IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1921.

No. 657.

J. W. BAILEY, AND J. W. BAILEY AS COLLECTOR, PLAINTIFF IN ERROR,

vs.

DREXEL FURNITURE COMPANY, DEFENDANT IN ERROR.

ABSTRACT OF THE ORAL ARGUMENT OF WM. P. BYNUM FOR THE DEFENDANT IN ERROR.

The argument for the defendant in error may be stated in four propositions:

1. In our dual system of Government no power exists in either the national or State governments to enact a law the necessary effect of which is a direct encroachment upon an acknowledged exclusive power of the other.

2. The standardization of the ages and the regulation of the hours of labor of persons in mines and factories within the States is an exclusive power of the States to which the Federal authority does not extend.

3. The necessary effect of the act of Congress known as the Child Labor Law, the validity of which is assailed in this suit, is to encroach directly upon this acknowledged exclusive power of the States.

4. The fact that this effect is sought to be accomplished under color of a tax does not bring the statute within the power of Congress, and renders it none the less unconstitutional and void.

I.

It is true that the Constitution contains only one exception and two qualifications as to the taxing power of Congress: the exception that it cannot tax exports and the qualifications that it must impose direct taxes by the rule of apportionment and indirect taxes by the rule of uniformity.

It is not true, however, that the taxing power of Congress is without constitutional limitation other than as contained in these exceptions.

The Government in its brief seeks to establish the proposition that, aside from this one express exception and these two express qualifications, Congress has unlimited and uncontrolled power of taxation, free from other constitutional restraint, and restricted only by its discretion. I have not had the advantage of seeing the Government's brief in this suit, but in the case of the *Atherton Mills v. Johnston,* in-

volving the same question as that which is presented here, the Government sought to establish its position by the citation, among others, of the following cases and of quotations of expressions therefrom, the wording of which it is contended established that proposition:

Nichol v. Ames, 173 U. S., 509, 515.
McCray v. United States, 195 U. S., 51.
License Tax Cases, 5 Wall., 462, 471.
Pacific Insurance Co. v. Soule, 7 Wall., 433, 443.
Austin v. The Aldermen, 7 Wall., 694, 699.

This proposition is the cardinal principle upon which the argument for the Government is based. It is the major premise from which it seeks to reach the conclusion that the tax on the employment of child labor is within the constitutional power of Congress and, if its position on this point is unsound, its conclusion as to the constitutionality of the statute falls with it.

An examination of these cases shows that the expressions relied on by the Government to establish its basic proposition are general and unnecessary to the decisions upon the facts before the court. The decisions in these cases in no way establish the proposition contended for by the Government and several of the opinions implicitly or explicitly negative that conclusion.

In *Nichol v. Ames,* the court was passing upon the constitutionality of a Spanish-American war-stamp tax on sales or agreements to sell on any exchange or board of trade. There was no suggestion that Congress, under the guise of a tax statute, was encroaching upon an exclusive power of the

States or effecting a regulation beyond its power to make. The statute was clearly a revenue statute *in effect*. The objections were that the tax was direct and unconstitutional because not apportioned; that if an indirect tax it was void for non-uniformity in that taxing only sales at exchanges and boards of trade was incompetent classification, and finally that the act was beyond the power of Congress because it required the execution of a memorandum of sale upon which the stamp should be affixed when such memorandum was not required by State law. The court disposed of the first two objections by holding that the tax was indirect and the classification was competent. The last objection was the only one which even approached a contention that the statute established a regulation in conflict with the regulatory power of the States. It will be noticed that this regulation was merely *incidental* to the *main effect* of the act, which was to impose a stamp tax and raise revenue. The regulation was the requirement of a special form of memorandum upon which the stamp should be affixed, as a convenient means of enforcing the collection of the tax. This was clearly within the power of Congress and does not in the remotest way resemble the regulations made by the Child Labor Law. Even there, however, the court was at pains to point out that the regulation in no way interfered with any regulation or law of the State, saying (pages 523-524):

> "In holding that the tax under consideration is a tax on the privilege used in making sales at an exchange, we thereby hold that it is not a tax upon the memorandum required by the statute upon which the stamp is to be placed. *The act does not assume*

> *to in any manner interfere with the laws of the State in relation to the contract of sale. * * * The statute does not render a sale void without the memorandum or stamp, which by the laws of the State would otherwise be valid. It does not assume to enact anything in opposition to the law of any State upon the subject of sales.* It provides for a written memorandum containing the matters mentioned, simply as a means of identifying the sale and for collecting the tax by means of the required stamp, and for that purpose it secures by proper penalties the making of the memorandum * * * Whether the means adopted were the best and most convenient to accomplish that purpose was a question for the judgment of Congress, and its decision must be conclusive in that respect. *The means actually adopted do not illegally interfere with or obstruct the internal commerce of the States, nor are such means a restraint upon that commerce so far as to render the means adopted illegal."*

This decision clearly implies, therefore, that regulations by Congress under the form of a tax could be such a direct and positive interference with and obstruction of exclusive regulatory powers of the State as to be illegal and beyond the power of Congress to enact.

We shall come back to the *McCray case* in the discussion of our fourth proposition and distinguish it from the case at bar. In this connection it is only necessary to observe that the expression from the opinion in that case relied on by the Government as establishing the unlimited taxing power of Congress is the remark of the court that nothing in the Fifth and Tenth Amendments "operates to take away

the grant of power to tax conferred by the Constitution upon Congress." We do not attempt to maintain the contrary of this. It is well recognized that the inhibition upon taking property without due process of law contained in the Fifth Amendment has no reference to taking by taxation. As to the Tenth Amendment, we do not contend that it added any limitation upon the taxing power of Congress which did not exist already by implication before the adoption of that amendment. It added nothing to the constitutional limitations already existing arising from the fundamental principles of the original instrument and from the dual system of government which it established. It was simply an expression of limitations which already existed by implication, and was adopted out of the abundance of caution to emphasize these fundamental limitations. The expression of the *McCray case* is simply that, as to any taxing power of Congress admittedly granted to it by the original Constitution, the Tenth Amendment had no effect to take away such power. The question before the court now is whether, under the principles of the Constitution which existed before and were expressly declared by the Tenth Amendment there is a grant of power to Congress to do what it has done by the enactment of the Child Labor Law.

The *License Tax cases,* 5 Wall., 462, far from establishing the proposition that there are no constitutional limitations upon the powers of Congress under the tax clause other than the express reservation as to exports and the express qualifications as to apportionment and uniformity, are strong authority for the proposition that a direct encroachment by Congress under the guise of the taxing power upon matters the regulation and control of which are within the exclusive

power of the States would violate constitutional limitations and be void. Those cases involved the constitutionality of a Federal license tax on the sale of lottery tickets and liquor. It was argued that those taxes were unconstitutional because in the States from which the cases came the sale of liquor and lottery tickets was absolutely prohibited, and because the payment of the Federal license or tax would give permission or authority to do what was declared to be a crime by the law of those States and would therefore destroy the State regulation of matters exclusively within the States' control. The decision that the Federal statutes were valid was based specifically on the holding that they did not authorize the sale of the prohibited articles in violation of State law and therefore did not interfere with the State regulation. It was virtually conceded by the court (p. 472) that if the payment of the Federal license tax did give authority to sell in violation of the State regulation the Federal statute, although a tax statute, would be unconstitutional. The court distinctly recognized the field of exclusive State authority which Congress has no constitutional power to invade even under its tax powers. It said:

> "It is not doubted that where Congress possesses constitutional power to regulate trade or intercourse, it may regulate by means of licenses as well as in other modes; and, in case of such regulation, a license will give to the licensee authority to do whatever is authorized by its terms. * * * But very different considerations apply to the internal commerce and trade of the States. Over this commerce and trade Congress has no power of regulation nor any direct control. This power belongs exclusively to the States. No interference by Congress with the

> business of citizens transacted within a State is warranted by the Constitution, except such as is *strictly incidental* to the powers clearly granted to the legislature. The power to authorize a business within a State is plainly repugnant to the exclusive power of the State over the same subject."

Then follows the statement as to the extensiveness of the taxing power relied upon by the Government; but the opinion thereafter affirmatively declares that there are fundamental limitations on the power which Congress may not constitutionally overstep, saying:

> "If, therefore, the licenses under consideration must be regarded as giving authority to carry on the branches of business which they license, it might be difficult, if not impossible, to reconcile the granting of them with the Constitution. * * * Nor are we able to perceive the force of the other objection made in argument, that the dealings for which licenses are required being prohibited by the laws of the State, cannot be taxed by the National Government. There would be great force in it if the licenses were regarded as giving authority, *for then there would be a direct conflict between National and State legislation on a subject which the Constitution places under the exclusive control of the States.* * * * There is nothing hostile or contradictory, therefore, in the acts of Congress to the legislation of the States."

I shall endeavor to show that in the case at bar there is a "direct conflict between National and State legislation on a subject which the Constitution places under the exclusive

control of the States." For the present it is sufficient to point out that the decision in the *License Tax cases* recognizes that where such direct conflict does exist the national legislation is unconstitutional, and that the decision in those cases in no way supports the proposition to which the Government cites them, but affirmatively declares limitations upon the taxing power of Congress other than the express exceptions and qualifications.

As to the case of *Pacific Insurance Company v. Soule,* 7 Wall., 433, 443, the first sentence of the paragraph, which the Government omits from its quotation of the rest of the paragraph on page 443, shows that the quotation only means that where the particular exercise of the taxing power by Congress is admittedly within constitutional limitations, the extent to which that exercise may go is unlimited. That important sentence is:

> "Where the power of taxation, exercised by Congress, is warranted by the Constitution, as to mode and subject, it is, necessarily, unlimited in its nature."

