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IN THE

SUPREME COURT OF THE UNITED STATES,

OCTOBER TERM, 1921.

J. W. BAILEY and J. W. BAILEY as Collector of Internal Revenue for the District of North Carolina, Plaintiff-in-Error, vs. DREXEL FURNITURE COMPANY, Defendant-in-Error.	No. 657.

IN ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF NORTH CAROLINA.

BRIEF FOR DEFENDANT-IN-ERROR.

Statement of Case.

This is an appeal by the defendant in the court below from a judgment of the District Court for the Western District of North Carolina, rendered December 10, 1921, holding unconstitutional and

void such part of the Federal Revenue Act of February, 1919, as imposes, or seeks to impose, a 10 per cent. tax, additional to all other taxes, on the profits arising from the sale or disposition of the products of mines, quarries, mills, canneries, workshops, factories or manufacturing establishments which, at any time during the year, shall have employed, or permitted to work, children under the age of fourteen years at all, children between the ages of fourteen and sixteen years for more than eight hours in any day, for more than six days in any week, or after the hour of 7 o'clock p. m., or before the hour of 6 o'clock a. m.

This suit was brought by a complaint filed on the eighth day of November, 1921 (Record, p. 1) by the Drexel Furniture Company, a manufacturing corporation resident in the Western District of North Carolina against a former Collector of Internal Revenue for the District of North Carolina to recover a tax assessed against it under the aforesaid provisions of the Revenue Act of 1919, which tax was paid under protest, and with notice of a purpose to sue to recover it back upon the ground that the law under which it was assessed and collected was unconstitutional.

The preliminary requirements of the statute with respect to bringing suit, such as filing claim for refund, etc., were fully met.

The District Court being of the opinion that the tax was illegally assessed and collected, because it was assessed and collected under an unconstitutional law, rendered judgment in favor of the plaintiff and against the defendant for the amount of the

tax so paid, and from this judgment the defendant has appealed.

The method adopted is in accordance with the recognized procedure, and presents for the consideration of this Court the validity of the statute: If the statute is unconstitutional the judgment should be affirmed.

Smietanka, Collector, vs. Indiana Steel Co., U. S. Sup. Ct., Oct. 24, 1921.

Statement of Question Involved.

The only question involved in this case is, therefore, whether the Act of Congress referred to is within the constitutional authority of Congress to enact.

The statute is Title XII of the Federal Revenue Act of 1918 (ratified, though, in February, 1919), which Revenue Act imposes large taxes on incomes and profits of individuals and corporations. The Act itself, in certainly most of its parts, is undeniably, as its title imports, "An Act to raise revenue." Title XII, Sec. 1200, imposes a tax of 10 per cent., additional to all other taxes imposed by the act, or any act, on the entire net profits received or accrued during each year, the first taxable year to begin April 25, 1919, from the sale or disposition of the product of any mine, quarry, mill, cannery, workshop, factory or manufacturing establishment that employs or permits the working of children during any portion of the taxable year otherwise than in accordance with the schedule permitted by said act, to wit: children under the age of fourteen at

all, or children between the ages of fourteen and sixteen, more than eight hours in any day or more than six days in any week, or after 7 o'clock p. m., or before 6 o'clock a. m. These taxes are to be, by the terms of the Act, collected upon reports made by the taxpayers in accordance with regulations to be issued by the Treasury Department.

The plaintiff's contention is that this Section 1200 of Title XII of the Act of February, 1919, is beyond the powers delegated to Congress by the United States Constitution and is, therefore, void.

The validity of the Act is challenged upon two principal grounds:

> (a) The statute, though forming a part of what is otherwise a revenue law, is not a taxing statute, but is an attempt to *regulate*—to impose the Congressional will as to what shall be permitted and what shall be forbidden—in a field in which Congress has no regulatory power, in violation of the Tenth Amendment of the Constitution which reserves to the states respectively, or to the people, powers not delegated to the United States.
>
> (b) The classification is arbitrary in that its basis is conduct preceding the origin of the thing selected as the measure of the tax, and not the nature and character of the thing itself; and also because its basis is a condition outside and beyond the sphere of congressional action, bearing unequally upon the members of the class, and thus is a violation of the rights of the individual under the Fifth Amendment,

and an invasion of the rights of the state reserved and withheld from congressional action by the Tenth Amendment.

ARGUMENT.

POINT I.

That this statute is unconstitutional is determined by the decision of this Court (Hammer vs. Dagenhart, 247 U. S., 251) declaring the Child Labor Law of 1916 unconstitutional.

In *Hammer vs. Dagenhart,* the Act considered prohibited the shipment in interstate or foreign commerce of any product of a mill situated in the United States, in which, at any time during the period of thirty days before the removal of the product, children under fourteen had been employed, or children between fourteen and sixteen had been employed more than eight hours in a day or more than six days in any week or between seven in the evening or six in the morning. That Act was held unconstitutional as exceeding the power of Congress and as invading the powers reserved to the states.

That case determined these propositions:

(1) That Congress may not under the guise of a granted power exercise an authority not entrusted to it by the Constitution.

(2) That when the purpose and effect of an Act of Congress necessarily appears from a consideration of the Act itself, and those sources open to the Court to consider, the Court will go behind the form to the substance, and if it appears that the legislative purpose may not be attained consistently with constitutional limitations, and is an exertion of power over a matter to which the federal authority does not extend, the Act will be declared void as transcending the granted power, and invading the reserved powers of the states.

(3) That Congress is without power to regulate the hours of labor of children in factories and mines within the states, that being a purely state function.

It would seem to us that this Court, in the *Dagenhart Case,* almost indicated prevision of the pending case, or a case like unto it, in a sentence used near the conclusion of the majority opinion:

> "Thus the act (passed under the authority of the Commerce Clause of the Constitution) in a *two-fold* 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*" (p. 276, *italics ours*).

Notwithstanding this solemn decision by this Court, Congress in its enactment of the Federal Revenue Act of 1918, the consideration of which began soon after the decision by this Court in *Hammer vs. Dagenhart,* prescribed precisely the same minimum ages and the same working hours which it had prescribed in the statute just declared unconstitutional, and provided that any employer operating a mine, quarry, mill, cannery or factory, who saw fit to disregard the will of Congress in his employment of children, should, instead of having his goods shut out of interstate commerce, as the statute condemned in the *Dagenhart Case* had provided, be subjected to a so-called tax of 10% on all the profits of his business additional to all other taxes.

