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WHEN IS A TAX NOT A TAX?

By ROBERT C. BROWN*

The title of this article is an obvious plagiarism of a well-known conundrum, and like that conundrum, can only be answered by the use of a pun. However, it is a pun which has frequent, though usually unconscious, legislative and judicial recognition. Both of these branches of our governmental machinery not infrequently make use of the term “tax” when they actually mean something quite different.

The answer to this query, which this article will attempt to substantiate, is that a so-called tax which is not for the purpose of raising governmental revenue is, in fact, not a tax at all. This is not to say that a tax in the true sense may not have other purposes as well. Undoubtedly, a true tax may be used to effectuate moral ends and may even be intended to discourage the activities subjected to the tax. But if no substantial revenue is contemplated from a monetary exaction—that is to say that if it is expected to result in ending of the activity with respect to which it is imposed—the exaction is not a tax. If it is to be sustained at all, it must be sustained under some governmental power other than the taxing power.¹

But if this is true, the well-known dictum of Chief Justice Marshall that the power to tax involves the power to de-

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¹ Cf. the argument of counsel in McCray v. United States, 195 U. S. 27 (1904), at 36.
stroy,” is unsound. This idea, though occasionally restated by the Court, is obviously inconsistent with the theory just stated, that a true tax is justified only for the purpose of revenue. It may well be that a governmental exaction may in fact be disastrous to the activity against which it is charged and may therefore, result in little or no revenue, and still it be a tax. If, however, the original purpose is the destruction of such activity, with the consequent intention that no revenue actually will be obtained, the exaction is not believed to be properly a tax.

The Supreme Court has, at least in recent years, recognized that the broad statement of Chief Justice Marshall must be at least somewhat limited. Thus, in *Knowlton v. Moore,* a case sustaining the power of the federal government to levy an inheritance tax, the Court said

“This distinction shows the inapplicability to the case in hand of the statement made by Mr. Chief Justice Marshall in *McCulloch v. Maryland,* 4 Wheat. 316, 431, ‘that the power to tax involves the power to destroy.’ This principle is pertinent only when there is no power to tax a particular subject, and has no relation to a case where such right exists. In other words, 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. But this reasoning has no application to a lawful tax, for if it had there would be an end to all taxation, that is to say if a lawful tax can be defeated because the power which is manifested by its imposition may when further exercised be destructive, it would follow that every lawful tax would become unlawful, and therefore no taxation whatever could be levied.”

It must be conceded that this language still recognizes the possibility of a confiscatory tax, though the particular tax involved was far from being such. But Mr. Justice Holmes,

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2 *McCulloch v. Maryland,* 4 Wheat. 316 (1819) at 431.
3 See e.g. *United States v. Railroad Co.*, 17 Wall. (U. S.) 322 (1872), at 327-8.
5 178 U. S. 41 (1900).
6 178 U. S. 60.
at least, has recognized the fundamental unsoundness of this famous but rather ill-considered statement of Chief Justice Marshall, by flatly denying it in the following language

"The power to tax is not the power to destroy, while this Court sits."\(^7\)

While this statement was made in a dissenting opinion, its truth will be demonstrated by a consideration of a number of decisions of the Federal Supreme Court itself, where a so-called "tax" was invalidated because confiscatory, and therefore not really a tax. The power to tax is not the power to destroy, because destruction of the thing or activity taxed means destruction of revenue, which it is the primary purpose of a tax to produce.

But before considering the cases directly on the point, it may be worth while to touch upon one or two allied points, though only for the purpose of eliminating them from detailed consideration. The first of these is the rule that a tax must be for a public purpose.\(^8\) The rule is clearly settled, though its application is often uncertain. It is entirely clear that this concept of a public purpose is rapidly expanding at the present time.\(^9\) But in any event the rule does not materially assist the thesis of this article, for it must be freely admitted that destruction of certain activities may undoubted-ly be for the public benefit, and therefore a public purpose. The obtaining of revenue is an important, but by no means the only, function of a government. The point that is made here is that revenue is the essential purpose of the *taxing* function.

Growing out of this is the undoubted proposition that the states, at least, may regulate and, indeed, distinctly discourage certain activities through their taxing power. A state exaction may be sustained both as a license under the police

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\(^7\) Panhandle Oil Co. v. Mississippi, 277 U. S. 218 (1928), at 223.

\(^8\) The leading case is Loan Association v. Topeka, 20 Wall. (U. S.) 655 (1874).

\(^9\) See note in (1928) 41 Harv. L. R. 775, "State and Municipal Excursions into Business as Public Purposes under the Taxing Power."
power and a tax;\textsuperscript{10} but even here it is generally held that if
the primary purpose is regulation rather than revenue, the
exaction is actually an exercise of the police power of the
state rather than its power to tax,\textsuperscript{11} and this, even though
the tax machinery is availed of in its collection.\textsuperscript{12} Such exac-
tions are not subject to constitutional limitations upon taxa-
tion. Furthermore, while it is clear that the states may not
directly tax interstate commerce, they may impose a license
fee upon those engaged solely in such commerce, provided
the fee is not substantially in excess of the cost to the state
for the necessary supervision in the interest of public order
and safety\textsuperscript{13} If, however, the assumed license fee is clearly
in excess of such cost of supervision, it will be regarded as
a tax and therefore unconstitutional, as a burden on inter-
state commerce.\textsuperscript{14}

There is not infrequently language to be found in court
decisions that a state may go farther; that it may actually
impose a confiscatory tax and, therefore, destroy the activity,
which is thus taxed.\textsuperscript{15} It is believed, however, that no case
—at least no modern case—will be found where the so-called
tax which was sustained, was itself actually confiscatory\textsuperscript{16}
It is clear that a tax may be burdensome and still produce
substantial revenue, or at least be intended to. At any rate,
the Supreme Court of Georgia has directly decided that an
express power given to a city by its charter to tax money
lenders, does not include the power to impose a prohibitive
tax\textsuperscript{17}—which fits in exactly with the thesis of this article.