The question at bar is not the extent to which an admittedly valid exercise of the power to tax may go, but whether the particular exercise of the supposed power is within the constitutional authority of Congress at all. To cite *Pacific Ins. Co. v. Soule* is to beg the whole question at bar. Besides, that the part of the paragraph relied on by the Government is *dictum* is shown by an examination of the question before the court to be decided. It was simply whether a tax upon the business of an insurance company was a direct or indirect tax. If direct, the statute under con-

sideration was void because the tax was not apportioned. The court held it to be an indirect tax.

In the case of *Austin v. The Alderman,* 7 Wall., 694, 699, from the opinion in which the Government quotes the expression "The right of taxation, where it exists, is necessarily unlimited in its nature. It carries with it inherently the power to embarrass and destroy," the reference was to the tax power of a State, not to the tax power of Congress. That expression on its face, as the expression quoted from *Pacific Insurance Company v. Soule,* assumes that the power exists, and then merely declares that its extent or degree is unlimited. The constitutionality of an exercise of the taxing power, even by the State, was not before the court. A Federal statute had authorized States to require the inclusion in the valuation of personal property of a taxpayer's shares in national banks *at the place where such bank was located and not elsewhere.* A statute of Massachusetts purported to require the listing of such shares owned by taxpayers within that State if the bank was located anywhere within the State. Austin lived in Boston and owned shares in national banks all of which were located in Boston, so that the facts of his case were within the strictest construction of the Federal statute. He objected that the State statute was invalid, as being beyond the grant of the Federal statute, since it would require the inclusion of shares in any national bank within the State and not simply at the place where the bank was located. The State Supreme Court held that "place" in the Federal statute meant "State," and that the two statutes were consistent. The question before the United States Supreme Court was not whether the State tax statute was valid, nor whether its construction by

the State court was correct, but whether, even if that construction were incorrect, the plaintiff was entitled to relief because in his case every bank in which he held shares was located in the place (Boston) where he lived and returned for taxes. The holding was simply that under the strictest construction of the Federal statute the action of the State with regard to Austin was valid, and he had no remedy on the ground that the State statute might give rise to another state of facts which would violate the Federal statute.

We see, therefore, that the cases relied on by the Government do not sustain its major premise; that aside from the one express exception and the two express qualifications on the taxing power of Congress that power is absolutely without constitutional limitation and is only controlled by the discretion of Congress, but that, on the other hand, most of them are authorities to sustain the negative of that proposition.

That contention at once appears unsound, however, when we see that limitations other than those expressed have been declared to exist, arising from the fundamental principles of the Constitution itself and from the fundamental necessity of maintaining inviolate the dual system of government established by that instrument.

If the proposition which the Government lays down were true, Congress could tax anything in existence except exports, and could achieve any object or result by a tax statute so long as it observed the qualifications of uniformity and apportionment, and this court could never declare unconstitutional any act of Congress purporting to levy a tax except on the ground that it was a tax on exports, or that it

violated either the rule of uniformity or that of apportionment.

This, however, I do not understand to be the law, and to show that it is not it is sufficient to recall that Congress has been held not to have such power, and that this and other courts have held unconstitutional taxing statutes of Congress for other reasons and have held that other constitutional limitations on the taxing power exist.

By virtue of *implied limitations* on the taxing power of Congress, arising from the fundamental principles of the Constitution itself, it has been held:

That the salary of a State judicial officer cannot be taxed by Congress;

Collector v. Day, 11 Wall., 122;

That Congress has not the power to tax municipal bonds within a State;

Pollock v. Farmers' L. & T. Co., 158 U. S., 630;

That Congress has no power to tax revenues of a municipal corporation;

U. S. v. Baltimore, etc., R. Co., 17 Wall., 327;

That Congress has no constitutional power to impose a tax on the tax certificates issued by State authority at a tax sale;

Barden v. Columbia County, 33 Wis., 447;

That Congress has no power to tax legal process in the State courts.

Smith v. Short, 40 Ala., 385.

Jones v. Keep, 19 Wis., 370.

There is no express limitation in the Constitution upon which these decisions are based. Each of them is grounded upon limitations necessarily implied from the fundamental principles of the Constitution itself, the independence and sovereignty of the national and State Governments respectively within the sphere of their acknowledged powers, and the law of self-preservation, which necessitates the maintenance of the dual form of government upon which our Republic is founded.

The taxing power of Congress, as well as all the other powers of the Federal Government, is subject to these fundamental limitations, necessarily implied from the principle of the Constitution establishing the dual system of a national government and State governments each independent and sovereign within its own sphere of power.

It is elementary that the Constitution is not a restriction upon powers already existing in the Government of the United States, but is an enumeration of powers granted to the Federal Government by the people.

Gibbons v. Ogden, 9 Wheat., 1, 187.
Calder v. Bull, 3 Dall., 386.
Briscoe v. Bank of Kentucky, 11 Pet., 257.
Gilman v. Philadelphia, 3 Wall., 713.
U. S. v. Cruikshank, 92 U. S., 542, 550, 551.

The national Constitution is the instrument which specifies the enumerated powers of the Federal Government and in which authority must be found for the exercise of any power which that Government assumes to possess.

Cooley's Constitutional Limitations, 11, n. 2, cases there cited.

It is also elementary that the powers not granted to the Federal Government by the Constitution remain in the sovereign States and in the people.

Lane County v. Oregon, 7 Wall., 76.
Collector v. Day, 11 Wall., 113.

In the case last cited the court said, page 124:

> "It is a familiar rule of construction of the Constitution of the Union, that the sovereign powers vested in the State governments by their respective constitutions, remained unaltered and unimpaired except so far as they were granted to the Government of the United States. That the intention of the framers of the Constitution in this respect might not be misunderstood, this rule of interpretation is expressly declared in the tenth article of the amendments, namely: 'The powers not delegated to the United States are reserved to the States respectively, or to the people.'"

The power of the States to regulate their purely local affairs by such laws as seem wise to local authorities is inherent in sovereignty, has never been surrendered to the General Government, and is beyond the power of the General Government to take away or destroy.

New York v. Miln, 11 Pet., 102, 139.
Slaughter House cases, 16 Wall., 36, 63.
Kidd v. Pearson, 128 U. S., 1, 21.
Hammer v. Dagenhart, 247 U. S., 251.

The result is that the General Government, on the one hand, and the respective State governments, on the other,

are separate and distinct sovereignties, each having a sphere of authority independent of any control by the other, and each acting independently and with sovereign powers in its respective sphere.

McCulloch v. Maryland, 4 Wheat., 315, 409, 402.
Lane County v. Oregon, 7 Wall., 71, 76.
Collector v. Day, 11 Wall., 113, 124.

In *McCulloch v. Maryland* it was said by the Chief Justice:

> "In America, the powers of sovereignty are divided between the government of the Union and those of the States. They are each sovereign, with respect to the objects committed to it, and neither sovereign, with respect to the objects committed to the other."

and, again:

> "No political dreamer was ever wild enough to think of breaking down the lines which separate the States and of compounding the American people into one common mass."

In *Collector v. Day, supra,* the court said:

> "The General Government, and the States, although both exist within the same territorial limits, are separate and distinct sovereignties, acting separately and independently of each other, within their respective spheres. The former in its appropriate sphere is supreme; but the States within the limits of their powers not granted, or, in the language of the Tenth Amendment, 'reserved,' are as independent of the General Government as that government within its sphere is independent of the States."

The power of the States to regulate their purely local affairs and to perform the high and responsible duties expressly reserved to them in the organic law, being a sovereign power, is free from control, abridgment, or destruction by the Federal Government; and the taxing power of Congress as well as all other powers of the General Government is subject to this fundamental and inherent limitation necessarily implied from the paramount principle of the Constitution itself. Any statute of Congress directly abridging or encroaching upon this sovereign power of the States is not the law of the land, and the courts should hold it unconstitutional and void.

Collector v. Day, 11 Wall., 113.

Turner v. Williams, 194 U. S., 279, 295, concurring opinion.

McCulloch v. Maryland, 4 Wheat., 315, 422.

Hammer v. Dagenhart, 247 U. S., 251.

Gordon v. United States, 117 U. S., 697.

In *McCulloch v. Maryland,* Chief Justice Marshall further said:

> "Should Congress, in the execution of its powers, adopt measures which are prohibited by the Constitution; or should Congress, under the pretext of executing its powers, pass laws for the accomplishment of objects not intrusted 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."

In *Gordon v. United States, supra,* the court, speaking through Chief Justice Taney in his last written opinion, said:

> "The reservation to the States respectively can only mean the reservation of the *rights of sovereignty* which they respectively possessed before the adoption of the Constitution of the United States, and which they had not parted from by that instrument. And any legislation by Congress beyond the limits of the power delegated, would be trespassing upon the rights of the States or the people, and would not be the supreme law of the land, but null and void; and it would be the duty of the courts to declare it so."