It needs no reference to the debates in Congress to ascertain the purpose of Congress in this enactment, and the direct effect of such enactment—if it is to have validity and effect at all. If recourse to these debates were necessary or desirable to show the purpose of Congress, such recourse shows the frankest and clearest expression of the congressional will and purpose:

It was declared in the course of the debate in the Senate (Senator Kenyon, Cong. Rec., Vol. 57, No. 16, p. 619) that it was right and proper that there should be found "some means of nullifying" the action of the Court in the *Dagenhart Case,* and the means adopted to nullify that decision is the present measure. "Here (in the *Dagenhart Case*) the Supreme Court decided that our attempt through the Interstate Commerce Clause of the Constitu-

tion to regulate this wrong was an unconstitutional way to get at it. Now we try another way, and pass that on to the Supreme Court for them to state whether or not it is constitutional legislation." (*Ibid,* p. 626). "I am frank to say that, of course, that will result in the non-employment of child labor" (Senator Lenroot, *Ibid,* p. 623). "The main purpose is to put a stop to what seems to be a very great evil, and one that ought to be in some way put a stop to" (Senator Lodge, *Ibid,* p. 619). "I have heard no one suggest any revenue would be raised by it * * * My individual judgment is no revenue will be raised by it" (Senator Simmons, Chairman Finance Committee, *Ibid,* p. 620).

It does not consist with the dignity that should characterize arguments in this Court to discuss, as if it were an uncertain thing, the purpose and effect of this statute. Of course it is not a revenue statute, and of course it is an attempt to impose upon all the citizens in all the states the congressional will as to their conduct in the operation of their manufacturing, mining and quarrying enterprises.

There was no motion for a rehearing of the *Dagenhart Case,* and the dissenting opinion, not less than the prevailing opinion, showed thorough consideration by this Court of every question involved. We are tempted to conclude this argument just here, for to our minds, the *ratio decidendi* of the *Dagenhart Case,* as well as the words of the prevailing opinion, must give it application not only to the grant of power to regulate commerce,

but to all the grants of power made by the Constitution to Congress, including the power to tax—unless an exercise by Congress of the power to tax is free from scrutiny and review by the Court, while an exercise by Congress of any of its other powers is subject to such scrutiny and review; unless the spirit and purpose of the Constitution are to be considered when power is exercised under the other grants, and disregarded only when the asserted soulce of power is the power to tax; unless covert legislation, that usurps state functions to the point of annihilation, is permissible through an exercise of the power to tax, and not through an exercise of any of the other grants of power; unless, indeed, the Tenth Amendment qualifies and limits only a part, and not all, of the grants of power, so that our dual form of government is immune from destruction only so long as Congress sees fit to refrain from the use of the power to tax.

POINT II.

The statute here considered is precisely condemned by the principles announced by this Court in numerous cases, including cases in which taxing statutes have been upheld.

In *McCulloch vs. Maryland* (4 Wheat., 316) this Court, through Chief Justice Marshall, rendered its famous decision upholding the right of Congress to charter a national bank, and forbidding a state to embarrass the operations of such bank,

but (at page 423) the Court used this solemn and often quoted language:

> "Should Congress, under the pretext of executing its powers, pass laws for the accomplishment of objects not entrusted to the government, it would become the painful duty of this tribunal, should a case requiring such a decision come before it, to say that such an act was not the law of the land."

It is to be noted that this language of Chief Justice Marshall is express in its application to the *federal authority,* and does not refer at all to the state authority, and this notwithstanding the fact that the decision of the Court struck down a state, and not a federal, statute. This language was a part of the gist of the decision, and not in any way an *obiter,* because one of the questions most seriously argued and considered was the right of Congress to charter a national bank, and the foregoing language was used in the course of the decision of this major premise that was directly involved in the case.

In *Veazie Bank vs. Fenno* (8 Wall., 533), the Court sustained, under circumstances to be hereinafter discussed, an Act of Congress levying a tax on the issue of currency by state banks, but in so doing this Court (at page 548) announced this principle—and it is to be noted that it was so announced in a case having solely to do with the power of taxation:

> "There are indeed certain virtual limitations (on the power of taxation) 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.*" (*Italics ours.*)

In the recent *Doremus Case* (249 U. S., 86), this Court upheld, as having relation to an admittedly valid tax imposed by section 1 of a congressional enactment, regulations and restrictions affecting the conduct of the traffic so taxed, which regulations and restrictions were set out in section 2 of the enactment. But the Court said (at page 93):

> "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."

Judge Cooley, in his thoughtful and authoritative treatise on Taxation, has recognized the general limitations that in any constitutional country must apply to the power of the sovereign to levy and collect taxes, and the special limitations that under our system of government exist as to the power of the sovereign, whether it be the sovereign state or the sovereign federal government:

> "Great as is the power of any sovereign to levy and collect taxes from its citizens, that

> power in a constitutional country has very distinct and positive limitations. Some of these inhere in its very language and exist whether declared or not declared in the written constitution; * * * other limitations spring from the peculiar form of our government and from the relation of the states to the national authorities." (*Cooley on Taxation* [3rd ed.], 82.)

If any statute is ever to fall under the condemnation of the foregoing judicial utterances, it is the statute now being considered. As impairing the "independent self-government of the states," as exerting authority "wholly reserved to the states," as exercised "for ends inconsistent with the limited grants of powers in the Constitution," —it certainly goes beyond anything yet attempted, and as far as anything that can be imagined. If sustained as a tax, it must be as a privilege tax, and yet it does not purport to bear any relation in amount to the extent that the privilege is enjoyed. It is not a tax on the products of child labor, but it is a tax on the employing of children under circumstances not approved by Congress, and the amount to be paid for disobedience to the will of Congress is arrived at precisely as the criminal judge arrives at the fine to be paid by a convicted criminal: The criminal judge does not ask what profit the criminal has made by his crime, but he asks what amount of fine will constitute a real and deterring penalty, and looks to the financial condition generally of the convicted criminal. So this statute imposes a tax of ten per cent. on the total

profits, whether from the employment of children or the employment of adults—whether from the investment of large capital, or skill or good fortune in management—that the offending employer has made during the year.

The employment of children, under conditions and circumstances condemned by the competent legislative authority, has never in the history of the world been treated as a privilege, but has always been treated as a crime. Whatever may be said as to the hours and circumstances of employment of adults, no one for many years has doubted that the regulation of minimum ages for children's employment, and maximum hours for a child's day labor, is within the police power of the states. The Government, in its brief in the *Dagenhart Case*, interestingly traced the development of child labor laws in this country from 1813, when Connecticut enacted a regulatory statute. That brief, with entire accuracy, stated that the conviction has grown up throughout this country "that the employment of child labor was morally repugnant and socially unwise."