\textsuperscript{10} Gundling v. Chicago, 177 U. S. 183 (1900).
\textsuperscript{11} Indianapolis v. Bieler, 138 Ind. 30, 36 N. E. 357 (1893), State v. An-
derson, 144 Tenn. 564, 234 S. W 768 (1920). Cf. License Tax Cases, 5.
Wall. (U. S.) 462 (1866), holding, that Congress may impose an excise tax
upon activities within a state which are prohibited by the local law.
\textsuperscript{12} Mitchell v. Williams, 27 Ind. 62 (1866).
\textsuperscript{13} Atlantic & Pacific Telegraph Co. v. Philadelphia, 190 U. S. 160 (1903).
\textsuperscript{14} Postal Telegraph Co. v. Taylor, 192 U. S. 64 (1904).
\textsuperscript{15} Probably the strongest language of this sort is that of Mr. Justice Car-
dozo in Fox v. Standard Oil Co., 294 U. S. 87 (1935), at 99-100. See also
Erwin v. Omaha, 118 Neb. 331, 224 N. W 692 (1929).
\textsuperscript{16} In both of the cases cited in note 15, \textit{supra}, the court expressly states that
the tax was not actually confiscatory, or at least was not proved to be so.
\textsuperscript{17} Morton v. Macon, 111 Ga. 162, 36 S. E. 627 (1900).
Nevertheless, the cases involving state exactions which bear upon the exact point of this article are comparatively rare. The reason for this has already been stated—namely, that the states have very broad police powers in addition to their taxing powers, so that if a particular monetary exaction cannot be sustained as a tax, it may nevertheless be sustained under the police power. Even if the exaction is clearly prohibitive, it may nevertheless fall within the police power, unless it is clear that the activity at which it is directed is inherently so innocent that it cannot be driven out by the state. Consequently, it is rarely essential for the state to justify the exaction solely under the taxing power, and the courts, not unnaturally, tend in their decisions to confuse the police power and the taxing power. They will talk of a "prohibitive tax" not really as an adjudication that there actually is such a thing, but rather as a decision that the state is justified in driving out the particular activity involved. The courts often reach such decisions without paying too much regard to what particular power is exercised by the state in doing so.

But with the federal government the situation is quite different. It is fundamental in our constitutional law that the powers of that government, while enormous, are nevertheless limited. It is not very realistic to say, as is sometimes done, that the federal government has no police powers, for it may clearly exercise its admitted powers for ends of public morals and safety, which are the basis of the police powers of the states. Nevertheless, the federal government has no general police powers, that is to say, it has no powers to protect public welfare, except within the bounds of its particular powers granted expressly or impliedly by the Constitution. On the other hand, it has what may be regarded for our purposes as general taxing powers; there are, of course, limitations, but such limitations are not of concern in this connection. The problem of this article is therefore frequently presented in connection with federal monetary exactions. If a so-called federal tax cannot be sustained under the federal taxing power, it is ordinarily unjustifiable. As will appear hereafter, it will sometimes happen that a federal monetary
exaction which cannot be sustained as a tax, will fall under some other power of the federal government; but the frequent state recourse to a general police power is denied to the federal government. Therefore, generally speaking, a federal tax must be a tax in the true sense, or it is unconstitutional.

Perhaps a good case to mark a transition to the problem of the federal taxing powers is *Alaska Fish Co. v. Smith.*\(^1\) Here the question was the validity of a tax imposed by the Territory of Alaska. The problem is thus really more comparable with a state tax, though the Court quite naturally treated it as involving some implications of the federal taxing power. The tax was on the manufacturing of fertilizers from fish, and was quite heavy, though probably not prohibitive. Mr. Justice Holmes, speaking for a unanimous Court, claimed that the argument that the tax was prohibitive was unsustained in fact. But this in itself weakens his subsequent statement that "Even if the tax should destroy a business it would not be made invalid or require compensation upon that ground alone. Those who enter upon a business take that risk."\(^1\)

Obviously that statement is not contrary to the thesis of this article. In the first place, the Court found that the tax was not in fact ruinous to the industry, even though it discouraged it and was intended to do so. Furthermore, it does not appear that even if the tax turned out to be prohibitive, it was intended so to be. It is probable that a tax which is unintentionally prohibitive is still a tax, though probably not a very wise one.

There is no doubt, however, that a so-called tax imposed by the federal government is sustainable, even though it is very burdensome.\(^2\) A distinct example of this is the federal tax on the sale of theater tickets outside the box-office, of five per cent of the excess over the box-office price, if that excess be not over fifty cents, or of fifty per cent of the excess, if such excess exceeds fifty cents. In a test of this tax, the court

\(^1\) 255 U. S. 44 (1921).
\(^2\) 255 U. S. 48.
\(^2\) Flint *v.* Stone Tracy Co., 220 U. S. 107 (1911).
held this an excise tax and not confiscatory, although the very terms of the Act showed that it would not be impossible to sell profitably at a figure above the box-office price, of more than fifty cents or less than a dollar; though a person might still sell at an excess of more than a dollar. It was also held that the undoubted fact that Congress intended to discourage such ticket-scalping activities was not material.\textsuperscript{21}

But notwithstanding all this, there are a number of cases in the Supreme Court where federal statutes purporting to impose taxes have been invalidated because of the fact that the plain purpose was not to impose taxes at all, but actually to exercise some regulatory power not within the scope of the authority of the federal government. The first group of these cases concerns federal liquor taxes.

Previous to the enactment of the Eighteenth Amendment there could be no dispute with respect to federal liquor taxes, at least on this ground. The federal government imposed many and heavy taxes, but the principal and, indeed, substantially the sole purpose was revenue—which was at all times very large. In fact it was held that the manufacturing and sale of liquor in territory where it was illegal by local statutes, was nevertheless subject to federal taxation.\textsuperscript{22}

With the passage of the Eighteenth Amendment the situation changed. The federal government then had police power with respect to the manufacture and sale of liquors—in fact the power and duty to prohibit such activities. This power was exercised and this duty fulfilled by the enactment of the Volstead Act. Section 35 of this Act provided that anyone making an illegal sale of liquor (which had been denounced as a crime by previous sections of the Act)\textsuperscript{23}

\begin{footnotes}
\textsuperscript{21}Alexander Theater Ticket Office v. United States, 23 F (2d) 44 (C. C. A. 2nd, 1927). This case was followed in McKenna v. Anderson, 31 F (2d) 1016 (C. C. A. 2nd, 1929), \textit{cert. den.} 279 U. S. 869 (1929).

\textsuperscript{22}License Tax Cases, 5 Wall. (U. S.) 462 (1866).

\textsuperscript{23}It was held in United States v. Yuginovich, 256 U. S. 450 (1921) that Congress might continue to tax sales of liquor even though such sales were made illegal by the Volstead Act. The Court said (p. 462), "The fact that the statute in this aspect had a moral end in view as well as the raising of revenue, presents no valid constitutional objection to its enactment."
\end{footnotes}
should also pay double the regular Internal Revenue tax, plus
a penalty of $500 upon retailers and $1,000 upon manufac-
turers. The problem in *Lipke v. Lederer*\(^2^4\) was whether this
provision for a double tax, like the provisions for specific
penalties, was itself a penalty rather than a tax. The Court
so held, on the ground that the obvious purpose of this ex-
action was to further punish the illegal manufacture and sale
of liquor (and thereby discourage it) rather than to obtain
revenue thereby. The result was that this double tax could
not be collected by distraint, as it could have been had it
really been a tax.