That this limitation applies to the taxing power of Congress as well as to all other powers of the Federal Government is held in the case of *Veazie Bank v. Fenno,* 9 Wall., 533, wherein the court, speaking of this power, said:

> "There are, indeed, certain virtual limitations, arising from the principles of the Constitution itself. It would undoubtedly be an abuse of the power if so exercised as to impair the separate existence and independent self-government of the States, or if exercised *for ends inconsistent with the limited grants of power in the Constitution.*"

The same limitations upon the taxing power, implied from the very nature of the Constitution, are declared to exist by Judge Cooley in his Constitutional Limitations, wherein he says:

> "These (the qualifications of apportionment and uniformity) are express limitations, imposed by the Constitution upon the Federal power to tax; but there are some others which are implied, and which, under the complex system of the American Government, have the effect to exempt some subjects otherwise tax-

> able from the scope and reach, according to the circumstance, of either the Federal power to tax or the power of the several States" (page 589).

After a review of the implied limitations upon the taxing power of the States arising from these same general principles of division of sovereignty between the State and Federal governments and the necessity of maintaining the complete independence of the Federal Government within its sovereign sphere, and after a review of the cases of *McCulloch v. Maryland,* 4 Wheat., 316, wherein it was held that States could not tax operations of the National Bank; *Dobbins v. Commissioners,* 16 Pet., 435, wherein it was held that a State could not tax an officer of the General Government on his offices and emoluments, and *Weston v. Charleston,* 2 Pet., 449, wherein it was held that a State could not tax obligations or evidences of debt of the National Government, Judge Cooley continues, on page 592:

> "If the States cannot tax the means by which the National Government performs its functions, neither, on the other hand and for the same reasons, can the latter tax the agencies of the State governments."

The matter is set at rest by the highly authoritative decision in the case of *Collector v. Day,* 11 Wall., 113, wherein, as we have seen, a Federal tax on incomes was held unconstitutional as applied to the income from his office of a judicial officer of the State. It was admitted by the court that there was no express limitation upon the taxing powers of Congress applicable to the case, but the decision was placed distinctly on the ground that the establishing of its judiciary was merely the means whereby the State carried into effect

one of its sovereign and reserved powers; that to allow another sovereignty to interfere by taxation with the exercise by the State of its sovereign powers would be to take away from those powers their sovereign character and to expose the State to destruction. The exercise of the supposed taxing power of Congress in that case was held to violate implied constitutional limitations, upon the principle of self-preservation, necessary both to the States and to the Federal Government as a Union of the States. It was said by the court:

> "Upon looking into the Constitution it will be found that but a few of the articles in that instrument could be carried into practical effect without the existence of the States. * * * Such being the separate and independent condition of the States in our complex system, as recognized by the Constitution, and the existence of which is so indispensable that, without them, the General Government itself would disappear from the family of nations, it would seem to follow, as a reasonable, if not a necessary consequence, that the means and instrumentalities employed for carrying on the operations of their governments, for preserving their existence, and *fulfilling the high and responsible duties assigned to them in the Constitution, should be left free and unimpaired, should not be liable to be crippled, much less defeated by the taxing power of another government, which power acknowledges no limit but the will of the legislative body imposing the tax.* * * *
>
> "We do not say the mere circumstance of the establishment of the judicial department, and the appointment of officers to administer the laws, being among the reserved powers of the State, disables the General Government from levying the tax, as that depends upon the express power 'to lay and collect taxes,'

but it shows that it is an original inherent power never parted with, and, in respect to which the supremacy of that government does not exist, and is of no importance in determining the question; and, further, that being an original and reserved power, and the judicial officers appointed under it being a means or instrumentality employed to carry it into effect, the right and necessity of its unimpaired exercise, and the exemption of the officer from taxation by the General Government stand upon as solid a ground and are maintained by principles and reasons as cogent as those which led to the exemption of the Federal officer in *Dobbins v. The Commissioners of Erie* from taxation by the State; for, in this respect, that is, in respect to the reserved powers, the State is as sovereign and independent as the General Government. And if the means and instrumentalities employed by that Government to carry into operation the powers granted to it are, necessarily, and, for the sake of self-preservation, exempt from taxation by the States, why are not those of the States depending upon their reserved powers, for like reasons actually exempt from Federal taxation? Their unimpaired existence in the one case is as essential as in the other. It is admitted that there is no express provision in the Constitution that prohibits the General Government from taxing the means and instrumentalities of the States, nor is there any prohibiting the States from taxing the means and instrumentalities of that government. *In both cases the exemption rests upon necessary implication,* and is upheld by the *great law of self-preservation;* as any government, whose means employed in conducting its operations, if subject to the control of another and distinct government, can exist only at the mercy of that government.

> Of what avail are these means if another power may tax them at discretion?"

The same truth was expressed by Pinkney in his argument in the case of *McCulloch v. Maryland,* when he said:

> "A power to build up what another may pull down at pleasure, is a power which may provoke a smile, but can do nothing else."

A power in the States to make regulations of domestic matters entirely within the scope of their sovereign and exclusive powers, which regulations, however, the Federal Government might pull down at pleasure by the use of its taxing power, would be as futile as would have been the power of the Federal Government if the decision in *McCulloch v. Maryland* had upheld the right of the State of Maryland to tax the notes of the national bank.

It was very strenuously contended by the Attorney General of the United States, in *Collector v. Day,* just as it is contended by the Government in this case, that although the taxing power of the States is admittedly subject to implied limitations which prevent its being used to effect invasions of fields of control or regulation given over to the exclusive power of the United States, still the taxing power of the Federal Government is not subject to like implied limitations against invasion of the exclusive powers of the States because of the supremacy of the Federal Government over the States; that since the taxing power is granted to the Federal Government without express limitation, and since the Federal Government is supreme in its sphere, therefore its taxing power is supreme and unlimited and its ex-

ercise is valid even though it may directly abridge or destroy the control or regulation by the States of matters within their exclusive and sovereign power. That is the whole of the argument of the Government to sustain this law. And that argument was conclusively answered by this court in the *Day case*. The Federal Government is supreme in its own sphere, but that sphere does not extend into and overlap the reserved sphere of the States—that realm which they have kept for themselves and in which they are now and always have been the sole and exclusive sovereign. The existence of two distinct and separate governments, both having sovereign control of the same subject matter, is an anomaly. It is repugnant to the very conception of sovereignty.

As this court said in the *Matter of Heff*, 197 U. S., 488, 505:

> "There is in these police matters no such thing as a divided sovereignty. Jurisdiction is vested entirely in either the State or the nation and not divided between the two."

That the police powers of the States, in so far as they relate to those internal affairs which have never been surrendered or restrained, are essentially complete, unqualified, and exclusive in the individual States, and cannot be assumed by the National Government by any means or assumption of power whatsoever is too well settled in our constitutional law to admit of dispute.

New York City v. Miln, 11 Pet., 102.
License Tax cases, 5 How., 504, 599.
New York v. Dibble, 21 How., 366, 370.

Patterson v. Kentucky, 97 U. S., 501, 503.
Barbier v. Connelly, 113 U. S., 27.
Bowman v. Chicago, etc., R. Co., 125 U. S., 465.
In re Rahrer, 140 U. S., 545.
Plumley v. Massachusetts, 155 U. S., 461.
L'hote v. New Orleans, 177 U. S., 587.
Ambrosini v. United States, 187 U. S., 1, 6.
Matter of Heff, supra.

In the case of *In re Rahrer, supra,* the court held, Mr. Chief Justice Fuller delivering the opinion:

> "The power of the State to impose restraints and burdens upon persons and property in conservation and promotion of the public health, good order and prosperity, is a power originally and always belonging to the States, not surrendered by them to the General Government, nor directly restrained by the Constitution of the United States, and essentially exclusive. * * *
>
> "In short, it is not to be doubted that the power to make the ordinary regulations of police remains with the individual States, and cannot be assumed by the National Government, and that in this respect it is not interfered with by the Fourteenth Amendment. *Barbier v. Connolly,* 113 U. S., 27, 31."

In the case of *New York City v. Miln, supra,* it was said:

> "I can discriminate no line of power between the different subjects of internal police, nor find any principle in the Constitution, or rule for construing it by this court, that places any part of a police system within any jurisdiction except that of a State, or which can revise or in any way control its exer-

> cise, except as specified. Police regulations are not within any grant of powers to the Federal Government for Federal purposes; Congress may make them in the Territories, this District, and other places where they have exclusive powers of legislation, but cannot interfere with police of any part of a State. As a power excepted and reserved by the States, it remains in them in full and unimpaired sovereignty, as absolutely as their soil, which has not been granted to individuals or ceded to the United States; as a right of jurisdiction over the land and waters of a State, it adheres to both, *so as to be incapable of exercise by any other power, without cession or usurpation.*"

As shown by all the authorities cited above, the exclusive character of the State's sovereignty within its reserved powers is the same as the exclusive character of the Nation's sovereignty within the scope of its granted powers. As shown by all those authorities, there are the same implied limitations upon the taxing power of Congress to prevent it from being used to invade or destroy the State's exclusive powers as there are upon the taxing powers of the States to prevent a like invasion or destruction of the Nation's exclusive powers. These reciprocal limitations upon either government are in each case based upon the same ground, the necessity of preserving the sovereignty of the other for the perpetuation of our dual system of government.

Just as the familiar rule holds that a State's power to tax, although not expressly limited is by necessary implication so limited that, for instance, it cannot impose a direct burden on interstate commerce, although it may impose a purely indirect and incidental burden thereon, the very same prin-

ciples of constitutional law prohibit the Congress from using its taxing power to impose a direct burden or regulation upon a matter within the exclusive scope of the State's authority, although the fact that an otherwise valid statute of Congress has an *incidental* regulatory effect upon such matters does not render it unconstitutional.

This is the true distinction pointed out in the *License Tax cases,* 5 Wall., 462, quoted above, wherein it was said:

> "No interference by Congress with the business of citizens transacted within a State is warranted by the Constitution, except such as is *strictly incidental* to the powers clearly granted to the Legislature."