This statute is a criminal statute, under the general title "A Bill to Raise Revenue." It is this, not only though, but much worse: It is an attempt to make regulations, in accordance with congressional wishes, and applicable to the whole country, in a matter so influenced by local surroundings as to be properly regulated only by local legislatures. To steal, to whip one's wife, is a definite evil everywhere. For Congress to attempt to prevent either by a prohibitory tax, would be, of

course, a grotesque invasion of the powers reserved to the states. But when Congress attempts to regulate child labor it is making an infinitely more vicious invasion of the police power which ought to continue to reside only in the states: Child labor is an evil, it is true, but whether it is evil for a child of a particular age to be permitted to work a particular number of hours, and whether on farms and not in factories, or in mines and not as messenger boys in cities—these are of the very class of questions that need, in order to be answered wisely, to be answered by legislatures who enact laws for communities smaller than the whole United States.

The states of the United States, including the state of North Carolina, have recognized the evil of unrestricted child labor, and have legislated with respect to it, each in accordance with its own peculiar conditions, having regard to climate, distribution of wealth, social conditions, and other such considerations. New York has statutes that relate to the employment of children in sweatshops, but sweatshops are unknown in North Carolina. Georgia has taken into account that the father is naturally and normally the principal producer of material support for the family, and permits the son of a widow to go to work at an earlier age, and work for longer hours, than is permitted to the son whose father is still living. Most of the state legislatures have seemed to believe, either that outdoor work is more nearly harmless for a young boy than factory work, or that farmers need peculiarly the services of

their sons, and have not attempted to regulate either the minimum age or the maximum hours so far as farm work is concerned.

Not only have the states their various statutes relating to child labor, but in many of them there have been progressive steps to protect the health, vigor and safety of the coming generation. Of course these steps have, in a general way, been coincident with the progress of the states in wealth. May-be it would be ideal (and maybe it would not be) if boys did no productive work at all, but devoted their whole time, until they reach the age of twenty-one, to physical, mental and moral preparation for the life that lies before them. But it may not be denied that a boy should not live up to this ideal if doing so involves the starvation of his mother and sisters. In other words, and without elaboration, whatever may be said of the evils of child labor, and the rules and regulations proper for the abolition or amelioration of the evil, the making of these rules and regulations constitutes a part of the police power properly exercisable by the local governments; and that what might be entirely wise and humane in a rich community, of cold climate, where weather conditions make ventilation difficult, inhabited chiefly by Anglo-Saxons, would be unwise in a community where poverty still stalks, where weather conditions may make possible constant fresh air even in a factory, and where the population is, in whole or in large part, of some other and earlier maturing race than the Anglo-Saxon.

In *George vs. Bailey* (274 Fed., 639) the same able District Judge (Judge Boyd of the Western

District of North Carolina) who was affirmed by this Court in his opinion that the child labor law passed by Congress, in the assumed exercise of its commerce power, was unconstitutional, held that this child labor law, though a so-called taxing statute, is likewise unconstitutional, and in his opinion he refers, with absolute justice, to the most recently enacted and present-applying child labor criminal statute of North Carolina (Public Laws of North Carolina, Session of 1919, Chapter 100, page 274):

> "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 in 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 il-

> legally, 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" (p. 643).

This statute is a criminal statute—a police regulation—and not a taxing statute, without respect to whether the employment of children under conditions contrary to the schedule prescribed by Congress is induced by the cupidity of the employer, or some other motive. In the brief for the Government in *Hammer vs. Dagenhart* (page 24), it is argued that child labor is really not cheaper than adult labor, and that there is therefore no economic advantage in the employment of children. If it be assumed that this argument is unsound, and that there is some economic advantage in the employment of child labor contrary to the will of Congress, such assumption by no means validates this statute as a tax statute. Many of the police regulations and prohibitions that states may properly pass, are intended to prevent encroachments upon the health, well being and good order of society, induced by the cupidity—the desire for gain—of the offenders.

POINT III.

It is not true that the taxing power of Congress is limited only by the limitations expressly stated by the Constitution to be applicable to the power to tax, to-wit: that exports may not be taxed, and that direct taxes must be apportioned, and excise taxes uniform. This Court has expressly and repeatedly recognized other limitations.

There are, undoubtedly, single sentences in opinions delivered by this Court, contradictory to the principles announced in those deliberate expressions of the Court quoted in the next preceding Point, which would seem to justify the argument that the prohibition of the power to tax exports, and the provisions for uniformity as to excise taxes, and apportionment of direct taxes, constitute the only limitations on this federal power.

So recently, though, as June, 1920, this Court in *Evans vs. Gore* (253 U. S., 245) held that the collection of an income tax from a federal judge, under a congressional enactment passed after his term of office began, would be unconstitutional, because inconsistent with Article III of the Constitution, which provides that the compensation of a federal judge shall not be diminished during his continuance in office. That decision was an express recognition by this Court, not by way of argument or *obiter,* but by definite and reasoned decision, that there is a limitation on the power of Congress to tax other than the specific limitations hereinbefore referred to; that when the congres-

sional enactment, or its proposed enforcement, runs counter to a definite limitation contained in any article of the Constitution, the congressional enactment is to that extent void.

Evans vs. Gore, it is true, dealt with what this Court conceived to be inconsistency between the congressional enactment and the express constitutional limitation which forbids the reduction of the compensation of a federal judge, but in *Collector vs. Day* (11 Wall., 113) this Court, in an opinion, the whole of which should be read carefully by those who conceive that the states should lose all consideration in these days of teeming nationalism, held that a federal income tax may not be collected from state judges, not because there is any constitutional provision against the diminution during their term of office of the compensation of state judges, but because of the *implied limitation on the federal power to tax, inherent in the very warp and woof of this federated government, which recognizes a dual sovereignty—on the one hand a federal authority supreme in its sphere, and on the other hand sovereign states supreme in their sphere.*

The validity and controlling authority of *Collector vs. Day* need not now be dwelt on to this Court, because this Court, so recently as in *Evans vs. Gore* gave consideration to *Collector vs. Day,* and the later cases which applied its doctrine, to-wit: the *Income Tax Case* and *United States vs. Railroad Company,* which respectively held that Congress was without power to impose an income tax in respect of interest received on state bonds, and on municipal revenues received by a state constituted municipality,

"True, the taxing power is comprehensive and acknowledges few exceptions. But that there are exceptions, besides the one we here recognize and sustain, is well settled. In *Collector vs. Day,* 11 Wall., 113, it was held that Congress could not impose an income tax in respect of the salary of a judge of a state court; in *Pollock vs. Farmers' Loan & Trust Co.*, 157 U. S., 429, 585, 601, 652, 653, it was held—the full court agreeing on this point—that Congress was without power to impose such a tax in respect of interest received from bonds issued by a state or any of its counties or municipalities; and in *United States vs. Railroad Co.*, 17 Wall., 322, there was a like holding as to municipal revenues derived by the city of Baltimore from its ownership of stock in a railroad company. None of those decisions was put on any express prohibition in the Constitution, for there is none; but all recognized and gave effect to a prohibition implied from the independence of the states within their own spheres." (*Evans vs. Gore,* p. 255.)