The doctrine of this case was followed in *United States v. La
Franca*,\(^2^5\) where Mr. Justice Sutherland, speaking for
a unanimous Court, said.

> "By Section 35, *supra*, it is provided that upon evidence of an illegal
sale under the National Prohibition Act, a tax shall be assessed and
collected in double the amount now provided by law. This, in reality,
is but to say that a person who makes an illegal sale shall be liable to
pay a 'tax' in double the amount of the tax imposed by pre-existing law
for making a legal sale, which existing law renders it impossible to
make. A tax is an enforced contribution to provide for the support of
government; a penalty, as the word is here used, is an exaction im-
posed by statute as punishment for an unlawful act. The two words
are not interchangeable, one for the other. No mere exercise of the
art of lexicography can alter the essential nature of an act or a thing;
and if an exaction be clearly a penalty it cannot be converted into a
tax by the simple expedient of calling it such."\(^2^6\)

It is obvious, of course, that a penalty may be used as ma-
chinery for collecting a tax as well as for other governmental
purposes, but these opinions show clearly that a penalty is
itself not a tax. The obvious reason, of course, is that a pen-
alty is not for the purpose of obtaining revenue (though it
may in fact produce some trifling amount of revenue). The
purpose is to compel obedience to the law, and to the extent
that this is successful, no penalties will be imposed and no
revenue thus obtained. Even if the penalties are part of a

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\(^2^4\) 259 U. S. 557 (1922).
\(^2^5\) 282 U. S. 568 (1931).
\(^2^6\) 282 U. S. 572.
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When a tax law, their purpose is to compel the payment of the tax, and thus to obtain the revenue from the tax itself and not from the penalty.

But in 1933 the Eighteenth Amendment was repealed, and the federal powers with respect to liquor, except the taxing power, went with it. However, Congress in an effort to assist dry states to enforce their laws attempted to impose a special tax of $1,000 on anyone selling liquor in prohibition territory. This so-called tax was in addition to the regular internal revenue taxes imposed upon all sales of liquor, whether in dry or wet territory. The Supreme Court, in United States v. Consantine, held this so-called tax unconstitutional as a penalty rather than a tax. The majority of the Court, speaking by Mr. Justice Roberts, said that even on the face of the statute the exaction was a penalty, because it was so large, and because it applied only to such sales as are illegal by local law. As to the matter of motive, the Court said.

"Reference was made in the argument to decisions of this Court holding that where the power to tax is conceded the motive for the exaction may not be questioned. These are without relevance to the present case. The point here is that the exaction is in no proper sense a tax but a penalty imposed in addition to any the state may decree for the violation of a state law. The cases cited dealt with taxes concededly within the realm of the federal power of taxation. They are not authority where, as in the present instance, under the guise of a taxing act the purpose is to usurp the police powers of the state." 27

The dissenting opinion, written by Mr. Justice Cardozo and concurred in by Justices Brandeis and Stone, does not seem to dispute this reasoning, but asserts that a higher tax may be justified in a prohibition territory, because presumably it will there be more difficult to collect any tax at all. However this may be, the case is a clear authority that a so-called tax which is intended to prohibit the activity against

28 296 U. S. 296.
which it is levied, is not really a tax at all, and cannot be imposed by the federal government unless justified under some other of its powers.

The second category of federal cases involving this problem directly, are those relating to so-called taxes on the sale of grain in exchanges. Of this the leading case is *Hill v. Wallace*, which held unconstitutional a tax of twenty cents a bushel on "grain futures," except where the seller actually owned the grain, or where the transaction was approved by an administrative body, to be designated by the Secretary of Agriculture. The tax was very clearly prohibitive, but Mr. Chief Justice Taft, who wrote the opinion for the Court, does not put much emphasis upon this. The Court assumes to rely upon the very terms of the Act as showing that it was intended for purposes of regulation rather than revenue, especially the title, which included "providing for the regulations of boards of trade." It cannot be doubted, however, that the extremely prohibitive nature of the tax had a considerable bearing. The Court was unanimous in invalidating the statute, though Mr. Justice Brandeis, in a separate opinion, expressed some doubt as to the right of the particular plaintiff to bring the action.

*Hill v. Wallace* contains a dictum that a similar tax imposed by the same statute on puts, calls, etc., is probably valid. This dictum, however, was repudiated a few years later in *Trusler v. Crooks*.

Here a unanimous Court, speaking through Mr. Justice McReynolds, held that this so-called excise tax was also unconstitutional. The Court had perhaps not much difficulty in reaching this conclusion, since the attorneys for the government practically conceded that, in their opinion, this part of the Act was also unconstitutional. It is to be noted, however, that the only possible ground for invalidating this tax is not that it was regulatory on its face, but rather that it was so plainly prohibitive in amount that no such activity could possibly be carried on, and therefore no revenue could be obtained. The Court occasionally insists that it will not invalidate what purports to

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29 259 U. S. 44 (1922).
30 269 U. S. 475 (1926).
be a tax merely because it is excessive;\textsuperscript{31} but this case shows that it will, if the excess is sufficient to demonstrate that no substantial revenue is to be received from it.

Next, and undoubtedly the most important, at least until recently, are the child labor cases. Congress has for some years been endeavoring to prohibit child labor; an undoubtedly desirable endeavor, but one which seems to be outside the powers of the federal government, at least without a constitutional amendment.

Balked by the Supreme Court in an endeavor to accomplish this purpose through the power to regulate interstate commerce,\textsuperscript{32} Congress turned to its taxing power and passed a statute which endeavored to put an end to child labor in the states, through imposing a tax of ten per cent of the net income of any employer of child labor. It is not perhaps entirely clear that such a tax would actually be prohibitive, though considering the fact that many states already had strict child labor laws, it would probably have been sufficient to have removed the present discrimination in favor of states having less advanced laws of this type, or no laws at all, and thereby to have largely, if not completely, put an end to this activity.

Undoubtedly, however, Congress was somewhat too frank in showing by the terms of the Act that it was intended as merely regulatory. For instance, it was provided that the tax would not be imposed where the employer was not aware that the employee was a child below the age for which employment was subject to the tax.

The question of the constitutionality of this so-called tax came before the Supreme Court in the so-called Child Labor Tax case.\textsuperscript{33} Here again the praise-worthy purpose of Congress was defeated, the Court holding that the statute was not really a tax act, but was rather a regulation in a matter not within the federal powers. With reference to the clauses of the Act, which showed clearly that the Act was intended

\textsuperscript{31} See Stewart Dry Goods Co. v. Lewis, 294 U. S. 550 (1935), which will be considered hereafter.