An otherwise valid exercise of the Federal taxing power will not be invalidated by reason of the fact that it has the effect of strictly incidental interference with a matter within the exclusive power of the States, but there is no constitutional authority for a direct, primary, or destructive interference by Congress, through pretended exercise of its taxing power or any other power, with matters within the exclusive scope of the State's sovereign authority.

We conclude that in our dual system of government no power exists in either the National or State Government to enact a law the necessary effect of which would be a direct invasion of or encroachment upon an acknowledged exclusive power of the other.

II.

The Standardization of the Ages and the Regulation of the Hours of Labor of Persons in Mines and Factories Within the States is an Exclusive Power of the States to Which the Federal Authority Does Not Extend.

This has been specifically decided in the recent case of *Hammer v. Dagenhart,* 247 U. S., 251, wherein this court held unconstitutional the former Federal Child Labor Law, which, under the guise of a regulation of interstate commerce, had the necessary effect to standardize the ages and to regulate the hours of labor of children in mines and factories.

The court first held that the thing intended to be accomplished by the statute—its necessary effect—was to standardize the ages and regulate the hours of labor of children in mines and factories within the States, saying:

> "The *thing intended to be accomplished by this* statute is the denial of the facilities of interstate commerce to those manufacturers of the States who employ children within the prohibited ages. The act *in its effect* does not regulate transportation among the States, but *aims to standardize the ages at which the children may be employed in mining and manufacturing within the States.*"

And again:

> "In our view the necessary effect of this act is, by means of a prohibition against the movement in interstate commerce of ordinary commercial com-

modities, to regulate the hours of labor of children in factories and mines within the States, a purely State authority."

The court then specifically held that the standardization of the ages and regulations of the hours at which children might be employed in mines and factories within the States is a matter within the exclusive power of the States and a matter to which the Federal authority does not extend. It said:

"The grant of authority over a purely Federal matter was not intended to destroy the local power always existing and carefully reserved to the States in the Tenth Amendment to the Constitution.

"Police regulations relating to the internal trade and affairs of the States have been uniformly recognized as within such control. 'This,' said the court in *United States v. DeWitt,* 9 Wall., 41, 45, 'has been so frequently declared by this court, results so obviously from the terms of the Constitution, and has been so fully explained and supported on former occasions that we think it unnecessary to enter again upon the discussion.' See *Keller v. United States,* 213 U. S., 138, 144, 145, 146. Cooley's Constitutional Limitations, 7 Ed., p. 11. * * *

"And in *Dartmouth College v. Woodard,* 4 Wheat., 518, 628, the same great judge (Marshall) said:

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

"That there should be limitations upon the right to employ children in mines and factories in the in-

terest of their own and the public welfare all will admit. That such employment is generally deemed to require regulation is shown by the fact that the brief of counsel states that every State in the Union has a law upon the subject. In North Carolina, the State wherein is located the factory in which the employment was had in the present case, no child under twelve years of age is permitted to work.

"It may be desirable that such laws be uniform, but our Federal Government is one of enumerated powers; 'this principle,' declared Chief Justice Marshall in *McCulloch v. Maryland,* 4 Wheat., 316, 'is universally admitted.' * * *

"The maintenance of the authority of the States over matters purely local is as essential to the preservation of our institutions as is the conservation of the supremacy of the Federal power in all matters entrusted to the Nation by the Federal Constitution.

"In interpreting the Constitution it must never be forgotten that the Nation is made up of States to which are entrusted the powers of local government. And to them and to the people the powers not expressly delegated to the National Government are reserved. *Lane County v. Oregon,* 7 Wall., 71, 76. The power of the States to regulate their purely internal affairs by such laws as seem wise to the local authority is inherent and has never been surrendered to the general government. *New York v. Miln,* 11 Pet., 102, 139; *Slaughter House Cases,* 16 Wall., 36, 63; *Kidd v. Pearson, supra.* To sustain this statute would not be in our judgment a recognition of the lawful exertion of congressional authority over interstate commerce, but *would sanction an invasion by the Federal power* of the control of *a matter purely local in character,* and over which no authority has

been delegated to Congress in conferring the power to regulate commerce among the states. * * *

"In our view the necessary effect of this act is, by means of a prohibition against the movement in interstate commerce of ordinary commercial commodities, to regulate the hours of labor of children in factories and mines within the States, a purely State authority. *Thus the act in a twofold sense is repugnant to the Constitution.* It not only transcends the authority delegated to Congress over commerce but also exerts a power as to a purely local matter to which the Federal authority does not extend."

III.

The Necessary Effect of This Law is to Encroach Directly upon This Acknowledged Exclusive Power of the States.

In construing an act of Congress with a view to determining its constitutionality, it is necessary for the court to consider its natural and reasonable effect.

This is held in the following cases:

Collins v. New Hampshire, 171 U. S., 30, 33, 34.
Hammer v. Dagenhart, 247 U. S., 251, 275.

In the first case cited this court held invalid a State statute making it a crime to sell oleomargarine that had not been artificially discolored pink. There was nothing in the statute itself to show that the purpose of the Legislature in passing it was to prohibit sales of oleomargarine altogether.

But, looking at the natural and reasonable effect of the statute, the court found that to color oleomargarine pink would be to give to that wholesome article of food a nauseating and repulsive color and thus to render it utterly unsalable as a food commodity, and therefore held that the statute, although in the form of a regulation, was in effect a prohibition. It said:

> "To color the substance as provided for in the statute naturally excites a prejudice and strengthens a repugnance up to the point of a positive and absolute refusal to purchase the article at any price. The direct and necessary result of a statute must be taken into consideration when deciding as to its validity, even if that result is not in so many words either enacted or distinctly provided for. In whatever language a statute may be framed, its purpose must be determined by its natural and reasonable effect."

The same doctrine and the same authority was reaffirmed and applied to the construction of acts of Congress in the late case of *Hammer v. Dagenhart,* 247 U. S., 251, wherein it was said:

> "A statute must be judged by its natural and reasonable effect. *Collings v. New Hampshire,* 171 U. S., 30, 33, 34."

The necessary effect of this law is the same as that of the former Child Labor Law, declared unconstitutional in Hammer v. Dagenhart, namely, to standardize the ages and to regulate the hours of labor of children in mines and factories.

In the *Dagenhart case* the court held unconstitutional the Keating bill, Act September 1, 1916, C. 432, 39 Stat. 675. It held that this act, under the form of a regulation of interstate commerce, was really in effect a regulation of the employment of child labor within the States.

That act purported to close the channels of interstate commerce to—

> "any article or commodity the product of any mill, cannery, workship, factory, or manufacturing establishment, situated in the United States, in which within thirty days prior to the removal of such product therefrom children under the age of fourteen years have been employed or permitted to work, or children between the ages of fourteen years and sixteen years have been 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 postmeridian, or after the hour of six o'clock antemeridian."

It will be noted that that statute did not in terms prohibit the employment of children under fourteen years of age or the employment of children under sixteen at night. The manufacturer or mine owner was free to employ children within these ages and to ship and sell the product of their labor within the State. He could even ship the product of their labor in interstate commerce if he waited thirty days. However, the court held that the necessary effect of this provision would be not to stop the movement of goods in interstate commerce, but to force the manufacturer and mine owner to conform to the Federal standard of ages and hours of labor of children.

The Supreme Court having held this Keating bill un-

constitutional as being in effect a regulation by Congress of a matter within the exclusive regulatory power of the States, and as being an unauthorized encroachment on the sovereign authority of the States, Congress attempted to achieve the very same object, almost immediately after the decision, by a use of the taxing power instead of its power over interstate commerce. The effort to regulate by Federal enactment these purely internal matters under the commerce clause having failed, the bludgeon of the Federal taxing power, armored with the *dicta* as to the unlimited extent of this power to which we have already adverted, was brought into use, and with it Congress sought to bring the domestic institutions and industries of the States into conformity with its idea of what should be a uniform regulation of the employment of children; to regulate a matter over which it had already been adjudged to have no control, and thus sought to recall and nullify the decision of this Court in the *Dagenhart case.*

In the face of that adjudication, it sought to assume an authority which has never been delegated, on the specious assumption that the taxing power has unlimited scope, which enables Congress to project the authority of the Federal Government into realms clearly barred to it by the Constitution and to do things which are admittedly beyond its power to do in any other way.

Title XII, Federal Tax Act of 1918, takes *verbatim* from the Keating bill the important regulatory words and inserts them into the body of a tax statute. It enacts that any person operating any mill, cannery, workshop, factory, or manufacturing establishment in which children have been employed within the very same limits as to ages and hours pre-

scribed in the unconstitutional Keating bill during any portion of the taxable year shall pay for that taxable year, in addition to all other taxes, an excise tax equivalent to 10 per centum of the entire net profits for the year.

It will be noted that the tax is not measured by the amount of products of child labor. If one child within the prohibited ages should work one hour during the year in a factory employing five thousand laborers the tax would be measured by 10 per cent of the total net profits from the labor of the five thousand for the entire year.

It will further be noted that this statute is even more far-reaching in its regulatory effect than the Keating bill. Under the former statute children could be employed in violation of the Federal regulation provided the products were only shipped or sold in intrastate commerce, or in interstate commerce after thirty days from the employment. But the present statute inflicts its ten per cent penalty, called excise tax, in every case where the Federal regulation as to ages and hours is not obeyed, even though the products of the excised labor never get into interstate commerce.

