Labor and his subordinates, whose normal function is the advancement and protection of the welfare of the workers."⁵⁰ Reference is made to the fact that what determines taxability bears no relation to the assessment of the tax. Ten per cent of the net profits is demanded whether the taxpayer "employs 500 children for a year, or employs only one for a day."⁵¹ These are features which stamp the child labor act as a regulatory measure, but which of course might be eliminated from other efforts to accomplish the same result. The other provisions are practically essential to any scheme of regulation. In describing them, Chief Justice Taft, after saying that the act does more than merely impose a heavy burden, continues:

"It provides a heavy exaction for a departure from a detailed and specified course of conduct in business. That course of business is that employers shall employ in mines and

⁴⁷ 42 Sup. Ct. 449, 450.

⁴⁸ *Ibid.*, 451.

⁴⁹ 42 Sup. Ct. 449, 450.

⁵⁰ *Ibid.*

⁵¹ *Ibid.*

quarries, children of an age greater than 16 years; in mills and factories, children of an age greater than 14 years, and shall prevent children of less than 16 years in mills and factories from working more than 8 hours a day or 6 days in the week. If an employer departs from this prescribed course of business, he is to pay to the government one-tenth of his entire net income in the business for a full year."⁵²

These details may be somewhat more varied or more minute than would be needed to penalize other undesirable modes of conducting industry, but some specifications of a similarly obvious significance would be so essential to such a purpose that the minor premise of this case would be a precedent for similar minor premises as to the character of any other federal scheme to use the fiscal power to improve the conditions of labor throughout the land. At any rate, whatever difficulties other statutes might present, no honest judgment can find fault with the discernment of the court in the present case. One must have an exalted conception of judicial gullibility to disagree with the Chief Justice when he concludes:

"In the light of these features of the act, a court must be blind not to see that the so-called tax is imposed to stop the employment of children within the age limits prescribed. Its prohibitory and regulatory effect and purpose are palpable. All others can see and understand this. How can we properly shut our minds to it?"⁵³

The propriety of the court's minor premise in this case is so undeniable that the decision affords less certainty of what line will be drawn in the future than would have been furnished by an adjudication on a more debatable statute. *Hill v. Wallace*,⁵⁴ makes it clear that regulatory vice can be discovered in specific license fees or fees measured by volume or value of transactions, as readily as in an income tax. There, too, the regulatory features of the act were so detailed and numerous and so unrelated to any fiscal object as to make the minor premise unquestionable. On the other side, we have the Oleomargarine Case distinguished instead of overruled. Of the statute there involved it could be said with a large degree of truth, as Chief Justice Taft said of the child labor statute, that "it provides a heavy exaction for a departure from a detailed and specified course of conduct in business." The details of the specification were less numerous than those of the child labor law, since they were confined to the kind of product and its complexion. Yet we may be confident that a new child labor tax would fail although it adopted the simple test of articles made or mined where children under sixteen were employed. If Congress seeks to defy the principle underlying the Child Labor Case, the court can keep the principle effective only by ceasing to distinguish between many details and few. It may be said of every tax that it provides an exaction for a departure from a specified course of business. A tax on making hard drinks is an exaction for a departure

⁵² *Ibid.* This is carelessly phrased. The course of business, departures from which are penalized, is not that the employer shall employ children *over* sixteen, or fourteen as the case may be, but that he shall *not* employ children *under* sixteen in mines or quarries or under fourteen in mills or factories. The time requirement on children between fourteen and sixteen in mills and factories is correctly phrased.

⁵³ 42 Sup. Ct. 449, 450.

⁵⁴ Note 34, *supra*.

from the business of making soft drinks or other things. A tax on corporations is an exaction for a departure from the conduct of business as individuals or partners. If the Oleomargarine Case is really still unimpaired, Congress has an easy way to suppress any product that cannot claim protection under due process or under Mr. Justice White's amorphous equivalent or near equivalent of "the principles of freedom and justice upon which the Constitution rests."⁵⁵ margarine tax was in all substance as much a perversion of the taxing power as