\textsuperscript{32} Hammer v. Dagenhart, 247 U. S. 251 (1918).

\textsuperscript{33} 259 U. S. 20 (1922).
to be regulatory,\textsuperscript{34} the Court, speaking by Mr. Chief Justice Taft, said

"In the light of these features of the act, a court must be blind not to see that the so-called tax is imposed to stop the employment of children within the age limits prescribed. Its prohibitory and regulatory effect and purpose are palpable. All others can see and understand this. How can we properly shut our minds to it?"\textsuperscript{35} 

The Chief Justice also considers the problem in its more fundamental aspects, in the following language

"The difference between a tax and a penalty is sometimes difficult to define and yet the consequences of the distinction in the required method of their collection often are important. Where the sovereign enacting the law has power to impose both tax and penalty the difference between revenue production and mere regulation may be immaterial, but not so when one sovereign can impose a tax only, and the power of regulation rests in another. Taxes are occasionally imposed in the discretion of the legislature on proper subjects with the primary motive of obtaining revenue from them and with the incidental motive of discouraging them by making their continuance onerous. They do not lose their character as taxes because of the incidental motive. But there comes a time in the extension of the penalizing features of the so-called tax when it loses its character as such and becomes a mere penalty with the characteristics of regulation and punishment."\textsuperscript{36} 

Much of the rest of the opinion is taken up with distinguishing other cases where the Court had sustained federal taxes having somewhat similar regulatory purposes. These cases will be considered later on. It is evident, however, that the Child Labor Tax Case determines the law as enunciated by the Federal Supreme Court, that a so-called tax which is intended merely to regulate or prohibit the activity purporting to be taxed, is not a tax at all.

Any lingering doubt that the Court might not adhere to this doctrine would seem to be removed by the very recent case of United States v. Butler\textsuperscript{37} This case held unconstitutional the so-called processing and floor-stock taxes imposed

\textsuperscript{34} E. g., the clause, already referred to, exempting an "innocent" employer.  
\textsuperscript{35} 259 U. S. 37.  
\textsuperscript{36} 259 U. S. 38.  
\textsuperscript{37} 56 Sup. Ct. 312 (1936).
by the Agricultural Adjustment Act (popularly known as the A. A. A.) These taxes (at least the processing tax) were clearly intended as excise taxes, and as such seemed clearly within the taxing power of the federal government. Furthermore, they are not on their face excessive, and appear to be very far from prohibitive in their rates.

The objection which the majority, speaking by Mr. Justice Roberts, found to these taxes was that all the proceeds thereof were ear-marked to be paid to farmers who would sign contracts with the federal government to restrict their acreage in accordance with the directions of the Secretary of Agriculture. It cannot be denied that the federal government would, and actually did, receive substantial revenue from these taxes, but the difficulty was that these receipts were to be handed over in full to the farmers signing such contracts, the government acting essentially as a conduit of title, or at the most as a trustee. Furthermore, the Court considered that while the tax itself was not prohibitive, the federal government was, through this expedient, essentially regulating agriculture in the states, in view of the fact that economic pressure would force practically all farmers to sign such contracts in order to receive the benefits provided in the Act. And the Court held that the federal government has no authority to regulate agriculture within the states.

As to the ultimate soundness of this decision, there may well be a question, especially in view of the vigorous dissenting opinion by Mr. Justice Stone, in which Justices Brandeis and Cardozo concurred. We are concerned only with the strictly tax aspects of the decision, and indeed not in all of these; for the Court considered at some length the relation of the general taxing power of the federal government to the so-called "general welfare" clause of the Constitution, and held, or at least purported to hold, that the broad power of taxation granted to Congress by that clause is not limited by other grants of legislative power. Here, too, we have no direct concern, we are interested only in what the Court says as to the exact nature of a tax, as distinguished from an exercise of an assumed power to regulate. But there is plenty on this exact point.
Thus, Mr. Justice Roberts, in speaking of the Agricultural Adjustment Act, says

"The statute not only avows an aim foreign to the procurement of revenue for the support of government, but by its operation shows the exaction laid upon processors to be the necessary means for the intended control of agricultural production."\textsuperscript{38}

And again, speaking more directly of the processing tax, he says

"It is inaccurate and misleading to speak of the exaction from processors prescribed by the challenged act as a tax, or to say that as a tax it is subject to no infirmity. A tax, in the general understanding of the term, and as used in the Constitution, signifies an exaction for the support of the government. The word has never been thought to connote the expropriation of money from one group for the benefit of another. We may concede that the latter sort of imposition is constitutional when imposed to effectuate regulation of a matter in which both groups are interested and in respect of which there is a power of legislative regulation. But manifestly no justification for it can be found unless as an integral part of such regulation. The exaction cannot be wrested out of its setting, denominated an exercise for raising revenue, and legalized by ignoring its purpose as a mere instrumentality for bringing about a desired end. To do this would be to shut our eyes to what all others than we can see and understand. Child Labor Tax Case, 259 U. S. 20."\textsuperscript{39}

Also it may be worth while to quote the following more general, but for our purposes extremely pertinent, observations

"The power of taxation, which is expressly granted, may, of course, be adopted as a means to carry into operation another power also expressly granted. But resort to the taxing power to effectuate an end which is not legitimate, not within the scope of the Constitution, is obviously inadmissible."\textsuperscript{40}

It may be conceded that the foregoing language does not necessarily decide the case. It may still be questioned, as indeed the dissenting judges do question most emphatically,
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whether it is pertinent with respect to the processing tax itself. Nevertheless, they are far from dicta, for they are all necessary steps in the reasoning of the Court in reaching its decision. And it is apparent that such language enunciates the thesis already stated in this article, that a so-called tax which is intended to penalize or prohibit the activity at which it is directed and which, therefore, does not contemplate any substantial revenue, is really not a tax at all, in a manner which could hardly be more emphatically and completely stated.

Furthermore, as already indicated, the dissenting opinion does not seem to dispute the soundness of the language which has been quoted from the majority opinion, it rather disputes the application of such principles to the processing tax. Thus, Mr. Justice Stone says in the dissenting opinion with reference to the argument with respect to the impropriety of the regulation

"Here regulation, if any there be, is accomplished not by the tax, but by the method by which its proceeds are expended, and would equally be accomplished by any like use of public funds, regardless of their source."41

He further argues that the regulation to which the majority objects is merely incident to the tax, and therefore unobjectionable. In connection with the argument of the majority on this point, he says

"The only conclusion to be drawn is that results become lawful when they are incidents of those powers but unlawful when incident to the similarly granted power to tax and spend."42

It will be noted that the issue seems to be on a point not within the scope of this article. The dissenting judges may not feel as strongly on the proposition as do those whose opinion prevailed, but they also seem to concede that a tax, the sole purpose of which is to regulate and not to earn revenue, is not really a tax.