Looking at these two statutes together, the conclusion is unavoidable that not only their purpose and intent, but their necessary result and their reasonable and natural effect, is the same—that effect declared by this court in the *Dagenhart case* "to standardize the ages at which children may be employed in mining and manufacturing establishments within the States" (p. 272) * * * and * * * "to regulate the hours of labor of children in factories and mines within the States, a purely State authority" (p. 276).

Just as in the case of *Collins v. New Hampshire,* although

the statute in form purported to be a mere regulation of the conditions in which oleomargarine should be sold, the court held that in reasonable and natural effect it was not a regulation but was an absolute prohibition of the sale of oleomargarine; just as in the *Dagenhart case,* although the statute in form purported to be a regulation of interstate commerce, the court held that it was not such a regulation, but was a regulation of employment of labor within the States; just so in this case it is clear that, although in form a revenue statute, this act is in reasonable and natural effect exactly the same thing as the act declared unconstitutional in the *Dagenhart case,* a regulation of employment of labor within the States.

Just as under the Keating bill the manufacturer would not cease to ship his goods in interstate commerce, but would cease employing children in violation of the Federal regulation, so under the present act the manufacturer will not pay the prohibitive tax of 10 per cent of his total net profits for the year, but will be at great pains to conform to the regulation of the Federal statute. Interpreting this statute in the light of its reasonable effect, as the court must, it cannot be found that it will have the effect to raise revenue; it must be found that its reasonable effect will be to standardize the ages and hours of employment of children. No reasonable man would choose to pay the prohibitive tax of 10 per cent in order to be free from the Federal regulation. This is the actual effect of the statute since its enactment, as will appear from the report of the Commissioner of Internal Revenue hereinafter referred to.

The only distinction between the two acts as to reasonable and natural effect is that this act has a far more complete

and far-reaching regulatory effect than the Keating bill would have had if it had stood, since the present act is in no way limited in application to cases where goods are shipped in interstate commerce, but purports to enforce the Federal regulation in all cases.

The language of the district court, in its opinion in this case, is very apt:

> "In determining that question the necessary result of the statute must be taken into consideration 'even if that result is not in so many words either enacted or distinctly provided for. In whatever language a statute may be framed, its purpose must be determined by its natural and reasonable effect.' *Collins v. New Hampshire,* 170 U. S., 30, 33, 34.
>
> "The purpose of the act in question appears upon its face. It is disclosed by its title and by its scope and inevitable effect. Through the medium of a tax, Congress here, as through the medium of a regulation of commerce in the act of September, 1916, has attempted to fix the standard of labor for mines, quarries factories, mills, etc., in the various States. *The act was not intended to, nor will it, raise revenue.* This was admitted, if not openly declared by its sponsors during its passage through Congress. It was intended solely to prohibit the employment of child labor. Whatever else it may be in theory, it is in substance and in fact a tax upon the employment of child labor and is so labeled by Congress. The title of the act is "A tax upon the employment of child labor.' In other words, it is a frank attempt to regulate a purely internal affair of the States, evidently because in the opinion of Congress the States have not regulated it as the Congress thinks it should be regulated."

Again, in the case of *George v. Bailey,* 274 Fed., 639, another case in which the same district court held this statute unconstitutional, it is said after quoting from the *Dagenhart case:*

> "There can be no possible misunderstanding as to the meaning of this decision, for it distinctly declared that the right to regulate labor within a State is a State function and that Congress is forbidden by the Constitution to interfere with it.
>
> "After the Dagenhart decision, Congress has undertaken to avoid its effect by enacting section 1200 of title 12 of 'An act to provide revenue and for other purposes,' approved February 24, 1919 (40 Stat. at Large, part 1, page 1057). This section is in the following language (quoting the section):
>
> * * * * * * *
>
> "It will be noted that this section is practically a reproduction of the material provisions of the Owen-Keating bill; the only difference being that under that bill the product of an establishment using child labor, was forbidden transportation in interstate commerce, and in the present act an establishment using child labor contrary to its provisions is subject to a tax of 10 per centum upon the net income derived from its operation.
>
> "The question which suggests itself in the outset is whether the last act is intended to raise revenue. It will scarcely be insisted that such is its object. It is more reasonable to conclude that the purpose of the tax feature is to impose a penalty in order to deter the violation of the child labor provision. It would be rather a non-productive revenue system which imposed taxes, the effect of which would be to

> annihilate the subject of taxation, or to prohibit the exercise of the privilege for which the tax is levied."

To standardize the ages and regulate the hours of labor of children in mines and factories is not only an acknowledged and adjudged exclusive power of the sovereign States, but it is a power which has been exercised by North Carolina by a full and excellent statutory regulation much superior to the regulation attempted by the Federal statute.

We have already seen that this is a matter exclusively within the power of the States and to which the constitutional authority of Congress does not extend. The State of North Carolina has already, prior to the enactment of this statute, occupied the field of this its exclusive power by a very full and excellent regulation. Consolidated Statutes 5031-5038.

This statute is part of a general chapter entitled "Child Welfare," and the first section creates a Child Welfare Commission, composed of the State superintendent of public instruction, the secretary of the State board of health, and the commissioner of public welfare of the State. It is made the duty of this commission to make and formulate such rules and regulations for enforcing and carrying out the provisions of this article as in its judgment shall be deemed necessary.

Section 5032 forbids the employment of any child under the age of fourteen years "in or about or in connection with any mill, factory, cannery, workshop, manufacturing establishment, laundry, bakery, mercantile establishment, office, hotel, restaurant, barber shop, bootblack stand, public stable, garage, place of amusement; brick yard, lumber yard,

or any messenger or delivery service, *except in cases and under regulations prescribed by the commission herein created.*" Employment in *bona fide* canning clubs is excepted, as in the Federal statute.

Section 5033 prohibits absolutely the employment of persons under sixteen years in any of the named businesses at night and in quarries or mines at any time.

Section 5034 provides for the issuance of age certificates, under regulations by the commission, to protect the employer to the extent of being *prima facie* evidence of the age of the child and the good faith of the employer.

Inspections by agents of the commission are provided for, obstructions of such inspections are rendered unlawful, and the entire statute is sanctioned by making a violation of any of its provisions a misdemeanor, punishable by fine or imprisonment, or both, within the discretion of the court.

Pursuant to this statute, the State Child Welfare Commission created thereby, in executive session, has made and promulgated in a public document, among others, the following rules and regulations which have the force of law in North Carolina:

> "1. No child of any age under 16 years shall be permitted to work in any of the occupations mentioned in section 5 (C. S. 5032), before 6 o'clock in the morning or after 9 o'clock at night. This ruling is made mandatory by section 6 (C. S. 5033), and the law gives no discretion to the commission to modify the same.
>
> "2. No girl under 14 years of age shall be permitted to work in any of the occupations mentioned in section 5 (C. S. 5032). The reason for this is that if

the womanhood of the State is to be properly conserved in the future, girls of tender age certainly should not be allowed to run the dangers of association inherent in employment in public places.

"3. No child under 14 years of age shall be employed in any of the occupations mentioned in section 5 (C. S. 5032), for more than eight hours in any one day.

"4. Boys between 12 and 14 years of age may be employed in the enumerated occupations when the public school is not in session when it is shown to the County Superintendent of Public Welfare or other authorized agent of the Commission that the proposed employment is not to the injury of the health or morals of the child. But in no case shall such employment be legal until a certificate has been issued by the County Superintendent of Public Welfare or other authorized agent of the commission on blanks furnished by the State Commission. Before determining the question the County Superintendent of Public Welfare or other authorized agent, may, if he deem it necessary, require a physical examination of the child by the public health officer or other practicing physician. The Employment Certificate is to be issued only upon documentary evidence or proof of age as required by the Commission.

"5. During the time that the public school is in session boys between 12 and 14 years of age may be employed on Saturday and out of school hours on the same conditions as above, provided that such employment does not interfere with their school work. Where school officials have provided for what is known as continuation schools, and where arrangement has been made to make the outside employment a unit of

> the school work, boys of this age may be, in specific cases, allowed to be occupied in employment during school hours for a limited time, at the discretion of the superintendent of the school."

Further rules and regulations, made and promulgated by the Commission subsequently to the foregoing, require that before boys under 14 may be employed, under the foregoing rules, there must issue from the Superintendent of Public Welfare an age certificate, that before the age certificate or the employment certificate shall issue there must be required a school record for the child applicant prepared by a school official or teacher according to the regular form of school record approved by the Department of Education. A further regulation makes it mandatory to have a physical examination in any case of application of child under 16 for employment certificates. It is also provided by regulation that the Superintendent of Public Welfare or other agent of the State Commission shall suspend any certificate for employment when a condition is found that will injure the health or morals of a child pending the action of the Commission, or revoke any certificate issued on false evidence.

This regulation by the State is better than the attempted Federal regulation because, first, it is enforced by criminal penalty and is a direct, absolute, and proper police regulation; second, it is a fuller protection of child life, since it does not leave it even possible for an employer to pay a penalty and continue to employ children within the forbidden ages; third, it is elastic, rules of the Commission making employment adaptable to particular circumstances, so as to allow beneficial work in moderation by children attaining

certain standards of strength and fitness; fourth, it is directly related to the public-school system and the public-welfare system of the State.