When one reads the opinion of this Court in the *Dagenhart Case* and in connection with it the doctrine of the earlier cases, so recently affirmed by this Court in *Evans vs. Gore,* it is hard to conceive any course of reasoning that will sustain the validity of this statute. The cases of *Collector vs. Day, Pollock vs. Farmers' Loan & Trust Co.* and *United States vs. Railroad Company,* it is true, had to do with the *functioning* of the sovereign states, but of what avail is it for a state to function *if its regulatory power has been usurped by Congress?*

POINT IV.

Considering the sovereign powers of the federal government and of the states respectively in their several spheres, this Court has condemned this statute in principle in its condemnation of certain taxing statutes of the states.

In *Western Union Telegraph Co. vs. Kansas* (216 U. S., 1), this Court considered a statute of the state of Kansas that required telegraph companies, *as a condition precedent to their right to engage in local business,* to pay into the state school fund a given percentage of their authorized capital, which represented all of their business and property everywhere. It is to be noted that this imposition of a tax was simply a condition precedent to the right of the Telegraph Company to engage in local business, and that the Telegraph Company might escape that liability by simply refraining from the conduct of local business—it was not a part of the statute to attempt to directly put any burden on interstate commerce. The validity of the tax was asserted in this Court by the argument that the matter of the right of a corporation to engage in local business in the state was dependent upon the option of the state itself, and conditioned upon the assent of the state, and, that, therefore, the state might impose such conditions as it saw fit. This argument was not to be regarded lightly, because this Court as early as *Paul vs. Virginia* (8 Wallace, 168), had said of the rights of states

with respect to the local business of foreign corporations:

> "They (the states) may exclude the foreign corporation entirely; they may restrict its business in particular localities, or they may exact such security for the performance of its contracts with their citizens as in their judgment will best protect the public interest. The whole matter rests in their discretion". (p. 181.)

And this Court, affirming *Paul vs. Virginia,* in a later case, had said:

> "The granting of the rights and privileges which constitute the franchises of a corporation being a matter resting entirely within the control of the legislature to be exercised in its good pleasure, it may be accompanied with any such condition as the legislature may deem most suitable to the public interests and policy. * * * As to a foreign corporation—and all corporations in states other than the state of its incorporation are deemed to be foreign corporations—it can claim a right to do business in another state to any extent only subject to the conditions imposed by its laws". (*Mining Co. vs. New York,* 143 U. S., 305, 314.)

The argument in favor of the validity of the tax seemed to be strong if the form of the statute was to be regarded, because it was not a tax directly

on the company's interstate business, or its privilege to engage in interstate commerce, or its property outside of the state, but the statute referred to the charge made against the corporation as a "fee" for the privilege of doing local business—a condition upon which the consent of the state to do local business was predicated. This Court however held the law invalid:

> "The statutory requirement that the telegraph company shall, as a condition of its right to engage in local business in Kansas, first pay into the state school fund a given per cent. of its authorized capital representing all its business and property everywhere, is a burden on the company's interstate commerce, and its privilege to engage in that commerce, in that it makes both such commerce conducted by the company and its property outside of the state contribute to the support of the state schools. Such is the necessary effect of the statute, and that result cannot be avoided or concealed by calling the exaction of such a per cent. of its capital stock a 'fee' for the privilege of doing local business. To hold otherwise is to allow form to control substance". (216 U. S., 1, 37.).

This decision was by a divided Court, four Justices joining in a vigorous dissent. Later cases, reannouncing the principle, though, have followed, and in *International Paper Co. vs. Massachusetts* (246 U. S., 135) this doctrine is reviewed and definitely adopted by a unanimous Court.

It is said that the argument drawn from these decisions is not valid in the case at bar because the nation is superior to the state by virtue of that clause in the Constitution which provides that the Constitution itself and the laws of the United States made in pursuance thereof constitute the supreme law of the land; and that while the state, though it adopts a form of legislation that makes the legislation seem valid under its reserved powers, must not encroach in fact upon the power delegated to Congress, it is, nevertheless, competent for Congress under a power delegated to it to override in fact the power reserved to the state. We conceive that this general statement of the supremacy of the nation over the state is not warranted, but is wholly vicious. It is the Constitution and the federal statutes enacted *in accordance with the Constitution* that constitute the supreme law of the land, and federal statutes enacted otherwise than in accordance with the Constitution are not only not the supreme law of the land but not law at all. Under our Constitution the nation and the states are not to be weighed in the balance to ascertain any general supremacy —the nation is supreme in the exercise of the powers delegated to it, and the states are supreme in the exercise of the powers reserved to them.

In 1870 *Collector vs. Day* (*supra*) came to this Court involving the question whether an income tax levied by Congress on every profession, trade, employment or vocation could be applied to the salary of a judicial officer of the state. It had already been decided by this Court, following the case of *McCulloch vs. Maryland,* that it was not

competent for the legislature of a state to levy a tax upon the salary of an officer of the United States (*Dobbin vs. The Commissioners of Erie County,* 16 Peters, 435). The argument was made that the national government was supreme, but this Court repudiated that argument, and held the tax invalid. It 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 supremacy of the general government, therefore, so much relied on in the argument of the counsel for the plaintiff-in-error, in respect to the question before us, cannot be maintained. The two governments are upon an equality, and the question is whether the power 'to lay and collect taxes' enables the general government to tax a salary of a judicial officer of the state, which officer is a means or instrumentality employed to carry into execution one of its most important functions, the administration of the laws and which concerns the exercise of a right reserved to the states". (pp. 124, 126.)

The attributes to sovereignty that belong to the states in matter of taxation have been declared by this Court in numerous cases to be of the kind, character and quality that belong to the federal government. In *Bell's Gap Railroad Co. vs. Pennsylvania* (134 U. S., 232), this Court said, with respect to a state tax:

> "The provision in the Fourteenth Amendment, that no state shall deny to any person within its jurisdiction the equal protection of the laws, was not intended to prevent a state from adjusting its system of taxation in all proper and reasonable ways. It may, if it chooses, exempt certain classes of property from any taxation at all, such as churches, libraries and the property of charitable institutions. It may impose different specific taxes upon different trades and professions, and may vary the rates of excise upon various products; it may tax real estate and personal property in a different manner; it may tax visible property only, and not tax securities for payment of money; it may allow deductions for indebtedness or not allow them. All such regulations and those of a like character, so long as they proceed within reasonable limits and general usage, are within the discretion of the state legislature or the people of the state in framing their constitution."