41 56 Sup. Ct. 325.
42 56 Sup. Ct. 327.
If this were all, the argument might end at this point, though it would perhaps be subject to the criticism that rather hard work has been made of a perfectly simple and apparently indisputable matter. But of course this is not all. There are a number of Supreme Court decisions which are actually, or at least apparently, in direct conflict with the thesis already put forth in this article and so emphatically stated in the cases already cited, especially the Butler case. These cases uphold federal taxes which were, or at least seemed to be, intended solely to drive out the activities subjected to tax, and in some cases, at least, actually did so. It follows that little, if any, revenue was expected to be derived, or in fact was derived, from these so-called taxes. If these decisions mean what they say, a tax which is not intended for revenue is still a tax, and the power to tax is still the power to destroy—and in fact has been used for that purpose. Such cases must, therefore, be carefully considered.

Perhaps not much attention need be paid to mere general statements of the Supreme Court indicating that it will uphold as a tax an exaction which is prohibitive and, therefore, not intended for revenue purposes. There are, perhaps, many such statements, but they are not really decisive, unless the actual decision is to this effect.

Typical of such general statements and perhaps worth quoting because it is so very recent, is the following excerpt from the opinion of Mr. Justice Roberts, speaking for the majority of the Court in Stewart Dry Goods Co. v. Lewis.43

"To condemn a levy on the sole ground that it is excessive would be to usurp a power vested not in the court but in the legislature, and to exercise the usurped power arbitrarily by substituting our conceptions of public policy for those of the legislative body. In Veazie Bank v. Fenno, 8 Wall. 533, a tax of ten per cent on the notes of state banks was upheld although it 'drove out of existence every State bank of circulation within a year or two after its passage.' See Loan Association v. Topeka, 20 Wall. 655, 663, 664. In Knowlton v. Moore, 178 U. S. 41, in sustaining an excise tax this court said, 'if a lawful tax can be defeated because the power which is manifested by

its imposition may when further exercised be destructive, it would follow that every lawful tax would become unlawful, and therefore no taxation whatever could be levied.' (P 60) * * Once the lawfulness of the method of levying the tax is affirmed, the judicial function ceases. He deludes himself by a false hope who supposes that, if this court shall at some future time conclude the burden of the exaction has become inordinately oppressive, it can interdict the tax.""44

This language sounds rather surprising in view of the language of the same Judge, which has already been quoted from United States v. Butler 45 Furthermore, the decision of the Court had the effect of invalidating a Kentucky tax on sales, simply because it was at varying rates according to the gross business of the retailer. This was held to be a denial of equal protection of the laws. Since the maximum rate was only one per cent on the sales, the decision seems rather narrow, and the author is inclined to concur in the dissenting opinion of Mr. Justice Cardozo, that the tax is distinctly reasonable. However this may be, a court statement that a tax cannot be invalidated because it is prohibitive, but that it can be invalidated because of a very limited classification of rates, with a maximum of one per cent, does not seem worthy of being taken too seriously

We turn, then, to cases which actually or purportedly do sustain a tax, notwithstanding that it is prohibitive or otherwise plainly not for revenue purposes. And of these the first, though the easiest to dispose of, is Veazie Bank v. Fenno,46 cited in the excerpt from Mr. Justice Robert's opinion in Stewart Dry Goods Co. v. Lewis, above.

Veazie Bank v. Fenno sustained the validity of a federal tax of ten per cent on notes intended to circulate as money issued by state banks. The tax was prohibitive, and was so intended, in fact, it very promptly brought about the desired result of absolutely ending all such issues of state banks.47

44 294 U. S. 562-3.
45 56 Sup. Ct. 312 (1936). Cf.. Trusler v. Crooks, 269 U. S. 475 (1926), where the Supreme Court invalidated a purported tax, apparently on the sole ground that it took judicial notice that the tax was prohibitive in rate.
46 8 Wall. (U. S.) 533 (1869).
In meeting the argument that the tax was so excessive as to evidence an intent by Congress to destroy the state banks, or at least this particular function of such state banks, the majority of the Court, speaking by Mr Chief Justice Chase, made two answers. The first of these is as follows

"The first answer to this is that the judicial cannot prescribe to the legislative departments of the government limitations upon the exercise of its acknowledged powers. The power to tax may be exercised oppressively upon persons, but the responsibility of the legislature is not to the courts, but to the people by whom its members are elected. So if a particular tax bears heavily upon a corporation, or a class of corporations, it cannot, for that reason only, be pronounced contrary to the Constitution."\(^{48}\)

This language is certainly contrary to the thesis of this article, at least as it applies to the very case before the Court—that is, a so-called tax which is not merely burdensome but actually and intentionally prohibitive. But the Court gave another reason for rejecting this argument of the taxpayer, which is submitted to be the real one. This answer is summarized in the following language

"Having thus, in the exercise of undisputed constitutional powers, undertaken to provide a currency for the whole country, it cannot be questioned that Congress may, constitutionally, secure the benefit of it to the people by appropriate legislation. To this end, Congress has denied the quality of legal tender to foreign coins, and has provided by law against the imposition of counterfeit and base coin on the community. To the same end, Congress may restrain, by suitable enactments, the circulation as money of any notes not issued under its own authority. Without this power, indeed, its attempt to secure a sound and uniform currency for the country must be futile."\(^{49}\)

This indicates that *Feazi Bank v. Fenno* is easily made consistent with the thesis of this article. The so-called tax in that case was not really a tax; it was merely a method, though perhaps a rather clumsy one, of exercising the broad currency powers of Congress by driving out the notes of state banks as a circulating medium. The completeness and dras-

\(^{48}\) 8 Wall. 548.

\(^{49}\) 8 Wall. 549.
ticness of the Congressional powers with respect to currency has been recently and clearly restated by the Court.\textsuperscript{50} It follows that if Congress had passed a statute expressly prohibiting the circulation of state bank notes, such a statute would have been entirely constitutional. The only point of \textit{Veazie Bank v. Fenno} is that such prohibition may formally be accomplished through the method of imposing a prohibitive tax; but this is still not really a tax.

More troublesome are the oleomargarine cases. Here we have interesting cases involving both state and federal taxes; but so far as the federal tax is concerned, it seems clear that, unlike a so-called tax with respect to currency, it must be sustained as a tax or it cannot be sustained at all.