As to the comparative merits of this system and the Federal statute, the District Court of the United States for the Western District of North Carolina said, in the opinion in the case of *George v. Bailey, supra;*

> "The Child Labor Law of North Carolina is made a feature of the public-school system of the State, thus concentrating the means for the promotion of the mental and the physical welfare of children under one harmonious plan, to be carried out by the agencies provided for in the act, the purposes of which are to foster the health and physical development of children, and at the same time train their minds for future usefulness, and its provisions appear ample to accomplish these ends.
>
> "By comparing the Federal and State statutes it will be readily seen that the latter affords as much protection to the health and physical condition of children as the former, and as stated before the State act co-ordinates its purpose to promote physical welfare, with provisions for mental training, and, further, an important provision of the State statute is the punishment provided for its violation. Instead of undertaking as the Federal act, to make the income of an establishment using child labor illegally, the subject of taxation, it denounces as a criminal offense the violation of its provisions and subjects the offender to a fine or imprisonment, or both at the discretion of the court.
>
> "There can be no doubt as a general proposition that the average person is more heedful respecting laws constituting crime than they are those creating

civil liability. For this reason the State statute is undoubtedly more capable of prompt execution than the act of Congress, and the expenses incident to it when compared to that of the Federal plan, must necessarily be a great deal less; but, however that may be, the burden incident to the enforcement of the State law, is not a drain upon the Federal Treasury but is borne by the State * * *.

"There could be no reasonable ground for dissenting to what Congress has done, if the action came within the scope of power delegated to the United States by the Constitution; but, as before stated, the Supreme Court has put an end to this question, and has decided in terms not susceptible of difference of opinion that Congress is not authorized to deal with this subject with the view of Federal control, but that such is the function of the several States, each to proceed in its own way.

"The State of North Carolina has undertaken to utilize the power reserved to it by the Constitution of the United States to control child labor within its borders, and through the General Assembly a law which is deemed wise, regulating this character of labor, has been enacted and provisions made for its endorsement."

The necessary effect of this Federal statute, if it be sustained, is to destroy the exclusive power of the State of North Carolina and other States to regulate child labor within their borders in such manner as they may deem best.

We have, therefore, this field of regulation adjudged by the highest authority to be a matter within the exclusive power of the States and a matter to which the Federal power does not extend. We have a sovereign State enacting a

full and satisfactory regulation in this field, enforced by criminal punishment, rendered elastic and adaptable to the needs and circumstances of individual cases, thoroughly safeguarded in the interests of the child, and closely related with all the important agencies of health, education, and public welfare of the State.

In general outline, the regulations of the Federal and State statutes are the same: no employment of children under sixteen in mines and quarries; no employment of children under sixteen at night; no children under sixteen to be employed more than eight hours a day, and a general age limit of 14 for day work.

The vital difference, however, is that under the State regulation, in cases where boys between 12 and 14 are physically fit, where they have the required school attendance, where proper evidence as to age is submitted, and where the Public Welfare Commissioner upon investigation adjudges that the employment desired will not be injurious to health or morals, there will be issued certificates for employment which absolutely authorize such boys to enter employment and authorize employers to employ them. Under the Federal regulation, on the other hand, there is no such provision, and the prohibitive 10 per cent tax would be imposed even in cases where the employment was thus specifically authorized by the State.

The State recognizes, as declared in the regulations of the State Child Welfare Commission, that:

> "It is still true that an 'idle brain is the devil's workshop,' and juvenile delinquency arises in nearly all cases from idleness or lack of proper direction of youthful energy."

It therefore authorizes employment of boys between 12 and 14, out of school hours, and with every safeguard as to their morals, health, and education. The Federal regulation cuts straight through at the age limit of 14, without elasticity, without regard for the needs or welfare of the individual case, and prohibits by penalizing the employer of any child under fourteen. The very difference between these two systems shows that the Federal Government is not the authority to establish such police regulation, and that the State governments are.

However, we are not concerned with policy, but with power. We have it adjudged that this field of regulation is exclusively within the scope of State authority. We have the State exercising that power in full and satisfactory manner. And we have Congress enacting a statute, the necessary effect of which is to establish an additional regulation of the same subject-matter which is absolutely repugnant to the regulation which North Carolina has already made and which it and it alone had exclusive authority to make.

The State of North Carolina, exercising this exclusive power to provide police regulations for the welfare of its people, examines the case of a boy of thirteen and for his own welfare, and under every safeguard, authorizes him to seek employment out of school hours in a certain manufacturing establishment and in like manner positively authorizes the manufacturing establishment to employ that boy. This is admittedly an exercise of the sovereign and exclusive power of that State.

But, if this statute be sustained, the Federal Government takes away from that boy his right to earn a livelihood out of school hours and his right to train himself in habits of

industry, granted him by his State, and takes away from that manufacturer the right which has been granted him by the State to employ that boy, by imposing upon the manufacturer a prohibitive 10 per cent tax on his total net profits for the year. No manufacturer will employ such a boy and subject himself to the Federal penalty. The result inevitably follows that the Federal Government has taken from the boy the right which the State has granted and from the State the power to give force and effect to its own law. The State regulation, though admittedly within the State's exclusive power, is nevertheless nullified or rendered impotent by the Federal regulation.

It must be conceded that to render the Federal regulation valid its enactment must be within the power of Congress and that, since Congress is supreme within its sphere, the Federal regulation must prevail over that of the State. The State regulation must be invalid in every respect in which it differs from the Federal regulation. This necessarily means that the exclusive power of the State over this matter is destroyed. It can only be exercised at the pleasure of Congress. Congress can, if it sees fit, raise the age limit to 16 in all cases and increase its penalty to 100 per cent instead of 10. The so-called power of the State would be at the mercy of Congress. It would be, in the language of Pinkney, "the power to build up what another may pull down at pleasure." It would not be a sovereign power. It would not be an exclusive power. It would not be a power at all, but only a permissive right revocable at the will of Congress.

Such a situation is utterly incompatible with the sovereignty of the States. By all the authorities it is a condition

which cannot exist under our institutions. By all the authorities, an act of Congress which seeks to bring about or would have the effect to produce such a condition is an act beyond the power of Congress to enact. It is an act the power to pass which has never been delegated to Congress. It is not therefore the law of the land.

This is not inquiring into the motives of Congress, but looking at the necessary, obvious, and inevitable effect of the statute itself.

But the Government argues that when Congress has passed a law the courts cannot examine into its motives in order to determine the validity of the act; that Congress in this case has the power to tax and that power may be exercised in its discretion; that the court has no right to consider the motive or purpose with which the statute was passed, whether to raise revenue or as a police regulation purely. The Government argues that when it is said that, although in form a tax statute, this legislation is in effect a police regulation destructive of the rights of the States, that is simply an attack upon the motives of Congress to which this court will not listen.

This is not a question of the motives of Congress, but of the reasonable, natural, and necessary effect of the legislation passed by Congress. The same argument was made in the *Dagenhart case,* and this court answered it in these words:

> "We have neither authority nor disposition to question *the motives of Congress* in enacting this legislation. The purposes intended must be attained consistently with constitutional limitations

> and not by an invasion of the powers of the States. This court has no more important function than that which devolves upon it the obligation to preserve inviolate the constitutional limitations upon the exercise of authority, Federal and State, to the end that each may continue to discharge, harmoniously with the other. In our view the *necessary effect* of this act is * * * to regulate the hours of labor of children in factories and mines within the States, a purely State authority."

The same argument was made by the Government in the district court in the case of *George v. Bailey,* 274 Fed., 639, wherein Boyd, J., held this present act unconstitutional, and the court answered it in these words:

> "There can be no criticism of the purpose our representatives had in view in the enactment of these statutes, for it is evident that they were prompted by the highest motives of humanity, accompanied with a desire to protect children from mental and physical deterioration, in order to maintain a standard of manhood and womanhood fully prepared to respond to the obligations and duties resting upon the citizens of this country. There could be no reasonable ground for dissenting to what Congress has done, if the action came within the scope of power delegated to the United States by the Constitution."

It is a question of the effect of this legislation and of the power of Congress to produce that effect, and not of the motives of Congress.

IV.

The Fact That This Effect is Sought to be Accomplished under Color of a Tax Does Not Bring the Statute Within the Power of Congress and Renders it None the Less Unconstitutional and Void.

All the powers delegated to the Federal Government are subject to the fundamental limitations arising from the system of dual and divided sovereignty established by the Constitution.

We have already seen that the great underlying principle upon which our Republic is founded is the principle of divided sovereignty between the States and the Nation, of a National Government of limited and delegated powers supreme within its sphere, and of State governments retaining in themselves or the people all of the powers of sovereignty not delegated to the Nation and supreme and exclusive in the exercise of those powers.

We have seen that the taxing power of Congress, as well as its other powers, is necessarily subject to the limitations of this fundamental principle, and has frequently been adjudicated so to be.

The test of the constitutionality of an act of Congress is therefore whether it has any obvious and reasonable relation as a means to the accomplishment of an end within the scope of one of the powers so delegated.