The foregoing quotation, it is to be noted further, as showing the analogy between the federal and state taxing power, was used by Mr. Justice

Day in the unanimous opinion of this Court in sustaining the corporation excise tax imposed by Congress in 1909 (*Flint vs. Stone Tracy Co.,* 220 U. S., 107, 160).

POINT V.

There are no words of the Constitution, nor admitted validity of analogous congressional tax enactment, nor decision of this Court, that works the validity of this statute, though it was enacted in the guise of a revenue bill and ostensibly under the power of Congress to collect taxes.

In this Point an effort will be made to consider, separately, the arguments and the precedents that are ordinarily advanced and suggested as making for the validity of this, or somewhat similar statutes. The argument now advanced is without reference or present access to the brief of the Solicitor General in this case.

POINT V-a.

THE POWER OF CONGRESS IS "TO LAY AND COLLECT TAXES, DUTIES, IMPOSTS AND EXCISES," AND THERE IS NO EXPRESSLY GIVEN POWER TO PROVIDE, UNDER COLOR OF A TAX LAW, FOR THE "GENERAL WELFARE OF THE UNITED STATES."

The words of the Eighth Section of the Constitution of the United States are:

> "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; but all duties, imposts and excises shall be uniform throughout the United States."

The suggestion has been made that, somehow, in these words, there is given a power, presumably not in the express grants of power otherwise contained in the Constitution, to legislate for the "general welfare." It is to us inconceivable that these words "to pay the debts and provide for the common defense and general welfare of the United States" refer to anything except the use that the taxes, duties, imposts and excises may be put to when they shall have been laid and collected—the uses, any one of which will justify the raising of revenue.

In the preamble to the Constitution of the United States, it is declared as a part of the purpose of the people in thus forming the United States of America and ordaining and establishing the Constitution, to "promote the general welfare," and the authority given by the first clause of the Eighth Section is a power to lay and collect taxes, duties, imposts and excises which, when collected, may provide among other things for the general welfare of the United States. Is it conceivable that anything else was in the minds of the framers of the Constitution? Is it conceivable that these words were intended to give the right to Congress to promote what it conceives to be the general wel-

fare, or to provide for the general welfare, in ways and to a degree not contemplated by other grants of powers, and thereafter expressly withheld, because not so delegated, by the Tenth Amendment?

We never have seen a judicial decision that presumed to place the validity of a so-called taxing statute on this suggestion. We are unable to prolong the argument because such argument involves the simple attempt to arrive at the meaning of a sentence, and that meaning seems to us obvious.

POINT V-b.

The Fact that Protective Tariffs Have Been Levied and Have Always Been Assumed to be Valid is in no Way Controlling or Influential in the Present Case.

It is true undoubtedly that Congress has enacted many tariff rates on the importation of articles into the United States, when at least a part of its motive in arriving at such rates was to discourage such importation. It is frequently suggested that this analogy requires the Courts to sustain any tax imposed in the ostensible exercise of the taxing power, even though it is plainly apparent that revenue is not sought.

This, though, leaves out of consideration the fact that Congress does have the undoubted power to exclude importations altogether, and since the greater includes the less, it must have the power to place such conditions upon the importations as it sees fit. Embargo acts are not so common as tariff

acts, but they have existed, and to an extent do now exist, and their constitutionality may not be denied. The power existing, then, in Congress, to impose restrictions or conditions on importations from foreign countries, it makes no practical difference whether Congress imposes such conditions in a statute labeled "An Act to raise revenue," or imposes them, more frankly, in a statute labeled "An Act to impose restrictions on imports."

This Court may not invalidate the exercise of an admitted congressional power simply because Congress has incorrectly labeled or incorrectly entitled the instrument by which it sees fit to exercise that power. This is but the corollary of the doctrine that this Court may not validate the attempted exercise by Congress of a power which it does not possess simply because Congress has incorrectly labeled the instrument.

> *"The direct and necessary result of the statute must be taken into consideration in deciding as to its validity* even if that result is not in so many words either enacted or distinctly provided for." (*Collins vs. New Hampshire,* 171 U. S., 30, 33. *Italics ours.*)

Chief Justice White, when a member of the United States Senate in 1892, completely and with characteristic vigor stated the distinction, in an argument, the whole of which is relevant to this question now under discussion: Having otherwise pointed out the distinction between import duties and internal revenue taxes, he said (Cong. Rec., Vol. 33, p. 6517):

"In other words, I contend that where power to destroy exists, the use of a wrong instrumentality to do the destruction may be the abuse of an instrumentality but not an abuse of power, because the power to destroy is vested. But where the power to destroy does not exist, the use of an instrumentality to destroy that which there is no power to destroy is not alone an abuse of the instrumentality, but an usurpation of the power itself. Now, the usurpation of power by Congress not vested by the Constitution in Congress is unconstitutional."

If Congress had the power to regulate the employment of children in the various states, then one might wonder at its accomplishing such regulation by a taxing statute, instead of by a statute of direct regulation, but this Court could not declare such so-called taxing statute void. It is precisely because this is a regulation beyond the power of Congress that this statute is void, and not because it is labeled a revenue bill.

POINT V-c

THE DECISIONS OF THIS COURT THAT SUSTAIN REVENUE ACTS OF CONGRESS WHICH INCIDENTALLY AFFECT CONDUCT DIRECTLY TO BE REGULATED ONLY BY THE STATES, DO NOT CONSTITUTE AUTHORITIES FOR SUSTAINING THIS STATUTE.

Congress could not possibly levy internal excise taxes, whether collected by stamps or otherwise,

without some incidental interference with the conduct of citizens in those fields which are directly regulatable only by the states. If this Court had held, therefore, that, on that account, federal tax statutes were invalid, it is hard to conceive how the federal government could have had any revenue except from imports until after the passage of the Income Tax Amendment to the Constitution. It is not remarkable, therefore, that this Court has, so far as we have found, without dissent, sustained federal revenue statutes that were in truth revenue statutes, and that were attacked as encroaching upon the power of the states, in influencing the conduct of its citizens.

The first of these cases were the *License Cases* (5 Wall., 462), in which it was contended that a federal statute imposing a tax on liquor dealers, undoubtedly for revenue purposes, was unconstitutional, especially in states which prohibited the sale of liquor. In view of the fact that the tax law itself contained the provision that the payment of the tax should not be taken as a license, it is hard to see how the fact that the liquor dealers who contested the tax were from the states which prohibited the sale of the liquor, was relevant to the discussion. This Court unanimously held that the tax was valid, notwithstanding that its imposition and collection might influence citizens to sell more or less liquor than they otherwise would have done.