The earliest case relating to the federal statutes was \textit{In re Kollock},\textsuperscript{51} where the Court, in deciding certain questions of administration in connection with the law, stated incidentally that the law is on its face one for levying taxes and must be assumed to be for the purpose of raising revenue. Certainly no objection can be made to this. But it becomes necessary to examine the terms of the law somewhat more fully. This can best be done in connection with \textit{McCray v. United States}.\textsuperscript{52}

The case just mentioned is undoubtedly the leading case with respect to the federal oleomargarine tax. The tax was ten cents a pound on colored oleomargarine, and only one-fourth of a cent on uncolored oleomargarine. The tax on colored oleomargarine was concededly prohibitive, its purpose was obviously to protect dairy farmers by preventing the sale of oleomargarine colored to look like butter. The opinion of the Court was by Mr. Justice White. Three members of the Court dissented, but no dissenting opinion was written.

The opinion starts with the contention that the Act on its face imposes an excise tax, and goes on to say that if the Legislature abuses its powers of taxation, the invalidation of such abuse by the judiciary would be an abuse by the judiciary of its powers. This looks somewhat like an early statement of a very curious idea of Mr. Justice White, that the Fifth

\textsuperscript{51} 165 U. S. 526 (1897).
\textsuperscript{52} 195 U. S. 27 (1904).
Amendment to the Constitution is no check upon the federal taxing powers; an idea which is absurd on its face and is now thoroughly repudiated. It fits in, however, with his reference in the opinion to Chief Justice Marshall's theory that "the power to tax involves the power to destroy"

The argument is perhaps well summed up in the following language

"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 that on their face they levy an excise tax. That being their necessary scope and operation, it follows that the acts are within the grant of power. The argument to the contrary rests on the proposition that, although the tax be within the power, as enforcing it will destroy or restrict the manufacture of artificially colored oleomargarine, therefore the power to levy the tax did not obtain. This, however, is but to say that the question of power depends, not upon the authority conferred by the Constitution, but upon what may be the consequence arising from the exercise of the lawful authority."

"Since, as pointed out in all the decisions referred to, the taxing power conferred by the Constitution knows no limits except those expressly stated in that instrument, it must follow, if a tax be within the lawful power, the exertion of that power may not be judicially restrained because of the results to arise from its exercise."

Such language obviously represents the same confusion between a very high and burdensome tax, which is usually unwise but is nevertheless still a tax, and a prohibitive tax. A somewhat similar confusion is evidenced in the following statement

"It hence results, that even although it be true that the effect of the tax in question is to repress the manufacture of artificially colored oleomargarine, it cannot be said that such repression destroys rights which no free government could destroy."

No doubt a "free government" can prohibit or at least severely limit the manufacture and sale of oleomargarine,

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63 Mr. Justice White, after becoming Chief Justice, stated clearly this theory, in Billings v. United States, 232 U. S. 261 (1914), and in Brushaber v. United States, 240 U. S. 1 (1916).
64 195 U. S. 59.
65 195 U. S. 63.
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particularly when it is so colored as to be easily mistaken for butter; but it hardly follows that the federal government, lacking as it does general police powers, has any such authority. It is possible that the doctrine of the McCray case can be justified as a regulation of interstate commerce to prevent fraud upon consumers, but this is at least very doubtful. It seems impossible to deny that this case is an authority to the effect that a prohibitive tax, though obviously not intended to produce revenue, is nevertheless a tax and within the federal taxing power.

Several recent cases involve somewhat similar state taxes on oleomargarine, and are of interest not only as such, but also as throwing light on the Court's present view with respect to the federal tax. It seems to be settled that a state may absolutely prohibit the manufacture of oleomargarine.\(^5\) Therefore, on the same reasoning as before in connection with the tax on state bank notes, a state might carry out this power by imposing a prohibitive tax without it being a tax in fact.

However, in the recent case of Magnano Co. v. Hamilton,\(^6\) the Court sustained a Washington tax of fifteen cents a pound on oleomargarine as a tax, although such an exaction is clearly prohibitive. Mr. Justice Sutherland, speaking for a unanimous Court, closed his opinion as follows

"From the beginning of our government, the courts have sustained taxes although imposed with the collateral intent of effecting ulterior ends which, considered apart, were beyond the constitutional power of the lawmakers to realize by legislation directly addressed to their accomplishment. Those decisions, as the foregoing discussion discloses, rule the present case."\(^7\)

Since the McCray case was cited in this opinion with approval, and its reasoning was followed, it must still be regarded as in good standing; and the result would seem to be that most prohibitive taxes are not taxes, but a prohibitive tax on oleomargarine is still a tax. But that the Court

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\(^6\) 292 U. S. 40 (1934).
\(^7\) 292 U. S. 47.
does not entirely disregard the anomalousness of this result is indicated by *Glenn v. Field Packing Co.*,\(^{59}\) where a Kentucky tax of ten cents a pound on the sale of oleomargarine was held invalid under the law of the state because, as the District Court said, it "was in reality a prohibition on the sale of oleomargarine in Kentucky, and hence was invalid under the state constitution." Kentucky thus apparently adopts the view that a prohibitive tax is not a tax.

The result seems to be that the oleomargarine cases are somewhat contrary to the thesis of this article, and to the present view of the Court with respect to most sorts of monetary exactions. So far as this is true, they must be deemed to rest only upon precedent made at a time when the Court had not become as aware as it now is of the unsoundness of Chief Justice Marshall's dictum.

More complicated still are the decisions with regard to the Harrison Anti-Narcotic Law, a law designed to prohibit the sale of narcotics, except for proper medicinal purposes. One of the important methods used for carrying out this purpose was by the imposition of a federal tax.

The leading case with respect to this part of the law is *United States v. Doremus*.\(^{60}\) This involved the law as originally enacted. The only tax was one of a dollar a year upon dealers in narcotics, though there were elaborate provisions as to registration and requiring records of sales. Obviously, the difficulty about this so-called tax is not that it is prohibitive, it is rather purely nominal. Nevertheless, it is subject to the same basic attack that it is not intended for purposes of revenue, the revenue itself being nominal and probably much less than the cost of administering the Act. In no realistic sense, therefore, can this be regarded as a revenue measure.

Nevertheless, the Court, by a five to four vote, sustained it as a revenue act, the provisions for records, etc., being regarded as merely incidental to the tax. This is undoubtedly another example of the legal tail wagging the dog, since the

\(^{59}\) 290 U. S. 177 (1933).

\(^{60}\) 249 U. S. 86 (1919).
tax itself was plainly incidental to these administrative provisions. Mr. Justice Day, in writing for the majority, said

"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. 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. *Veazie Bank v. Fenno*, 8 Wall. 533, 541, in which case this court sustained a tax on a state bank issue of circulating notes. *McGray v. United States*, 195 U. S. 27, where the power was thoroughly considered, and an act levying a special tax upon oleomargarine artificially colored was sustained."61

He thus relies upon cases previously discussed, which purport to support, under the taxing power, an exaction not intended for revenue, without noticing the rather doubtful grounds upon which these cases now rest.