This principle of construction was laid down by Mr. Hamilton, when Secretary of the Treasury, in his opinion on the

constitutionality of the National Bank Act, and has been followed by this court. In that opinion Mr. Hamilton said:

> "The *relation* between the measure and the end; between the *nature* of the means employed toward the execution of a power, and *the object of that power* must be the criterion of constitutionality, not the more or less necessity or futility. * * *
>
> "But the doctrine which is contended for is not chargeable with the consequences imputed to it. It does not affirm that the National Government is sovereign in all respects, but that it is sovereign to a certain extent—that is, to the extent of the objects of its specified powers.
>
> "It leaves therefore, a criterion of what is constitutional, and of what is not so. This criterion is the *end,* to which the measure relates as a *means.* If the *end* by clearly comprehended within any of the specified powers, and if the *measure have an obvious relation to that end,* and is not forbidden by any particular provision of the Constitution, it may safely be deemed to come within the compass of the national authority. There is also this further criterion, which may materially assist in the decision: *Does the proposed measure abridge a pre-existing right of any State or any individual?*"

As Pinkney said in his argument in *McCulloch v. Maryland,*

> "The power to lay and collect taxes will not execute itself. Congress must designate in detail all the *means of collection,*"

and then he proceeds to lay down the criterion of constitutionality in words very similar to Mr. Hamilton's:

> "The judiciary may, indeed, and must, see that what has been done is not a mere *evasive pretext,* under which the national legislature travels out of the prescribed bounds of its authority, and encroaches upon State sovereignty, or the rights of the people. For this purpose, it must inquire, whether the means assumed *have a connection, in the nature and fitness of things, with the end to be accomplished.*"

The same criterion was adopted by Chief Justice Marshall in his opinion in that case. He said:

> "Let the end be legitimate, let it be within the scope of the Constitution, and by all means which are appropriate, which are *plainly adapted* to that end, which are not prohibited, but consist with the letter and *spirit of the Constitution,* are constitutional."

That criterion of constitutionality has been adhered to by this court ever since.

An act of Congress purporting to be a tax statute is valid and constitutional only if it have a reasonable relation or be plainly adapted to the end of raising revenue.

The taxing power is given to Congress in these words of the Constitution:

> "SEC. 8. The Congress shall have power:
> "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."

The purpose of the grant was to enable Congress to raise revenue to pay the debts and provide for the common defense and general welfare.

Applying the foregoing criterion to any act of Congress in the form of a tax statute, the first thing to do is to see if the end aimed to be accomplished is legitimate and within the scope of the power conferred. If the end of the statute is clearly and directly to raise revenue, it is legitimate and within the scope of the Constitution. If it is to establish a police regulation of matters within the exclusive power of the States, it is not. It will be admitted that it is only when the end or object is the raising of revenue that an act of Congress in the form of a tax is constitutional.

The second thing to do in applying this criterion is to determine whether the *means* adopted by the statute in question have any *natural or obvious relation* or are *plainly adapted to* the constitutional end of raising revenue.

That the exercise of a power beyond the constitutional grant to Congress, under the pretext or form of a granted power, is not the law of the land and must be held void, was further held by Marshall in *McCulloch v. Maryland,* wherein he said:

> "Should Congress, in the execution of its powers, adopt measures which are prohibited by the Constitution; or should Congress, under the pretext of executing its powers, pass laws for the accomplishment of objects not intrusted 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."

Although a revenue act of Congress may be valid as such in spite of the fact that it *incidentally interferes* with the

police powers of the States, this can be so only where it has *a real relation to the raising of revenue.*

United States v. Doremus, 249 U. S., 86.

This was a case wherein Doremus was indicted under the Harrison Narcotic Act, which required the payment of a license tax of $1.00 a year to sellers, dispensers, and distributors of certain drugs, and the use of certain forms for recording and publicity of sales and gifts of such drugs, and punishing violations as crimes. The district court, as stated in the opinion, held the statute unconstitutional on the theory that it was not a revenue measure, but was an invasion of the police power of the States under the guise of a tax (page 89).

The Supreme Court reversed the decision of the district court, holding that the statute was constitutional because it had a *direct and real relation* to the raising of revenue, that it was in reality a revenue act. It was said by this court:

> "Of course Congress may not in the exercise of Federal power exert authority wholly reserved to the States. Many decisions of this court have so declared."

The usual distinction, and the familiar one, that courts cannot concern themselves with the "motives" of the legislature in passing the act, was then made:

> "And from an early day the court has held that the fact that other motives may impel the exercise of Federal taxing power does not authorize the courts to inquire into that subject. *If the legislation enacted has some reasonable relation* to the exercise of the taxing authority conferred by the Constitution, it

> cannot be invalidated because of the supposed motives which induced it."

And it was specifically held that the act in question had reasonable relation to the raising of revenue:

> "Considering the full power of Congress over excise taxation, the decisive question here is: *Have the provisions in question any relation to the raising of revenue?* * * *. Considered of themselves we think they tend to keep the traffic above board and subject to inspection by those authorized to collect the revenue. They tend to diminish the opportunity of unauthorized persons to obtain the drugs and sell them clandestinely without paying the tax imposed by the Federal law."

Thus in the *Doremus case,* one of the latest utterances of the court, it affirmed and applied again the old criterion of constitutionality so lucidly proclaimed by Mr. Hamilton and so authoritatively adopted and incorporated in our jurisprudence by Marshall in *McCulloch v. Maryland.*

Of course the tax of $1.00 a year would be readily paid by those engaged in selling and dispensing narcotics and revenue would be raised. And the act was upheld distinctly upon the ground that it was clear that it had a natural and reasonable relation to the raising of revenue, and that it would have the necessary effect of a tax or revenue act. The statute had a reasonable relation as a means to the end of raising revenue, and that end was within the scope of the Constitution.

The statute now before the court has no obvious, natural, or reasonable relation to the raising of revenue. It has relation as a means only to the end of regulating the local police affairs of the States.

It will be admitted that if the statute now before the court has a real relation, as a means, only to the end of effecting a police regulation of the ages and hours of employment of children in mines and factories in the States, then that end is without the constitutional power of Congress and the statute void. This is decided in the *Dagenhart case* and is beyond dispute.

It follows, then, that the statute is valid only if its *end* is the raising of revenue. The Government assumes that the end of the statute is to levy and collect taxes under the tax clause of the Constitution, and seeks to defend it only on the theory that it is an exercise of the tax power of Congress. Assuming this, for sake of argument, it follows necessarily that the statute is constitutional only if it be "plainly adapted to," or has a "natural or reasonable relation to," the constitutional end of levying and collecting taxes and raising revenue for the General Government.

Although this court is not concerned with the motives of Congress in enacting legislation, it is competent for it to consider and take judicial notice of the history of legislation and its historical background.

United States v. Freight Association, 166 U. S., 317.
United States v. Union Pac. R. R. Co., 91 U. S., 79.

The history of this legislation on its face, and without any scrutiny of the motives of Congress as declared in debate,

shows that it is an attempt to circumvent the decision in the *Dagenhart case* and to effect, under color of an exercise of the tax power, the very thing which the court held in that case to be a matter to which Federal authority does not extend. The promptness with which Congress proceeded to pass this statute, after the decision holding unconstitutional the Owen-Keating bill, the taking of the regulatory words of the unconstitutional Owen-Keating bill and the placing of them *verbatim* in this statute, and the natural effect of the present statute as appears from the face of the act itself, an effect which, as we have seen, is identical with the natural and necessary effect of the Owen-Keating bill held by this court entirely beyond the constitutional power of Congress; all these show beyond a doubt that this legislation is an effort to nullify the *Dagenhart* decision and to accomplish an object beyond the reach of Federal power. All this appears from the face and history of the legislation and of the times in which it was passed, without considering the frank declarations of the sponsors of the bill, that it was enacted with no view of raising revenue, but solely to avoid the effect of the *Dagenhart* decision, and the equally frank admission of the chairman of the Finance Committee of the Senate that no one claimed that it would produce revenue.

We have already seen that a construction of the statute upon its face will lead to the inevitable conclusion that it has no reasonable relation to the raising of revenue and is not only not "plainly adapted," but has no relation at all to that end. We have seen that upon such construction of the statute it must be seen that no reasonable man would pay the prohibitive penalty of 10 per cent of his entire net profits for the year in order to be free to violate this regulation.

We have seen that this is not a question of the motives of Congress, but simply of the necessary and reasonable effect of the statute.

This court will take judicial notice of public documents emanating from Departments of the Government, and will consider them whether they form a part of the records of the case or not.

New York Indians v. United States, 170 U. S., 32.

See also:

Brown v. Piper, 91 U. S., 42.
Bank v. Adams Express Co., 93 U. S., 185.
Brown v. Spillman, 155 U. S., 670.
Mills v. Green, 159 U. S., 657.
The Delaware, 161 U. S., 472.
Nichol v. Ames, 173 U. S., 517.
United States v. Rio Grande, etc., Co., 174 U. S., 698.
1 Greenleaf on Evidence, Secs. 5, 6.

Under this well-known rule the court will take judicial notice of the Document No. 2896 of the Treasury Department, being the Annual Report of the Commissioner of Internal Revenue for the Fiscal Year Ending June 30, 1921, which report shows conclusively that the present child-labor law has no reasonable or natural relation to the raising of revenue, and is in no way adapted to that end.

On page 16 of that report it is stated that the personnel of the Child Labor Tax Division comprises 51 persons. We may assume that these persons are employed at an average of not less than $2,000.00 a year salary. This gives an annual expense for salaries alone of $102,000.00. It may be

well assumed that the expenses of administering this law in Washington and in the field, the defraying of traveling expenses of inspectors, etc., will raise the total expense of the Government in enforcing this law to many times $102,000.00.

On the same page we see that for the year 1919 the total receipts of "taxes collected" from the "Child Labor tax" were nothing; for the year 1920, $2,380.20, and for the year 1921 $24,223.67. In other words, for the fiscal year 1921, it cost the Federal Government several hundreds of thousands of dollars to collect total returns of $24,223.67 from the operation of what is now contended to be a statute having a reasonable relation as a means to the end of raising revenue. At a total expense of about three times that for 1921, the Government has, therefore, taken into its treasury a total of only $26,603.87 in the three years 1919-1921.