In *Nicol vs. Ames* (173 U. S., 509), there was considered a real revenue act, having no regulatory purpose, but only a tax-collecting purpose, which imposed taxes on certain sales made at exchanges.

This Court sustained the classification as being a reasonable one, and sustained the tax as being indirect and not direct. Its effect on the conduct of citizens regulatable by state authority was merely incidental. This decision, too, was by an unanimous court.

In *Flint vs. Stone Tracy Co.* (220 U. S., 107), this Court considered the validity of the corporation excise tax of 1909, which, plainly for revenue purposes, levied a tax on incomes of persons associated together and enjoying the franchises of corporations, and laid no such tax on individuals conducting business alone, or in association with others in copartnership. This Court again unanimously sustained the law, carefully arguing the privilege value of the corporate formation.

> "The thing taxed is not the mere dealing in merchandise, in which the actual transactions may be the same, whether conducted by individuals or corporations, but the tax is laid upon the privileges which exist in conducting business with the advantages which inhere in the corporate capacity of those taxed, and which are not enjoyed by private firms or individuals. These advantages are obvious, and have led to the formation of such companies in nearly all branches of trade. The continuity of the business, without interruption by death or dissolution, the transfer of property interests by the disposition of shares of stock, the advantages of business controlled and managed by corporate directors, the general ab-

> sense of individual liability, these and other things inhere in the advantages of business thus conducted, which do not exist when the same business is conducted by private individuals or partnerships. It is this distinctive privilege which is the subject of taxation, not the mere buying or selling or handling of goods which may be the same, whether done by corporations or individuals". (pp. 161, 162).

We have no quarrel with these cases just hereinbefore discussed, nor with *Knowlton vs. Moore* (178 U. S., 41), nor *Spreckles Sugar Refining Co. vs. McClain* (192 U. S., 397), nor with *Springer vs. United States* (102 U. S., 586). We freely concede, with all the intendments and implications reasonably arising out of such concession, that a federal excise tax levied and collected for the purpose and with the result of raising funds for the federal government, is valid, nowithstanding its incidental influence on the conduct of citizens in matters directly regulatable only by the states.

POINT V-d.

The Three Cases Decided by this Court Not Clearly in the Class Just Hereinbefore Discussed—The Veazie Bank Case, The Doremus Case and The Oleomargarine Case—are Distinguishable from the Case at Bar, and are not Authorities for Holding this Statute Constitutional.

Veazie Bank Case.

The *Veazie Bank Case* (8 Wall., 533) sustained the constitutionality of an act of Congress that imposed a 10% tax on the issues of currency notes of any state bank. The points of argument made against the validity of the tax, as reported, were (1) that the tax in question was a direct tax and had not been apportioned; (2) that the act imposing the tax impaired a franchise granted by the state. It would be uncandid for us to say that there are no expressions in the opinion of Chief Justice Chase, which, if they had been necessary to the decision in the case, would not have been embarrassing to us in this argument. It is, in our judgment, though, entirely inaccurate to say that the decision itself is authoritative on the question here involved. In length, most of the opinion of the Court is a discussion of the question as to whether the tax was direct so that it should have been apportioned, or indirect, and the decision of the Court is that it was an indirect tax and, therefore, did not have to be apportioned. The stress of the dissenting

opinion is that the tax, being an excise levied on the enjoyment of a franchise granted by the state, was unconstitutional, whether levied for revenue purposes or otherwise. If the dissenting opinion had been the prevailing opinion of the Court, the corporation excise tax could not have been sustained. The only discussion in the prevailing opinion of the Court in any respect relevant to the question involved in this case, is contained in a dozen lines (page 548) in which Chief Justice Chase states, in answer to the insistence of counsel—evidently oral, and not reported in the points of counsel shown in the report of the case—that the tax levied was so excessive as to indicate a purpose on the part of Congress to destroy the franchise of the bank, and not to raise revenue, that:

> "The first answer to this (that insistence) is that the judicial cannot prescribe to the legislative departments of the government limitations upon the exercise of its acknowledged powers. * * * So if a particular tax bears heavily upon a corporation, or a class of corporations, it cannot, for that reason only, be pronounced contrary to the Constitution."

After these dozen lines, the opinion proceeds to the demonstration that, without respect to that question, this particular tax, or regulation, if you please, is vindicated because Congress under its power to provide a circulating medium, has the undoubted power to restrain by suitable enactments

the circulation as money of any notes not issued under its own authority. Except for the short and tentative words of the opinion just hereinbefore fairly reproduced, the *Veazie Bank Case* illustrates precisely the doctrine under which protective tariff laws are valid, to wit: that Congress, having the power to regulate, may use the instrumentality of taxation to accomplish such regulation. The *decision* in the *Veazie Bank Case*—as distinguished from some of the unnecessary words of the Chief Justice—is authority only for the proposition not here contested, that where the power to regulate exists, the Court will not deny the validity of any statute that accomplishes such regulation.

THE DOREMUS CASE.

The *Doremus Case* (249 U. S., 86) did not involve at all the validity of a tax *levy*. An Act of Congress, passed in 1914, by section 1 imposed a tax on every person who produces, imports, manufactures, compounds, deals in, dispenses, sells, distributes, or gives away any of certain narcotic drugs. Of course there was no attack on the validity of that imposition. Section 2 provided certain regulations as to the sale of these narcotics, requiring dealers to require certain prescriptions on certain order blanks. The question before the Court was whether these regulations thus set out in section 2 had any reasonable relation to the collection of the tax imposed by section 1, and this Court (four justices dissenting) held that these

regulations in section 2 did have reasonable relation to the collection of the tax imposed by section 1, as tending—

> "to diminish the opportunity of unauthorized persons to obtain the drugs and sell them clandestinely without paying the tax imposed by the federal law. * * * We cannot agree with the contention that the provisions of section 2 controlling the disposition of these drugs in the ways prescribed can have nothing to do with the facilities of collecting revenue, as we should be obliged to do if we were to declare this act beyond the power of Congress acting under its constitutional authority to impose excise taxes" (pages 94, 95).

We respectfully and confidently submit that, fairly considered, there is not in this *Doremus Case* authority for holding the present statute constitutional, and this contention does not have as its cause or condition that four of the nine justices then constituting the Court dissented on the ground that the regulations provided in section 2 went beyond the constitutional power of Congress. It is to be remembered, too, that it was in the prevailing opinion of the Court in the *Doremus Case* that the principle was distinctly stated as already quoted, that Congress "may not in the exercise of federal power exert authority wholly reserved to the states".