But already in *United States v. Jin Fuey Moy*,62 the Court had recognized the somewhat questionable nature of this justification of the law, by giving it a very narrow construction—one clearly not consonant with the purpose of the regulatory provisions, which were really the heart of the Act. Mr. Justice Holmes, speaking for the Court, stated that the Act can only be sustained as a revenue measure, and said.

"It may be assumed that the statute has a moral end as well as revenue in view, but we are of opinion that the District Court, in treating those ends as to be reached only through a revenue measure and within the limits of a revenue measure, was right."63

Subsequent to this, the Act was amended so as to drastically increase the fees, and in addition to impose a tax of one cent an ounce upon all sales of narcotics. This resulted in substantial revenue being obtained, so that the Act was properly

61 249 U. S. 93.
63 241 U. S. 402.
sustained as a revenue measure. Furthermore, in Nigro v. United States, a much broader construction of the Act was sustained than had been permitted in the Jin Fuey Moy case, which was distinguished mainly upon the ground that the recent amendments had made the Act plainly a revenue measure. Mr. Chief Justice Taft obviously had some difficulties with the previous cases and showed his appreciation of the very doubtful grounds upon which the original Act had been sustained, by saying:

"Four members of the Court dissented in the Doremus case, because of opinion that the court below had correctly held the Act of Congress, in so far as it embraced the matters complained of, to be beyond its constitutional power, and that the statute, in Section 2, was a mere pretext as a tax measure and was in fact an attempt by Congress to exercise the police power reserved to the States and to regulate and restrict the sale and distribution of dangerous and noxious narcotic drugs. Since that time, this Court has held that Congress by merely calling an Act a taxing act cannot make it a legitimate exercise of taxing power under Section 8 of Article I of the Federal Constitution, if in fact the words of the act show clearly its real purpose is otherwise. Child Labor Tax Case, 259 U. S. 20, 38. By the Revenue Act of 1918, the Anti-Narcotic Act was amended so as to increase the taxes under Section 1, making an occupation tax for a producer of narcotic drugs of $24 a year, for a wholesale dealer, $12, for a retail dealer, $6.00, and for a physician administering the narcotic, $3.00. The amendment also imposes an excise tax of one cent an ounce on the sale of the drug. Thus the income from the tax for the Government becomes substantial. Under the Narcotic Act, as now amended, the tax amounts to about one million dollars a year, and since the amendment in 1919 it has benefited the Treasury to the extent of nearly nine million dollars. If there was doubt as to the character of this Act—that it is not, as alleged, a subterfuge—it has been removed by the change whereby what was a nominal tax before was made a substantial one. It is certainly a taxing act now as we held in the Aiston case."

Justices McReynolds, Butler, and Sutherland all dissented the first two writing separate dissenting opinions. Both of

65 276 U. S. 332 (1928).
67 276 U. S. 352-3.
these opinions assert that the law is still a mere regulatory act, and therefore beyond the powers of the federal government. Indeed, Mr. Justice McReynolds had been able to carry the whole Court with him in his opinion in *Linder v. United States*,\(^{68}\) that the Act even as amended could not be construed to prohibit sales by a registered physician of morphine, even to a known addict. The Court agreed that if the Act were construed so as to prohibit this, it would be clearly outside of any provision which would be incidental to the taxing part of the Act. The cases are thus somewhat inconsistent, but all agree that the Act is sustainable only as a revenue measure.

Nevertheless, it is impossible to deny that these narcotics cases, especially *United States v. Doremus*,\(^{69}\) might possibly be cited as contrary to the thesis of this article, that a tax which is not intended for revenue is in fact not a tax. However, the almost apologetic attitude which the Court has taken in other cases with reference to the *Doremus* case, shows that it is recognized to be on a somewhat unstable foundation. At the most it may be deduced from these cases that the Court will go a long way to support a highly desirable regulatory law under the guise of taxation, but it certainly will not do so if the guise is too easily and palpably pierced, either on the face of the law or by matters of which the Court will take judicial notice.

And finally we come to the tariff cases. Here the problem would seem to be very definitely involved. This is not always the case, for tariffs are often—perhaps usually—for purposes of revenue, at least in substantial part. But not infrequently they are not intended for this purpose at all. They are actually and avowedly for the purpose of protecting our supposedly weak infant industries from destruction by foreign competition. For this purpose, the rates are made so high as to be practically prohibitive, and thus to reduce the revenue from imports of commodities thus protected to a nominal amount. Here, then we seem to have a prohibitive tax.

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\(^{68}\) 268 U. S. 5 (1925).

\(^{69}\) 249 U. S. 86 (1919), *supra*, note 60.
That tariffs are often for the primary and occasionally exclusive purpose of protection rather than for revenue, has often been recognized,\textsuperscript{70} and it has been frankly avowed by the Supreme Court itself in \textit{Hampton & Co. v. United States}.

In this case the "flexible tariff" provisions of the Tariff Act of 1922 were sustained. The effect of these provisions was that after a proper investigation by the Tariff Commission, which showed an insufficient tariff rate on a certain commodity to equalize the advantage of a foreign producer, the President was empowered to increase the tariff so as to wipe out this differential. The Court held that this was not an improper delegation of legislative power; a conclusion which is perhaps doubtful in view of more recent decisions.\textsuperscript{72} However, the point which chiefly interests us is the definite decision of the Court that Congress has power to levy a tariff for the purpose of protecting domestic industries. As to this, the unanimous Court, speaking by Mr. Chief Justice Taft, said "It is contended that the only power of Congress in levying of customs duties is to create revenue, and that it is unconstitutional to frame the customs duties with any other view than that of revenue raising. It undoubtedly is true that during the political life of this country there has been much discussion between parties as to the wisdom of the policy of protection, and we may go further and say as to its constitutionality, but no historian, whatever his view of the wisdom of the policy of protection, would contend that Congress, since the first revenue Act, in 1789, has not assumed that it was within its power in making provision for the collection of revenue, to put taxes upon importations and to vary the subjects of such taxes or rates in an effort to encourage the growth of the industries of the Nation by protecting home production against foreign competition."\textsuperscript{73}

This certainly recognizes a power to impose a prohibitive tax; though the Court has also recognized the sharp difference between the provisions of the tariff acts for the imposi-

\textsuperscript{70} See \textit{e. g.}, Morton \textit{v.} Macon, 111 Ga. 162, 36 S. E. 627 (1900), at 36 S. E. 639.

\textsuperscript{71} 276 U. S. 394 (1928).

\textsuperscript{72} Panama Ref. Co. \textit{v.} Ryan, 293 U. S. 388 (1935).