Of this total amount paid into the Treasury, undoubtedly a large part is in litigation now, paid under protest. The present case involves over $6,000. Although this amount was paid under protest in the fiscal year 1922, still it is an index of the status of Government revenues under this act. The entirely insignificant amounts paid in are paid under duress, and are then litigated.

From this we see that the Government has spent many hundreds of thousands of dollars over and above receipts during three years in an effort to enforce this attempted regulation of child labor. In the face of this it cannot be pretended that this statute has any reasonable relation to the raising of revenue.

What has actually happened, the real effect of the statute as it has been enforced, is precisely what we have shown to be its natural and necessary effect when construed on its face. The employers have conformed to the Federal regulations, and no tax has been paid. The Government has had no revenue from the tax. But it has accomplished a police regulation within the States which it had no constitutional authority to effect.

This is directly shown again by the language of the Commissioner's report. He says (page 18):

> "Federal certificates of age are issued in a number of States where child-labor law requirements are less exacting than are those provided for by the tax law. Such certificates are issued by child labor officers in the States of Georgia, Mississippi, North Carolina, South Carolina, and Virginia. * * *
>
> "The 23,017 applications received in the five States where Federal certificates of age are issued is 29 per cent below the number recorded for the preceding year. This decrease is *largely due to the increased tendency of the employer to refuse employment to those under 16.*"

The Commissioner himself declares that the statute has an increased tendency, not to raise revenue, but the very reverse, to force employers to conform to the Federal police regulation.

It results that this statute has no obvious, natural, or reasonable relation to the raising of revenue or taxes and is in no way adapted to that end. It is therefore unconstitutional, because not a means plainly adapted to, or having a natural, obvious, or reasonable relation to, an end within

the scope of the power of Congress. Besides, the right of the Government to remit the tax if the employment has been *bona fide* is not in harmony with the theory and nature of a revenue measure but shows that the so-called tax is more in the nature of a penalty.

On the other hand, it has not only an obvious and reasonable, but a direct and necessary, relation solely to the enforcement of a police regulation of child labor within the States. It is not only plainly adapted to that end, but that is the only end to which it is at all adapted. That end is admittedly beyond the power of Congress, and has been so adjudged. Therefore the statute is unconstitutional for this reason.

The McCray Case, the Flint Stone Tracy Case, and the Doremus Case Distinguished.

The Government relies largely on the *McCray case* (195 U. S., 27). That case is clearly distinguishable from the one at bar. The tax on oleomargarine in that case was not a prohibitive tax and was not such a high tax as to have the reasonable effect of causing a cessation of the sale of the commodity rather than compliance with the incidental Federal regulation as to artificial coloring. On the other hand, the Government showed in that case that even after paying the ten-cents-a-pound tax on oleomargarine it still cost no more than butter and could be sold for even less than butter. See page 41, where it was shown:

> "The tax of ten cents per pound upon oleomargarine colored in imitation of butter is not prohibitive of its manufacture and sale. See vol. 9, Manufac-

> tures, p. 3, Census Report 1900, for summary of facts respecting the relative cost and value of butter and oleomargarine. These facts show that the cost and value of oleomargarine, with the ten cent tax added, about equals the cost and value of butter. In the testimony of the dealers it is stated that good butter costs on an average two cents per pound more than colored oleomargarine in the Chicago Market."

It was there held, just as we contend here, that in construing the statute its necessary scope and effect should be considered. And the decision was based upon the finding by the court that the scope and effect of the statute was to raise revenue, although it might have an incidental regulatory effect. The holding that the acts were within the power of Congress was specifically based on the finding that their necessary scope and effect was to raise revenue. The court said:

> "Undoubtedly, in determining whether a particular act is within a granted power, its scope and effect are to be considered. Applying this rule to the acts assailed, it is self-evident 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 attack was on that part of the statute which taxed artificially colored oleomargarine ten cents a pound, while ordinary uncolored oleomargarine was taxed only ¼ of a cent a pound. It was argued that this higher tax on colored oleomargarine was not adapted to raise revenue but simply to effect a police regulation as to coloring and was therefore

beyond the constitutional power of Congress; that is, the amount of the tax was the only indicia of an illegitimate end.

That this court correctly decided that the necessary scope and effect of this provision was to raise revenue from the tax on colored oleomargarine, and not simply to prohibit its sale and hence effect a mere police regulation, is conclusively shown by the Commissioner's Report above referred to, which, on page 23, shows that for the year 1920 the revenue produced from that source was $1,194,720.17, while that from the tax on the uncolored product was only $930,343.25; and that for 1921 the revenue produced from the former was $921,192.25 as compared with that from the latter of $655,427.08.

In other words, not only is the oleomargarine tax a considerable revenue producer, but the very tax attacked in the *McCray case* as being not a tax, but a police regulation in the form of a tax and having no relation to raising revenue, has consistently raised more revenue than the admittedly valid ¼ of a cent tax. These facts are the very reverse of the facts as to the child labor tax.

The *Flint Stone Tracy Case,* 220 U. S., 107, is also clearly distinguishable from the case at bar. In that case a tax on income of corporations was attacked on the theory that it was a tax on the privilege of using the corporate franchise, that this franchise was the grant of the State, and that therefore the Federal Government could not tax it. In the first place it was a pure tax, a revenue producer. It had only that end and effect and was a means plainly adapted to raising revenue and to no other end. It was admitted that the Federal Government had the right to tax corporate incomes. It was contended that this right was taken away because part of

the income came from the exercise of a franchise granted by the State. The specific point decided is stated by the Court on page 153:

> "The inquiry in this connection is: how far do the implied limitations upon the taxing power of the United States *over objects which would otherwise* be legitimate objects of Federal taxation, withdraw them from the reach of the Federal Government in raising revenue, because they are pursued under franchises which are the creation of the States?"

And the holding was:

> "We, therefore, reach the conclusion that the mere fact that the business taxed is done in pursuance of authority granted does not exempt it from the exercise of Federal authority to levy excise taxes upon such privileges."

That case bears no analogy to the case at bar. The child-labor tax is not a tax on corporate income. It is a tax or penalty "on the employment of child labor," measured by 10 per cent of the net income of the offender.

We have already fully discussed the facts and the holdings of the *Doremus case* and have shown that the registration tax on dealers in narcotics in that act was held to be constitutional upon the specific ground that it bore a reasonable relation to the raising of revenue; that the dealers would pay the $1.00 tax and would not stop dealing; that it was a tax act and not a mere police regulation. To show that the court was correct in this decision, it is only necessary again to call attention to the Commissioner's report, which, on page 126, shows that for the fiscal year ending June 30, 1921, 295,127 registrants paid the tax. The stat-

ute had no effect to prevent dealing in narcotics. It raised revenue.

The Veazie Bank Case Distinguished.

The only case in which this Court has ever held valid an act of Congress which purported to be a tax statute, but which had no reasonable relation to the raising of revenue because its necessary effect would be to destroy the subject taxed, was the *Veazie Bank case,* 8 Wall., 533, and that statute was sustained, not under the taxing power of Congress but under the power to establish and maintain the currency. It was held that although the effect of the tax on State bank notes was to prohibit them absolutely, still that was a means having a reasonable relation to the end of establishing the currency, and hence was constitutional, although as a tax statute it might have no relation to the raising of revenue.

To sustain this statute would tend to destroy the sovereignty of the States within their sphere and to destroy the dual system of government founded by the Constitution.

We have seen that this statute, which is defended only as a tax statute, has no reasonable relation to the raising of revenue. We have seen that the only thing to which it is reasonably related is the standardization of the ages and hours of labor of children in mines and factories within the States. We have seen that this is its necessary and only effect. We have seen that this effect is one to which the power of the Federal Government does not extend, and which Congress has no authority under the Constitution to accomplish.

We have seen, in the words of Marshall, that the exercise of a power beyond the constitutional grant to Congress, under the pretext or guise of a granted power, is not the law of the land and must be held unconstitutional and void by the court when such a case is properly presented to it.

The case is now presented. The question is squarely before the court: Can Congress, under the pretext of an exercise of the taxing power, directly usurp the power of police regulation within the States, which is beyond the constitutional authority of the Federal Government?

On the decision of this question depends the permanence of our dual system of government, the fundamental principle of the divided and independent sovereignty of the Nation and the States, which underlies our American system of government. Its decision is as important as the decision in *McCulloch v. Maryland*. If this statute is sustained, it follows necessarily that Congress has the arbitrary power to destroy any acknowledged exclusive and sovereign power of the States by simply giving to its regulation the form of a tax. If it is sustained, it follows that any decision of this Court endeavoring to establsh the boundary line of the non-delegated rights and powers of the States, upon which the Federal Government cannot encroach, such as the decision in the *Dagenhart case,* may be overruled and recalled by Congress by re-enacting the same statute in the form of a tax, although it would be utterly impossible for the Government to realize from it one cent of revenue.

The only answer offered is that we must have confidence in Congress that it will not use its taxing power, unlimited as the Government contends it to be, to encroach upon the

rights of the States. We must assume that Congress has proper motives and must trust it not to do wrong.

It is not a question of confidence. It is a question of power. If Congress has the power to invade the acknowledged exclusive rights of the States, the States exist as sovereign only at the mercy of Congress. They have only the power to build up what Congress may pull down at pleasure. This, in the language of Pinkney, would leave to them only the power to provoke a smile, but nothing else.

The concluding words of the court in the *Dagenhart case* apply with even greater force in the present case:

> "The far-reaching result of upholding the act cannot be more plainly indicated than by pointing out that if Congress can thus regulate matters intrusted 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.*"