One clear line of distinction appears. Details and specifications in no way descriptive of the inherent and continuing characteristics of a commodity are under a ban notwithstanding the Oleomargarine Case. Thus protective labor legislation cannot be introduced into an excise law without getting discovered, unless perhaps when the protection is against injurious substances as in the case of the tax on making "phossy-jaw" matches. But what about a special excise on divorcees or law teachers? What does such a tax show on its face that was not shown on the face of a tax on colored oleomargarine five times as great as that on uncolored? If the court ever has to face such frolics on the part of Congress, it will have to use the Fifth Amendment as a shield against arbitrary exactions or unreasonable discrimination, or else be more alert in reading the faces of statutes than it was when it looked at the oleomargarine law. Such alertness will, of course, be always possible. With a firmly established major premise against regulation in the guise of taxation, the minor premise as to the characteristics on the face of any law may vary with the slightest shades of distinction between different measures. For purposes of escape from a troublesome precedent, a court may today acquiesce in the minor premise of a court of yesterday and yet be ready tomorrow to re-examine the premise and in a new case posit one in substantial contradiction to it. Thus the technical survival of the Oleomargarine Case may still leave it without procreative power. The oleo- was the tax on child labor. The difference lay rather in the amount of objective evidence needed to convince the court that it had clearly caught Congress in unconstitutionality. Henceforth the court will very naturally be less likely to close its eyes to what "all others can see and understand."

The other precedents adduced in support of the child labor tax were easily disposed of after the Oleomargarine Case was distinguished. The tax on state bank notes⁵⁶ could be put to one side, not only on the same ground, but on the further ground that Congress might have suppressed state bank notes directly and that therefore the regulatory aspects of its prohibitive exercise could not encroach on reserved powers of the states.⁵⁷ The excise on doing business in

⁵⁵ See his opinion in the Oleomargarine Case, 195 U. S. 27, 64, where he concedes that, even though due process does not restrain Congress in selecting objects of taxation or in fixing the amount of the tax, there still may be exactions so arbitrary as not to be entitled to the name of tax.

⁵⁶ Sustained in *Veasie Bank v. Fenno*, note 45, *supra*.

⁵⁷ A similar answer may be made to arguments based on the analogy of a protective tariff. There is no doubt that such a tariff regulates production and commerce within a state, but it does it no more than would a direct prohibition on importation, and this would be a constitutional exercise of the congressional power over foreign commerce.

corporate capacity⁵⁸ was distinguished as clearly a revenue producing measure with its regulatory features slight and incidental. *United States v. Doremus*,⁵⁹ which sustained the Harrison Anti-Narcotic Act imposing a tax of \$1 on dispensers of named drugs and forbidding them to make sales except in pursuance of written orders on blanks obtained from the revenue department, was distinguished on the ground on which it was decided, i.e., that these requirements had a reasonable relation to the enforcement of the fiscal demand. This decision had been reached only by a five-to-four vote, and the judgment of reasonableness on which it was predicated is of course rationally indefensible. The court allowed Congress to abuse its taxing power for a worthy end. Yet the law there sustained was distinguishable from the child labor law, in that its regulatory features were not the basis of taxability. Thus the Narcotic Case belongs in a different compartment from that which contains the issue of the Oleomargarine Case and the Child Labor Case. The device of the Harrison Act is a clever one for securing publicity of transactions so that the states may be aided in the execution of their police powers. It does not in and of itself enable the federal government to suppress unworthy conduct as would the artifice attempted in the child labor tax.

One point that appears plainly from the Child Labor Tax Case is that a federal statute which in form imposes an excise may be a regulation rather than a tax even though it yields some revenue. The child labor statute could not be declared unconstitutional on the ground that it was not a revenue producing measure, for the case before the court was a suit to recover back a tax that had been paid. Yet one of the necessary links in the chain leading to the decision was that the burden of the exaction was so onerous that "its prohibitory and regulatory effect and purpose are palpable." Undoubtedly the court will find itself called upon to consider whether other taxes that fall on one mode of business and not on another are not regulatory inducements to abandon the mode subject to the tax. There will be little difficulty in sustaining the tax where its success as an income producer to the government is considerable and notorious as in the case of the corporation excise tax of 1909. In less clear cases there will be at hand the concession of Chief Justice Taft, already quoted,⁶⁰ that an incidental motive of discouraging an enterprise by making it onerous cannot outweigh a primary motive of obtaining revenue. The fact that the line may often be a difficult one to draw is no adequate argument against drawing it somewhere. The burden of the tax will always be an element to consider, but it seldom can be exclusively controlling. A very slight burden may be enough to induce abandonment of the taxable enterprise or the taxable mode of conducting it. A heavy burden may be borne for a number of years before readjustment is feasible. Perhaps, after all, the most workable test will be the character and extent of the particulars which are the basis of taxability. Under

⁵⁸ Sustained in *Flint v. Stone Tracy Co.*, 220 U. S. 107, 31 Sup. Ct. 342 (1911).

⁵⁹ 249 U. S. 86, 39 Sup. Ct. 214 (1919).

⁶⁰ Cited in note 48, *supra*.