\textsuperscript{73} 276 U. S. 411.
tion of the tariff and the penalty provisions operative in case of attempted violation.\textsuperscript{74}

Obviously, the existence and judicial support of such purely protective tariffs constitute a negation of the thesis of this article, unless such power of Congress can be justified in some other way than by its taxing power. And here the problem of regulation of foreign commerce comes into the picture.

Whether or not the power of Congress to regulate foreign commerce is exclusive, it is undoubtedly complete.\textsuperscript{75} A monetary exaction may undoubtedly be imposed under that power without it necessarily being a tax. Thus, an act of Congress, imposing upon steamship companies a charge of fifty cents a person for all non-citizens brought to the United States, the fund so raised to be used for the relief of needy immigrants, has been sustained as a regulation of commerce.\textsuperscript{76} The Court said expressly that this charge was not a tax. If, then, the protective tariff is a regulation of commerce and not a tax, it can be sustained without resort to the idea that "the power to tax involves the power to destroy."

And this is exactly what the Supreme Court has done in the recent decision of Board of Trustees v. United States.\textsuperscript{77} Here the University of Illinois had imported certain scientific apparatus for use in its laboratories. A tariff having been exacted upon such importation, the University sued to recover the amount so paid. There can be little doubt that the University should have recovered, if the tariff is to be regarded as a tax. There is nothing better settled than that the federal government may not directly tax a governmental function of a state, and there was, of course, no dispute that education is a governmental function.

Yet the Court unanimously held that the University had properly been compelled to pay a tariff on this apparatus and could, therefore, not recover it. The Court was unanimous, the opinion being written by Mr. Chief Justice Hughes. The

\textsuperscript{74} Helwig v. United States, 188 U. S. 605 (1903).
\textsuperscript{75} Gibbons v. Ogden, 9 Wheat. (U. S.) 1 (1824).
\textsuperscript{76} Head Money Cases, 112 U. S. 580 (1884).
\textsuperscript{77} 289 U. S. 48 (1933).
\textsuperscript{78} The Collector v. Day, 11 Wall. (U. S.) 113 (1871).
theory was that tariffs are regulations of commerce and are not for the purpose of revenue, even though revenue may incidentally be obtained. A regulation of interstate or foreign commerce by Congress is, of course, binding upon a state.

The soundness of this reasoning is perhaps extremely questionable. But after all, this is not of very great importance. The Court has performed the feat of sustaining the imposition of a tariff without calling into play the taxing power of Congress. If the tariff is not a tax, its motives and effects are of no concern in our study of the nature of taxation. It suffices that the tariff cases are not contrary to our thesis.

One other federal statute appears to represent an attempted exercise of the taxing power for purely regulatory purposes. About twenty-five years ago a statute was passed, putting a prohibitive tax upon the manufacture and sale of the old-fashioned phosphorous matches. It was desired to put an end to this industry, because of the serious effect which working in phosphorous had upon the health of the laborers.

Curiously enough, this legislation, which was completely successful in ending the industry, seems never to have been attacked in court. At least no case with respect to it went up to the Supreme Court. Just why this should have been so is hard to determine. It may be surmised that one reason was that in the light of such cases as McCray v. United States, which was then the prevailing authority, it was thought that a contention that a prohibitive tax was not within the taxing power could not be sustained. Furthermore, it was perhaps thought that the legislation might be sustained under the power to regulate interstate commerce, though the later decision of Hammer v. Dagenhart seems to invalidate this

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79 See the vigorous attack upon Board of Trustees v. United States, supra, by Sveinbjorn Johnson, in an article in (1934) 68 U. S. L. R. 248, Federal Taxation Affecting State Instrumentalities. Mr. Johnson was the counsel for the University of Illinois in this case. And see Hart, Processing Taxes and Protective Tariffs, (1936) 49 Harv. L. R. 610.


81 195 U. S. 27 (1904), supra, note 52.

82 247 U. S. 251 (1918), supra, note 32.
theory. And it may well be that persons concerned in the industry did not dare to defy public sentiment by attempting to contest the law, and merely closed up their business. At any rate, the business was ended, and there is now no one to contest the law. Furthermore, any attempt to revive the industry would probably be immediately stopped by state legislation. The match statute is, therefore, at the most, a claim by Congress to impose a prohibitive tax, but without the support of judicial sanction.

On principle then, it would seem that a so-called tax is not actually a tax unless it is imposed for purposes of revenue. Of course this need not be the sole purpose, since a tax can undoubtedly be used partially for regulatory purposes and even to somewhat discourage the activity against which the tax is directed. Nor can it be invalidated merely because the revenue obtained is not very large, since this may indicate only that the tax is unwise. But if judging from the face of the statute, which purports to impose the tax, or probably when it does not so appear but is within the judicial knowledge of the Court, the purpose of the legislative body is clearly not to obtain substantial revenue, but solely to regulate or prohibit the industry against which the exaction is directed, the exaction is not really a tax. If it can be sustained at all, this can be done only under some other governmental power—ordinarily the police power.

There are comparatively few authorities on this precise point, except with respect to federal taxes. The reason for this is that the states have general police power, so that an exaction which cannot be regarded as a tax may be (and usually is) nevertheless sustainable under such police power. The authorities with respect to state taxation, therefore, ordinarily fail to make this distinction very clear.

But with respect to federal taxes, the distinction, if it is sound, is usually applicable, since the federal government has no general police power. And it has usually been accepted, at least in the modern cases. There is a great deal of language in Federal Supreme Court decisions which seems to disregard this distinction, but on analysis, it will usually be found either that the distinction is not applicable, since the exaction was
intended to furnish a substantial amount of revenue, though it had other purposes, or else, as in the case of the so-called tax on state bank notes, the exaction is not really a tax but falls within other powers of the federal government.

The only lines of cases in the federal courts which at all directly involve the sustaining of a so-called tax as such, where the exaction is not for purposes of revenue, are the oleomargarine cases and the anti-narcotic cases. The oleomargarine cases, so far as they are still in good standing, are practically conceded by the Court to rest upon authority rather than principle. The anti-narcotic cases have themselves been distinctly limited by the Court, and are now justified, because the present Harrison Anti-Narcotic Act has become clearly a revenue measure. And the modern decisions, especially with respect to child labor and the Agricultural Adjustment Act, enunciate this principle with great precision and force. It seems, then, that authority and principle substantially coincide with respect to this matter. A "tax" is not a tax unless it is imposed for the substantial purpose of raising revenue.

83 Veazie Bank v. Fenno, 8 Wall. (U. S.) 533 (1869), supra, note 46.
84 Child Labor Tax Case, 259 U. S. 20 (1922), supra, note 33.