THE OLEOMARGARINE CASE.

McCray vs. United States (195 U. S., 27), decided in 1904, is the case most frequently referred to by those who conceive that the decisions of this Court confirm the right of Congress to regulate, by the use of the taxing power, all activities of citizens, without reference to the police power of the states.

A careful and frank consideration, not necessarily of particular words, but of the reasons for the decision of that case, and of the circumstances of the case generally, is certainly not irrelevant: Congress had passed a statute, the effect of which was to levy a tax on oleomargarine, free from artificial coloration that would make it look like butter, at the rate of ¼ of a cent per pound, and on oleomargarine, artificially colored to look like butter, a tax of 10 cents per pound. The Court decided, first, that ordinarily, a tax imposed on the production of an article that is consumed is valid—tobacco taxes, sugar taxes, and other such taxes had been freely imposed and collected. The question of classification was then reached, and it was ascertained and declared that a classification whereunder one rate of tax was imposed upon colored oleomargarine, and another rate on uncolored oleomargarine, was not arbitrary and fanciful, but had a legitimate basis, considering the prices and profits at which the two different classes of articles could be sold. It would seem to us that this differential, or classification, is justified, just as was afterwards justified the differential or classification, as between wholesade and retail dealers for

purposes of taxation under a state statute, as declared in *Cook vs. Marshall County* (196 U. S., 261). The Court then came to the contention, made by the oleomargarine makers, that the statute was not intended to raise revenue, but was intended to prevent the sale of artificially colored oleomargarine, and that on that account this Court should hold that the statute was beyond the power of Congress. This contention, of course, involved going clean beyond what appeared on the face of the statute,—a tax of twice ten cents a pound on tobacco, is not prohibitive nor regulatory but only revenue-producing. The contention involved necessarily a consideration of facts of costs, selling values and competitive conditions in the business. Even going thus outside of the record, the oleomargarine makers by no means established in any admitted or conclusive way that this tax was, or was intended to be, prohibitive. To quote from the reported argument of the Solicitor-General, (page 41):

> "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, Manufactures, p. 3, Census Report, 1900, for summary of facts respecting the relative cost and value of butter and of 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."

That this argument by the Solicitor-General was sound is conclusively shown by subsequent results: For the year 1920, the revenue produced by the ten cent tax on colored oleomargarine was $1,194,720.17, and in 1921 was $921,192.25 (Annual Report of the Commissioner of Internal Revenue for the Fiscal Year Ending June 30, 1921, p. 23).

The statute was held valid by this Court, three Justices dissenting.

In the instant statute we do not have an attack on the validity of a statute dependent solely on the high rate of the tax imposed. We have no contention whose validity depends on bringing to the attention of the Court, otherwise than from the statute itself, facts to show that the statute is only regulatory, and not in truth a tax statute. In the present case we have no tax at all on a product and its volume of production or sale, but a simple congressional declaration that if an employer, for a single day, or with respect to a single child, violates the schedule showing the will of Congress as to the employment of children, he shall pay ten per cent. of the whole year's profits. The fiscal results of this statute, contrast also with those that followed the imposition of the oleomargarine tax: Many employers believe that this statute is altogether unconstitutional and invalid, and it has sometimes been embarrassing to general organization and working conditions for factories to employ boys between fourteen years of age and sixteen years of age at all, and not at sometime permit them to work more than eight hours per day. In

this way, in the completed fiscal years of the operation of the law—a period of a little more than two years, or from April 30, 1919, to June 30, 1921—the Internal Revenue Department, with an average staff of fifty employees for the enforcement of the child labor law, has collected the gross sum of $26,603.87 (Annual Report of the Commissioner of Internal Revenue for the Fiscal Year Ending June 30, 1921, p. 16). If it be assumed that the members of the staff receive annual salaries of $2,000, this collection of $26,603.87 has been at an expense of over $200,000.

POINT VI.

A general reconsideration of the elementary and basic principles upon which this government rests forces the conclusion that this statute is unconstitutional and invalid.

Cases such as this that involve great constitutional questions are not to be solved by an attempt to write out a legal formula that reconciles all preceding cases that have been decided. There inevitably is involved in the decision of such cases the quality of statesmanship as well as the qualities of a lawyer. Throughout the history of this Court, as of this country, there have appeared, from time to time, trends or tendencies of statutes and of decisions, one serving as a precedent for a next further step in the same direction,—and then there has come before the Court a case which, if decided in accordance with the theretofore existing trend or

tendency, would constitute, to quote a memorable phrase recently uttered by a member of this Court, the "step from the deck to the sea." *Hammer vs. Dagenhart* (*supra*) was one of those cases:

In the judgment of this Court the statute there condemned had gone beyond the line which under our Constitution must mark the limit to the theretofore increasing tendency and power of Congress to regulate everything and everybody under the Interstate Commerce Clause of the Constitution. *Western Union Telegraph Co. vs. Kansas* (*supra*), discussed in Point IV hereinbefore (pages 21 to 23) marked another turning point—this Court realized that the previous decisions made by this Court in recognition of the powers of the states to prevent foreign corporations from doing business in them respectively, and to adjust their systems of local taxation as they, the separate states, see fit, were leading to a *practical* condition that was intolerable. In the attempt by the Government to sustain this statute by extending, even by an inch, the doctrines asserted by it to be laid down in the *McCray Case,* the *Doremus Case* and the *Veazie Bank Case,* we are brought to a like practical situation.

What are the general and elementary principles that must be taken into account?

1. This is a federal government with a written constitution, and if any statute, federal or state, is not in accordance with that written constitution, it is the duty of this Court to declare such statute

void. That this is the law has not been judicially doubted since *Marbury vs. Madison.*

> "If written constitutions are to be regarded as of value, the duty of the Court is plain to uphold the constitution, although in so doing the legislative enactment falls. The reasoning in support of this was, in the early history of this Court, forcibly declared by Chief Justice Marshall in *Marbury vs. Madison* (1 Cranch, 137, 177), and nothing can be said to the strength of his reasoning." *Fairbank vs. United States* (181 U. S., 283, 285).

2. This is a federated government—"an indissoluble union of indestructible states"—and no state legislation is valid that encroaches upon the powers delegated to the union, and no federal legislation is valid that encroaches upon the powers reserved to the states. Inevitably the efficient exercise of a federal power may incidentally diminish, or otherwise affect, a state power; but if the encroachment be direct, and not incidental, then the federal statute is void.

> "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 vs. Oregon,* 7 Wall., 71, 76. The power of the states to regulate their purely internal affairs by such means as seem wise to the local

authority is inherent, and has never been surrendered to the national government" (*Hammer vs. Dagenhart, supra.*, p. 75).

"Both the states and the United States existed before the Constitution. The people, through that instrument, established a more perfect union by substituting a national government, acting, with ample power, directly upon the citizens, instead of Confederate government, which acted with powers, greatly restricted, only upon the states. But in many articles of the Constitution the necessary existence of the states, and within their proper spheres, the independent authority of the states, is distinctly recognized. To them nearly the whole charge of interior regulation is committed or left; to them and to the people all powers not expressly delegated to the national government are reserved" (*Lane County vs. Oregon,* 7 Wall., 71, 76).

"If the Constitution in its grants of powers is to be so construed that Congress shall be able to carry into full effect the powers granted, it is equally imperative that where prohibition or limitation is placed upon the power of Congress, that prohibition or limitation should be enforced in its spirit and to its entirety." (*Fairbank vs. United States,* 181 U. S., 283, 289.)

3. The enforcement of 'the constitutional limitations on the legislative powers of Congress or the

states, resolves itself always into a practical matter. It is quite impossible, by precise legal formula, to limit the extent of the police power of the states as opposed to the limitation of the Fourteenth Amendment; or to define the limitations on the power of Congress prescribed by the Due Process Clause; or to separate the proper functions of state and nation. After all is said and done, there remains the question of practical effect, and there must be a point, the location of which depends to some extent on the qualities and characteristics of statesmanship of the members of the Court, where the Court must say "Thus far and no farther."

4. The maxim of our law, first enunciated by Marshall, that the power to tax is the power to destroy, is not an admonition to the Courts to assume that every tax law passed by the sovereign power is valid; but it is an admonition to scrutinize carefully whether the power exists, because of the realization that, if it exists, it may be used to the extent of destruction.

> "The power to destroy which may be the consequence of taxation, is a reason why the right to tax should be confined to subjects which may be lawfully embraced therein, even although it happens that in some particular instance no great harm may be caused by the exercise of the taxing authority as to a subject which is beyond its scope." (*Knowlton vs. Moore,* 178 U. S., 41, 60).

This admonition ought to be effective, not only when consideration is given to possible confisca-

tory rates of taxation, but when consideration is given to the objects to be accomplished by the taxing power. The purpose and effect of this statute, beyond peradventure of doubt, are simply and solely to regulate matters entrusted to local authorities. If it is sustained, it is quite impossible to conceive how any statute labeled a taxing statute, passed by Congress to regulate business activities or even personal conduct, may ever be held unconstitutional. It is argued that this Court has concluded this case by some of its earlier decisions; but the distinction between this case and *McCray vs. United States* is far and away greater than any distinction that could be drawn between a decision of this Court confirming the validity of this statute and a case which involved a minimum wage statute, or an employees' pension statute, or a labor union or anti-labor union statute, or any of the countless other conceivable federal statutes which, being enacted, one by one, would transfer to the national authority the whole regulation of business and personal life.

5. It is true that this statute, if valid, leaves to the State of North Carolina the right to make a more drastic child labor law; and its existing child labor law is, as heretofore pointed out (page 16), in some respects more drastic and effective. The respective states in these internal matters, though, must, under the Constitution, and if our theory of a federated government is to be sustained, be free to *permit* its citizens to adopt a given course of conduct, as well as free to *forbid* its citizens to

adopt a certain course of conduct; and the citizen of the state must be free, as to these matters, to pay allegiance to, and obey the will of, *one* sovereign, the state, and not *two* sovereigns. This is by no means saying, as the liquor dealer attempted to argue in the *License Cases* (*supra*), that this right of the citizen, and right of the state, may not be incidentaly affected in order that the federal government may have requisite revenue. It is true, too, under the Eighteenth Amendment to the Constitution, that in matters connected with the liquor traffic, the citizen is subject to two sovereigns, the state and the nation. But in the relations that are here involved, and as against a statute as frankly regulatory as this is, the states have reserved to them in the Constitution the power to permit as well as to forbid, and the citizen the right to a proper and single control.

6. Even this Court may not declare a congressional enactment void because it is in the judgment of members of the Court unwise; there must be "juridical *un*constitutionality" and not simply "political *anti*-constitutionality," to warrant the Court holding a statute passed by Congress unconstitutional and void. This does not mean, though, that this Court must demonstrate the constitutionality or unconstitutionality of a statute by the application of a legalistic formula or distinction, such as might be very useful in disposing of the ordinary legal question. It does not mean, either, that this Court is to shut its eyes to every tendency of the times, or to every consideration of the effect on our institutions of the decision that it is called

upon to make. The decisions of this Court announced by John Marshall stopped the tendency toward magnification of the individual states, and if that tendency had not been stopped the nation would have been impotent. The present tendency is in the other direction, and the federal government is overloaded, while the states are being left to function hardly at all. In a thoughtful article recently called to our attention (we have lost the name of the author), tribute was paid to the principle of local self government in the following words:

> "The reverse of that principle is the danger signal flashed by history. Particularly in this country of great territorial extent, of urban concentration and rural paucity of population, of diversity of climate, natural conditions, resources, habits, occupations, economic circumstances and social interests, the perils of centralization in respect of affairs purely local in their nature and not those specifically and wisely delegated in the Constitution, are apparent from the lessons of the past. It is to the principle of local self-government that our country—if it is to remain one country—must look for political salvation, or look in vain."

In 1915, Senator Elihu Root, in his Princeton Lectures on the Constitution, gave significant expression to the same thought:

> "On the other hand, if the power of the nation would override that of the states and

> usurp their functions, we should have this vast country, with its great population, inhabiting widely separated regions, differing in climate, in production, in industrial and social interests and ideas, governed in all its local affairs by one all-powerful central government at Washington, imposing upon the home life and behavior of each community the opinions and ideas of propriety of distant majorities. * * *. Preservation of our dual system of government, carefully restrained in each of its parts, by the limitations of the Constitution, has made possible our growth in local self-government and national power in the past, and, so far as we can see, it is essential to the continuance of that government in the future."

7. The question before this Court in this case, then, is, whether a resort to the Commerce Clause of the Constitution having failed, Congress may, by a resort to the Tax Clause of the same instrument, control the entire police power of the states, and so open the door to the complete nationalization of our government, so ardently desired by some of the publicists of our day.

This is an interesting and important case, because upon its result depends the question whether the *Dagenhart Case,* and its decision, was a real, or merely a temporary and *pro forma,* assurance of the continuance unimpared of state authority over "matters purely local."

POINT VII.

The judgment of the District Court is right and should be affirmed.

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